



CESCON  
BARRIEU

2018  
CASE LAW COMPENDIUM  
**CADE'S**  
**JUDGEMENT**  
SESSIONS

2018

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SESSIONS

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## INTRODUCTION

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This Compendium aims to consolidate the main precedents of the Administrative Council for Economic Defense (CADE) in 2018, as a direct result of the monitoring of CADE's Judgement Sessions by our antitrust department. A clear contribution for the diffusion of the antitrust culture in Brazil, with an effective and direct access to the recent case-law of the authority.

Indeed, recent years have been challenging for Brazil, both from an economic and a political standpoint. As a reflex, the Brazilian Antitrust Authority (CADE) has analyzed and decided over important domestic and international corporate transactions (merger filings), and made substantial progress in the ruling of cartel investigations and unilateral conduct cases. Such decisions are an important reference to the market and should guide the strategy for new transactions and the review of the companies' internal practices.

In order to improve the reading experience, this Compendium was organized per month and by Judgement Session. In addition, the Compendium also refers to CADE's website<sup>1</sup>, which contains the agenda, audio records and minutes of each correspondent Session covered.

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<sup>1</sup> Available on the following website (accessed on December 12, 2018): <http://www.cade.gov.br/assuntos/sessoes/pautas-das-sessoes-ordinarias-1>.

## Institutional Context

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In 2019, CADE will go through important changes. Despite the confirmation that the authority will continue to be linked to the Ministry of Justice, there will be important substitutions of the current members.

Precisely, the following positions will be vacant: (i) 4 positions at CADE's Tribunal, due to the end of the terms of office of Commissioners João Paulo Resende (July/2019), Paulo Burnier da Silveira (July/2019), Polyanna Ferreira Silva Vilanova (July/2019) and the replacement of Commissioner Cristiane Alkmin, who left CADE to head the State Treasury Secretariat of Goiás<sup>2</sup>; (ii) the position of the General-Superintendent, due to the end of Mr. Alexandre Cordeiro Macedo term (October/2019); and, finally, (iii) the position of Chief Attorney at the Attorney General's Office, due to the end of the term of Mr. Walter de Agra Junior (October/2019). With respect to both the General-Superintendent and the Chief Attorney, there may be a renewal of their terms for an additional period of two (2) years.

Furthermore, it is worth highlighting the replacement occurred in the position of Federal Prosecutor of the Federal Public Prosecution Service (MPF) at CADE, previously held by Mr. Márcio Barra Lima (whose term ended in December 2018), who was replaced by Mrs. Samantha Chantal Dobrowolski<sup>3</sup>.

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<sup>2</sup> Available on the following website (accessed on December 12, 2018): <https://www.jota.info/tributos-e-empresas/concorrenca/cristiane-alkmin-cade-goias-11122018>.

<sup>3</sup> Available on the following website (accessed on December 12, 2018): <https://www.jota.info/tributos-e-empresas/concorrenca/samantha-chantal-dobrowolski-mpf-cade-05122018>.

Such new appointments will be made by the new Government of President Jair Bolsonaro and may imply in a renewal of the authority, and may bring new ideology and different interpretation of the law with possible changes in the case law. Specially, important agendas may be resumed, such as the estimated benefits for the calculation of the administrative fines and pecuniary contribution in cartel cases, CADE's role on cartel damage claims and the role of MPF on merger filings.

## Merger Filings 2018

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It has been said that CADE is becoming more interventionist, with a growing number of blocking decisions on corporate transactions. However, a more careful analysis shows that the authority has, in fact, been facing more complex merger filings in the past two years.

Despite the turbulent economic scenario, there was a noticeable increase in the number of M&A transactions in Brazil and, consequently, in the number of merger control notifications submitted to CADE's review – an increase of approximately 7% in 2018 as compared to 2017.

On the other hand, as a consequence of the domestic market consolidation – a typical consequence of turbulent economic scenarios – and of a variety of complex international cases that continued to involve Brazil, CADE faced more sophisticated cases in terms of antitrust analysis.

Likewise, even simpler transactions often required expeditious clearance from CADE to avoid bankruptcy of the players and other credit issues inherent in a country facing financing restraints.

Regarding the top sectors in mergers, one could highlight the IT industry, public services (e.g. energy), the financial market, and agribusiness, as well as the retail, real estate, chemical, food and pharmaceutical sectors.

In addition, considering the amount of new terms of international cooperation signed in recent years and events with foreign authorities, CADE and other foreign authorities of jurisdictions such as the US, Europe and BRICs (especially China and India) have cooperated more directly in international transactions, especially in cases in which remedies were negotiated.

In 2018, rules preventing the early consummation of a merger – gun jumping – have also been a top priority to which the country's corporate culture has had to adapt. As a clear message, it is essential that parties adopt a conservative position with the aim of reducing the risk of gun jumping, thus also avoiding significant fines or even the annulment of the deals. The adoption of clean teams and parlor rooms, putting into practice CADE's rules and guidelines, enables important decisions to be taken ahead of the clearance.

Finally, in connection with increased enforcement in merger filings, the allocation of antitrust risks has also become an important trend in Brazilian M&A agreements, with a particular focus on termination clauses for strategic deals where there is a high likelihood that the buyer will be unable to close as part of antitrust restrictions (i.e. reverse breakup fees).

We highlight the following transactions analyzed by CADE in 2018:

› **Blocking decision of the Liquigás/Ultrazgaz deal<sup>4</sup>**: At the beginning of 2018, CADE's Tribunal blocked the proposed acquisition of Liquigás – part of the Petrobras Group – by Ultrazgaz, the two largest distributors of liquefied petroleum gas (LPG) in Brazil. Interested third parties played a key role in the blocking decision and were able to demonstrate that the transaction would increase the chances of abuse of market power within the LPG market, with negative impacts to consumers. Remedies proposed by the parties did not convince CADE and it concluded that it should not try to find a solution to an antitrust issue created by Ultrazgaz as a consequence of a competitive bid (regardless of the price offered) when other proposals would have less impact on competition. Likewise, CADE found that the breakup fee negotiated by Liquigás – 10% of the total purchase price – constituted clear evidence that the parties knew the antitrust risks involved in the acquisition. Although not directly influencing the outcome of CADE's assessment – CADE emphasized that provisions of this type should be disclosed, even though, in this specific case, the existence of the breakup fee confirmed that the seller was aware of the risks involved when accepting the offer and would be financially protected in case of a rejection.

› **XP/Itaú transaction approved with restrictions<sup>5</sup>**: acquisition of a minority stake of maverick financial services firm XP Investimentos, by the leading Brazilian bank Itaú Unibanco, with negotiated behavioral remedies. The clearance created discussions since the Brazilian Central Bank, which jurisdiction over merger filings in the financial sector

4 Merger Filing nº 08700.002155/2017-51.

5 Merger Filing nº 08700.004431/2017-16.

overlaps with CADE's jurisdiction, issued a stricter decision than CADE, limiting the equity to be held by Itaú Unibanco to 49.9% of XP's shares, and so blocking a potential acquisition of control.

› **Votorantim Siderurgia/ArcelorMittal transaction approved with restrictions<sup>6</sup>:** acquisition of Votorantim Siderurgia S/A (owned by the Votorantim Group), by its competitor ArcelorMittal Brasil S/A., with negotiated structural remedies. The transaction would create a powerful player in the commercialization of common long steel and the current rivalry in the market was deemed insufficient to avoid an abuse of dominance by the resulting company. Therefore, and to address competition concerns, the parties negotiated an agreement which included the divestiture of two packages of assets, to be sold to different individual acquirers.

› **Suzano/Fibria transaction unconditionally approved<sup>7</sup>:** combination of the operations and shareholders from Fibria Celulose S.A. and Suzano Papel e Celulose S.A. through a corporate restructuring and conversion of Fibria into a wholly owned subsidiary of Suzano, duly cleared by the General-Superintendence.

In 2019, CADE shall continue to rule relevant transactions, and one should highlight as clear examples the following M&A transactions: (i) Saint Gobain/Rockfibras, (ii) Siemens/Alstom and (iii) Disney/Fox.

6 Merger Filing nº 08700.002165/2017-97.

7 Merger Filing nº 08700.004085/2018-57.

## Cartels

CADE continues to benefit from the solid Brazilian Leniency Program and second-in settlement system, first introduced in 2000, which has boosted cartel enforcement in Brazil.

Indeed, the majority of international cartel cases reached Brazil through immunity agreements negotiated by one of the players involved in foreign investigations. As examples of foreign cartel investigations, one could refer to several cases in the auto parts industry, cargo, cathode ray tubes, DRAM, hermetic compressors, freight forwarding, wire harnesses, and optical disk drives, among others.

A highlight was a global investigation in the foreign exchange market, targeting banks and traders. Initially, CADE initiated a probe, in 2015, to investigate an alleged cartel in the manipulation of foreign exchange rates involving the Brazilian Real and foreign currencies (offshore exchange)<sup>8</sup>. After that, a Leniency Plus<sup>9</sup> agreement was signed between CADE and one of the investigated banks, where the latter reported a similar alleged domestic cartel in the national onshore exchange rate market, involving the Brazilian currency.<sup>10</sup>

8 Administrative Proceeding nº 08700.004633/2015-04.

9 CADE provides the following definition of Leniency Plus: "As in other jurisdictions, an applicant that does not qualify for leniency for the initial matter under investigation (either by being the second to come forward, or by clearly being the cartel leader), but discloses a second cartel, and meets the other Leniency Program requirements, will receive full administrative and criminal immunity for the second offence and a one-third reduction in fine with respect to the first offence."

10 Administrative Proceeding nº 08700.008182/2016-57.

Furhtermore, domestic industries and markets are also under the scrutiny of the authority, with several dawn raids performed throughout 2018. High profile investigations include cement and concrete, ceramic rollers, electricity meters, fuel distribution, and pharmaceuticals, among others.

However, there is a clear game changer evolving within the domestic market: the Lava Jato scandal is an ongoing investigation carried out by the Brazilian Federal Police, focusing on corruption at the state-controlled oil company Petrobras. The investigation has expanded to other infrastructure sectors in Brazil. The scandal has resulted in several immunity agreements negotiated with CADE, many of them resulting in new already opened formal cases.

This increase in investigations is confirmeb by the record number of leniency agreements and cease and desist commitments (TCCs in its Portuguese acronym) executed throughout the last years. As reference, 21 leniency agreements were signed only in 2017 and, in 2018, 60 TCCs were negotiated, resulting in the collection of pecuniary contributions totaling approximately BRL 1.328 billion. Only in November 2018, with the execution of TCCs under six investigations related to the Lava Jato scandal, the monetary contributions to be collected already amounted up to BRL 897.9 million<sup>11</sup>.

Besides that, CADE's Tribunal has been more open to discussions related to the standard of proof in cartel cases, with recent dismissals in the packaging and parking lot markets. Indeed, the Tribunal concluded that indirect evidence was not, per se, sufficient to condemn all the defendants and that an individualized analysis was a key element to evidence wrongdoings.

11 Available on the following website (accessed on December 14, 2018): <http://www.cade.gov.br/noticias/cade-celebra-acordos-em-investigacoes-da-lava-jato>.

Finally, and as a direct consequence of the increase in cartel convictions, Brazil is seeing an increase in the number of civil claims launched to recover damages caused by cartels, which were until now incipient. According to the most recent statistic data provided by the Brazilian Institute of Antitrust, Consumer and International Trade Studies (IBRAC)<sup>12</sup>, until June 2017, there were 127 lawsuits involving this subject matter and only 37 of them were related to administrative proceedings from CADE.

Notwithstanding the still short representativity of these lawsuits, there is, currently, a proposed bill<sup>13</sup> under analysis from the Federal Senate that aims to amend important provisions, such as the statute of limitations, in order to promote its adoption in matters investigated by CADE.

In 2019, the expectation is that, among others, CADE will continue the investigations related to the Lava Jato scandal and the opening of new cases arising from leniency agreements executed with the authority.

## Unilateral Conduct Cases

The first years of the Brazilian New Antitrust Regime enacted in 2012 were focused on merger filing and cartel cases. More recently, though, CADE is also boosting the enforcement of unilateral conduct offences.

Highlights of recent unilateral conduct cases include:

12 See at: <http://www.ibrac.org.br/UPLOADS/Eventos/383/Slides%20-%20Painel%202%20-%20A%C3%A7%C3%B5es%20de%20Repara%C3%A7%C3%A3o%20Civil.pdf> PLS nº 283/2016

13 PLS nº 283/2016

2018 termination, by majority of votes, of the investigation against automakers in the vehicle repair and maintenance aftermarket<sup>14</sup>. The Administrative Proceeding was initiated in 2007 to investigate if Volkswagen, Fiat Chrysler and Ford were abusing their intellectual property rights with the intention of preventing the manufacturing and sale of spare automotive parts in the aftermarket. Among other arguments, a majority of CADE's Commissioners concluded that manufacturers acted under the protection of the Brazilian Intellectual Property Law and that protection of industrial design is essential for the functioning of the market.

2018 settlement with online travel agencies (OTAs) Booking.com, Decolar.com and Expedia, regarding abusive price-parity clauses<sup>15</sup>. The OTAs committed to stop prohibiting hotels from offering better prices or conditions in their own offline sales channels and on other OTAs' platforms. However, OTAs can still require parity regarding the offer of accommodation through the hotels' own websites. According to CADE, the commitments aim to provide a balance between the potential anticompetitive effects of the conduct and the protection of OTAs against free riders – they shall be in effect for three years and there was no imposition of penalties.

2018 conviction of Rodrimar and Tecon Rio Grande, operators of the port terminals of Port of Rio Grande and Port of Santos, for abuse of

14 Administrative Proceeding nº 08012.002673/2007-51.

15 Available on the following website (accessed on December 14, 2018): <http://www.cade.gov.br/noticias/booking-decolar-e-expedia-celebram-acordo-de-cessacao-com-o-cade>. TCC procedures nos. 08700.006295/2017-07, 08700.005902/2017-11 and 08700.006233/2017-97, signed on March 27, 2018.

dominance<sup>16</sup>. According to CADE, the companies charged abusive fees for port services, with the potential to discriminate and increase the costs of rivals, rule out market agents, decrease incentives for new entrants and increase prices. Applied fines totaled BRL 5.7 million.

## Conclusion

2018 was a paradigmatic year for the antitrust culture in Brazil. In 2019, one should expect the continued growth of the enforcement, with an increase of high profile cases covering merger filings, cartel investigations, unilateral conduct and private litigation. This trend of strengthening of CADE's role in the economic and legal scenario should not be affected by the beginning of the new elected government, but rather improved through ongoing discussions held between CADE and the Brazilian legal community. New jurisprudential understandings are welcome and, if they occur, they will certainly assist in the construction of an even more solid antitrust culture in Brazil.

With effect, the long-standing Brazilian tradition of smooth government transitions, the endurance of Brazilian democratic institutions, and decisive respect for the rule of law, are factors well understood by market players.

16 Administrative Proceeding nos. 08012.001518/2006-37 and 08700.008464/2014-92.

## CHART OF 2018 JUDGEMENT SESSIONS

CADE's Judgement Sessions	Date
117 <sup>th</sup> Judgement Session	February 7, 2018
118 <sup>th</sup> Judgement Session	February 28, 2018
119 <sup>th</sup> Judgement Session	March 14, 2018
120 <sup>th</sup> Judgement Session	March 27, 2018
121 <sup>st</sup> Judgement Session	April 11, 2018
122 <sup>nd</sup> Judgement Session	April 25, 2018
123 <sup>rd</sup> Judgement Session	May 9, 2018
124 <sup>th</sup> Judgement Session	May 23, 2018
125 <sup>th</sup> Judgement Session	June 13, 2018
126 <sup>th</sup> Judgement Session	July 4, 2018
127 <sup>th</sup> Judgement Session	August 8, 2018
128 <sup>th</sup> Judgement Session	August 22, 2018
129 <sup>th</sup> Judgement Session	September 5, 2018
130 <sup>th</sup> Judgement Session	September 19, 2018
131 <sup>st</sup> Judgement Session	October 3, 2018
132 <sup>nd</sup> Judgement Session	October 16, 2018
133 <sup>rd</sup> Judgement Session	November 7, 2018
134 <sup>th</sup> Judgement Session	November 21, 2018
135 <sup>th</sup> Judgement Session	December 5, 2018

## JUDGMENTS IN FEBRUARY, 2018

### 117th CADE's Judgement Session

February 7, 2018

### CADE approves Bayer/Monsanto merger subject to the execution of a Merger Control Agreement (ACC)

On 7 February 2018, CADE approved the merger between Bayer, a German multinational agricultural input company, and Monsanto, an American agrochemical and agricultural biotechnological corporation.

In response to the General-Superintendence (SG)'s opinion to block the deal, the parties negotiated a structural remedy and agreed to divest a significant portion of Bayer's seed assets to BASF. Among the divested assets, the LibertyLink technology, an herbicide tolerance control platform developed by Bayer for the soybean production cycle, will be divested. The divestment of the same technology was required by the South African antitrust authority as a condition to approve the transaction in that country.

The reporting commissioner Paulo Burnier emphasized that the Merger Control Agreement (ACC) negotiated between CADE and the parties meet the four criteria required by the SG to enable the approval of the transaction, i.e.: (i) structural solution; (ii) divestiture of relevant R&D assets; (iii) acquisition by a single buyer with effective capacity to compete; and (iv) international dimension of the remedy.

In addition to the divestment of assets as part of the structural remedy, behavioral remedies were also put in place, including extensive licensing of technology, prohibition of exclusivity, transparency of commercial policies and prohibition of tie-in sales or bundling.

According to the reporting commissioner, the international cooperation between antitrust authorities was essential for the analysis of the merger filing. CADE exchanged information with the authorities of South Africa, Russia, India, the US and the EU.

As a separate matter, CADE decided to open an investigation in order to review certain practices that were brought to CADE's attention by third parties during the analysis of the merger filing.

CADE's Tribunal approved the transaction by majority of votes. Commissioners João Paulo de Resende and Cristiane Alkmin Junqueira Schmidt voted in favor of blocking the deal.

**CADE rejects third party's appeal and approves acquisition of Sealed Air Embalagens Ltda. by Copobras da Amazonia Ltda.**

CADE's Tribunal followed the General Superintendence's opinion and decided, upon judgment of an appeal filed by a third party, to clear with no restrictions the acquisition of Sealed Air Embalagens Ltda., which operates in the EPS trays business, by Copobras da Amazônia Industrial de Embalagens Ltda.

After the SG handed down the clearance opinion, Spumapac, as a third party duly admitted to the case records, filed an appeal to CADE's Tribunal,

arguing that the transaction would create a risk of elimination of competition and strengthening of the dominant position of Copobras Amazônia.

However, CADE's Tribunal concluded that, even in a post-transaction scenario, there would be no sufficient incentives for the exercise of market power by Copobraz Amazônia, in view of the existence of effective competition in this market, besides the probability, timeliness and sufficiency of the entry of new agents.

**CADE approves ArcelorMittal-Votorantim transaction subject to the execution of a Merger Control Agreement**

The transaction was approved with the execution of a Merger Control Agreement, negotiated between the applicants and CADE's commissioners, that establishes a package of structural remedies.

Although the SG recommended that CADE's Tribunal should block the transaction, because the efficiencies brought by the applicants were not sufficient to compensate the damages to the competition environment, CADE's Tribunal concluded, by majority of votes, that the merger could be approved with the parties' commitment to accept remedies that mitigate the identified antitrust concerns.

Among the conditions established in the Merger Control Agreement, the parties were required to divest productive assets in the long steel, rolled and drawn wire market. Other remedies include selling and purchasing restrictions and implementation of performance goals.

In order to avoid reversibility discussions, CADE's Tribunal established that, in case of non-compliance with the divestment obligation, the assets must be sent to auction and, in the worst case scenario, in the absence of transfer of the package, the deal must be blocked

and reversed. In addition, a monitoring trustee will be indicated in accordance with CADE's best practice.

As it occurred in the Bayer/Monsanto decision, CADE's Tribunal approved the transaction by majority of votes. Commissioners João Paulo de Resende and Cristiane Alkmin Junqueira Schmidt voted in favor of blocking the deal.

**CADE's Tribunal decides to terminate the administrative proceeding against helicopter manufacturer, but imposes fine for non-compliance with the Cease and Desist Commitment (TCC)**

CADE's Tribunal decided, through a unanimous decision, to close the investigation started almost 15 years ago against Helicópteros do Brasil S.A – Helibrás and, simultaneously, for the non-compliance of the company with the Cease and Desist Commitment (TCC) executed with the antitrust agency.

The administrative proceeding was launched in 2003, after a complaint brought by the company Líder Signature S.A., alleging that Helibrás refused to provide technical manuals, which are necessary for the maintenance of the Eurocopter line helicopters, as well as for homologation with the Department of Civil Aviation (DAC). Líder also pointed out the refusal to supply replacement parts by the defendant.

In 2005, Helibrás executed a TCC with CADE committing itself to provide the tools, spare part units and outstanding manuals – provided that those manuals were not supplied by Aircraft Technical Publishers – ATP.

Following the execution of the agreement, the administrative proceeding was suspended against Helibrás.

However, in 2006, it came to CADE's knowledge that Helibrás was failing to comply with the obligations of the TCC. In its legal defense, Helibrás argued that the TCC had lost its object due to private agreements negotiated with Líder aiming to terminate judicial and administrative proceedings and establishing Líder as the agent of Helibrás in Brazil.

Although the reporting commissioner recommended the condemnation of Helibrás for non-compliance with the TCC back in 2006, a lawsuit suspended the investigation for several years.

The proceeding was finally brought for judgement on February 7. By means of a unanimous decision, CADE's Tribunal accepted the opinion issued in the case records and decided to close the administrative proceeding, due to the absence of sufficient evidence to condemn Helibrás. According to CADE's Tribunal, the potential refusal to sell manuals and spare parts did not have the ability to prevent the access to the products or create difficulties for the competitor's operation.

However, CADE's Tribunal brought back the discussion regarding the non-compliance of the TCC in 2006 and kept the previous fine imposed in the total amount of BRL 478.845,00, since the agreement was intended to preserve the sale of manuals, tools and spare parts to any potential buyer – and not only to Líder. Likewise, it was highlighted that the private instrument which sought to terminate judicial and administrative claims among the parties had only an impact on their private relations, and it could never be used to put an end on a commitment made before CADE nor on investigations and conviction for antitrust violations.

### **CADE rejects an appeal related to an investigation in Port of Santos**

SINDICAM, which is an organization of road transport individuals, and its chairman appealed against the decision of CADE, issued in April 2017, which condemned them for anticompetitive practices, more specifically price fixing and creation of difficulties for competitors in the cargo and container transportation market at the Port of Santos.

In a nutshell, the appellants alleged that cartel formation did not occur as a result of the high number of freelancers operating at the Port of Santos. Likewise, the conduct of price fixing did not occur either, since the alleged freight fee chart used for such potential purpose would be merely referential. Furthermore, they reinforced the legal nature of the strikes of autonomous truck drivers in search of better working conditions.

#### **CADE's Tribunal decided not to rule on the appeal due to the lack of new facts or documents that could enable any change on the previous decision issued by the authority.**

Decision on the investigation related to potential anticompetitive practices by automakers in the IAM market was postponed

The discussion related to the administrative proceeding started in 2007, based on a complaint filed by ANFAPE (Associação Nacional dos Fabricantes de Autopeças), which argued that the automakers Volkswagen, Fiat Chrysler and Ford exercised abusive intellectual property rights, in order to ultimately prevent the manufacture and sale of autoparts in the IAM market.

In the previous judgment session (116th), which took place in December 2017, the reporting commissioner Paulo Burnier agreed with the opinions of the SG, the Attorney General's Office at CADE and the Federal Public Prosecutor's Office and decided for the conviction of the defendants, based on the understanding that: (i) the production of identical parts in the IAM is essential for the existence of such market; and (ii) the protection of industrial designs in this sector would not only restrict competition but it would eliminate it, creating monopoly and market power.

However, after the vote of the reporting commissioner, Commissioner Mauricio Bandeira Maia requested to issue a separate vote, suspending the final decision on the case.

The judgment was resumed on February 7. Commissioner Mauricio Bandeira Maia voted for the dismissal of the investigation against the automakers. In summary, the commissioner understood that: (i) the abuse of intellectual property rights would have already been considered when the Law of Intellectual Property (Law No. 9279/1996) was enacted; and (ii) there was no analysis in the case records of the parts that are not must-match and that could also be subject to an industrial design register – and potential efficiencies of such intellectual properties in the IAM market vis-à-vis the automakers market power.

After the vote of commissioner Mauricio Maia, commissioner João Paulo de Resende also requested to issue a separate vote, with the indication that he will bring the case back for judgment on the next session (February 28).

CADE approves sale of two Petrobras subsidiaries to Petrotemex subject to the execution of a Merger Control Agreement

CADE approved the acquisition, by the Mexican Petrotemex Group, of Companhia Petroquímica de Pernambuco (PSUAPE) and Companhia Integrada Têxtil de Pernambuco (CITEPE), both subsidiaries of Petrobras.

Petrotemex exports PTA to Brazil, the main input for the production of PET resin, specifically to M&G Polímeros Brasil S.A., and PET resin for smaller companies.

M&G, which was accepted as a third party in the merger filing, acquires PTA from PSUAPE, the only PTA producer in Brazil, and Petrotemex, which produces PTA in Mexico. Due to tax reasons, the import of PTA from other countries is unfeasible. On the other hand, M&G also competes with CITEPE in the PET resin sales market.

Therefore, CADE concluded that there would be incentives, after the transaction, for Petrotemex to reduce the offer of PTA to M&G, harming the company in the market of PET resin.

In order to enable the approval of the case, the applicants, the SG and M&G built up a Merger Control Agreement which was fully adopted by the reporting commissioner Cristiane Alkmin Junqueira Schmidt. The agreement establishes that a long-term agreement will be executed, whereby Petrotemex undertakes to continue providing PTA to M&G in nondiscriminatory terms (volumes, cost and other data have been kept confidential), giving additional time for the latter to find alternative solutions to obtain inputs, for example, through the construction of a PTA plant in Brazil.

Commissioner João Paulo de Resende was the only one to disagree with the negotiated solution, since he understood that it creates the possibility of coordination in the PET resin market, as both CITEPE and M&G will have the same supplier and they will have no incentives to compete. In practical terms, there would be a risk of double monopoly in both PTA and PET resins. According to the commissioner, the negotiated Merger Control Agreement solves the problem of discrimination for M&G, but ends up creating a classic hub-and-spoke arrangement, aggravated by the formal bond created between all market players and with CADE's seal. The commissioner also stated that, even if they would not commit infractions against the economic order, there would be strong indications of tacit collusion. In addition, there would be clauses that, in practice, would allow Petrotemex to control the expansion of M&G.

CADE's Tribunal approved the transaction by majority of votes.

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### 118th CADE's Judgement Session

February 28, 2018

#### **CADE vetoes transaction between Ultragas and Liquegás**

In the second Judgment Session of 2018, and the first one of the Commissioner Paula Azevedo, CADE vetoed, by majority of votes, the acquisition of Liquegás by Ultragas.

Commissioners Paulo Burnier, Paula Azevedo, João Paulo de Resende and the President followed the vote of the Reporting Commissioner,

Cristiane Schmidt, who rejected the transaction, concluding that the remedies contained in the Merger Control Agreement proposed by the parties – involving the divestiture of 45% of Liqueigás' assets – would be insufficient to mitigate the high competition concerns resulting from the transaction.

Commissioner Polyanna Vilanova presented a dissenting vote for the approval of the transaction, conditioned to the execution of a Merger Control Agreement, and was followed by Commissioner Mauricio Maia.

CADE's General Superintendence (SG) had already recommended that the Tribunal should block the transaction. In its opinion, the SG identified high concentration in the affected markets. The transaction would eliminate a strong competitor in an industry in which only four companies account for more than 85% of the Liquefied Petroleum Gas (LPG) supply. The high barriers to entry, low rivalry, insufficient efficiencies derived from the transaction and the unavailability of remedies that could properly address the competition concerns identified were also the key elements that led the non-approval of the case.

Furthermore, one of the highlights of this merger filing was the significant intervention by third parties throughout the course of the merger review process. Cescon Barriou acted for Copagaz, a third party that also claimed the transaction should not be approved.

As a result of the veto, Ultragas will have to pay Petrobras a historic break-up fee of BRL 280 million (equivalent to 10% of the value of the transaction).

### **CADE approves transaction in the energy cogeneration market with restrictions**

CADE approved the acquisition of TGM Indústria e Comércio de Turbinas e Transmissões Ltda., by WEG Equipamentos Elétricos S.A., conditioned to the execution of a Merger Control Agreement.

These companies operate in the market of equipment for the energy cogeneration industry (turbogenerator). WEG currently manufactures a part of this equipment, while TGM manufactures the complementary part. Thus, CADE considered that, after the transaction, WEG would become the only Brazilian manufacturer capable of providing the integrated turbogenerator, and the separate equipment that is assembled to form it.

Therefore, SG concluded in its analysis that there would be risks of exercise of portfolio power by WEG, and was concerned about: (i) WEG's ability to discriminate its competitors by offering separate equipment under less competitive conditions; and (ii) WEG's possibility of practicing bundled sales and cross subsidies. SG then recommended the transaction should be approved subject to the execution of a Merger Control Agreement.

The Reporting Commissioner, Polyanna Vilanova, pointed out that SG's concerns would not justify the application of any divestiture obligation, in view of the lack of proportionality of the measure.

Therefore, it was concluded that behavioral remedies negotiated in the Merger Control Agreement were sufficient to address the competition concerns identified, establishing commitments such as non-discrimination between clients interested in purchasing the integrated

turbogenerator and those interested in acquiring the equipment that compose it separately.

### **CADE's Tribunal decides to terminate administrative proceeding in the resale fuels market**

CADE's Tribunal decided, through a unanimous decision, to close the investigation of alleged influence of uniform commercial conduct, formation of cartel, creation of barriers to entry and creation of difficulties for the operation of competitors in the resale fuels market in the city of Natal, state of Rio Grande do Norte. In this case, the parties investigated worked with the local legislative power to prevent the sale of fuel in hypermarkets and supermarkets in the city of Natal.

At the 116th CADE's Judgment Session, after the Reporting Commissioner Polyanna Vilanova voted to dismiss the case, Commissioner João Paulo de Resende requested to issue a separate vote, to analyze the conducts in more detail. In his vote, the Commissioner stressed that there was no indication, in this specific case, that the trade union has used illegal means that extrapolated the rhetorical argument to convince the members of the local house of representatives (creating barriers for the entry through lobbying).

Finally, Commissioner João Paulo de Resende voted to follow the Reporting Commissioner's vote to dismiss the administrative proceeding, as well as the other Commissioners.

### **Decision on the Investigation of Cartel in the Optical Disc Market is Postponed**

The judgment of the administrative proceeding that investigates the alleged international cartel in the optical disc market (ODD), which would have affected Brazil between 2003 and 2009, was initiated in the last session.

The proceeding was initiated after a Leniency Agreement was executed between the Secretary of Economic Law (which is the former investigative unit of the Brazilian Competition Defense System succeeded by CADE's General Superintendence) and Phillips. The SG recommended the conviction of all the investigated parties, with the exception of Phillips, as the lenient beneficiary.

Following the referral of the case to CADE's Tribunal, Sony signed a Cease and Desist Commitment (TCC) in the proceeding, acknowledging the existence of contacts between competitors and pledging to pay a pecuniary contribution of BRL 4 million.

The Reporting Commissioner of the case, João Paulo de Resende, pointed out that the company BenQ was only involved in information exchange behavior with no effective participation in the cartel. Thus, the statute of limitation would be five years (whereas in the case of cartel conduct the statute of limitation is 12 years, according to the criminal law). Therefore, there would be no possibility to enforce the law against BenQ.

In relation to the other investigated parties, the Reporting Commissioner concluded that there was evidence about the existence of a cartel

envisaged to manipulate purchase processes carried out by computer manufacturers such as Dell, HP, Microsoft and Samsung.

Therefore, the Commissioner acknowledged the immunity of the leniency beneficiary, declared the proceeding dismissed in relation to Sony and voted for the conviction of the other investigated companies, except for BenQ, imposing fines varying from BRL 182 thousand (QSI) to BRL 14.3 million (HLDS), according to the participation of each company in the collusion.

After the vote of the Reporting Commissioner, Commissioner Paula Azevedo requested the case for review.

#### **CADE approves TCC proposal presented by company in the ceilings and grids market**

CADE also approved a TCC proposal presented by Tigre in the scope of the administrative proceeding that investigates anticompetitive practices in the market of PVC ceilings and grids. The company offered the payment of a pecuniary contribution in the amount of BRL 324,928.17. However, the approval was not unanimous.

Commissioner João Paulo voted to reject the settlement proposal due to the fact that, in his view, the pecuniary contribution was not properly calculated, as it considered the average of the company's revenues in the last four years, a period in which the company sold considerably less according to him.

In addition, the Commissioner pointed out that the percentage applied over the revenues was only 2%, since SG understood that there would not be sufficient evidence of a diffuse cartel in the records, but only an exchange

of sensitive information. Finally, he mentioned that the conduct duration was not considered. Commissioner Cristiane Schmidt also voted to reject the settlement, following the reasons of Commissioner João Paulo.

Commissioner Paulo Burnier argued that the conduct duration was considered as mitigating/aggravating the conduct and therefore the Tribunal's analysis took it into account. Thus, the Commissioner voted for the approval of the settlement, position followed by the other Commissioners, who, by majority of votes, prevailed over Commissioners' João Paulo de Resende and Cristiane Schmidt votes.

#### **CADE rejects appeal against the approval of Bayer/Monsanto and Arcelormittal/Votorantim transactions**

CADE analyzed the appeals requesting clarification of the decision of the Tribunal on merger filings approved in the previous session.

In the first case, ABROSOJA, ABRASS and ABRAPA questioned CADE's decision to approve, by majority of votes, the transaction between Bayer and Monsanto, subject to the execution of a Merger Control Agreement.

In the second case, CSN, which acted as a third party in the ArcelorMittal/Votorantim merger filing, also questioned the non-unanimous decision to approve the transaction, also subject to the execution of a Merger Control Agreement.

Both appeals were received by the Tribunal and rejected on the merits. The Tribunal held that there was no question of omission, contradiction or obscurity justifying the review of the previous decisions.

The Reporting Commissioner of the appeal presented by CSN, Polyanna Vilanova, warned about litigation strategies to postpone the implementation of decisions, highlighting the fine set forth in the Civil Procedural Code.

CADE and the Central Bank of Brazil sign memorandum of understanding

CADE and the Central Bank of Brazil (BACEN) executed a Memorandum of Understanding to regulate the interaction between the two authorities. The memorandum provides that CADE and BACEN will begin to work with a greater level of information exchange based on discussions of technical parameters to ensure a better balance and consistency of procedures and regulations issued by both agencies.

CADE and BACEN will continue to act on merger filings that require both agencies' approval. In cases of mergers involving risks to the solidity and stability of the National Financial System (SFN), BACEN may approve the merger and inform CADE, so that this authority approves the transaction without restrictions, based on the grounds of BACEN's decision.

Regarding investigations of anticompetitive conducts involving financial institutions, the analysis will be CADE's responsibility, which will use information provided by BACEN.

The memorandum also includes the commitment of BACEN and CADE to review their regulations, if necessary, and to work together to approve a bill establishing clear and defined parameters for the performance of local authorities, in order to provide greater legal certainty and predictability for the defense of competition in the SFN.

## JUDGMENTS IN MARCH, 2018

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### 119th CADE's Judgement Session

March 14, 2018

#### **CADE approves the transaction between Itaú Unibanco/XP Investimentos with restrictions**

CADE approved with certain restrictions the acquisition of equity interest equivalent to 49% of the voting shares and 75% of the total capital stock of XP Investimentos S.A. by Itaú Unibanco S.A. The conditions imposed by CADE for the approval were established through a Merger Control Agreement (ACC).

The merger was approved by the majority of CADE's Tribunal, while João Paulo de Resende and Cristiane Alkmin Junqueira Schmidt voted for rejecting the transaction.

During the analysis of the transaction, CADE's technical bodies highlighted that XP was a pioneer in the open investment platform business model and that its growth and innovative business model have been generating a migration of clients from banks to such open platform companies. In this context, the transaction presented concerns beyond the affected markets since the acquisition of a disruptive player could be motivated by the need to protect the market itself, which strategy would reduce competition and innovation.

The Reporting Commissioner, Paulo Burnier, highlighted that the market in which XP offers its services is constantly transforming and, therefore,

potential interventions should be taken with cautiousness. In this context, the conditions established in the ACC aims at reducing negative effects to competition in the analyzed markets. The possibility of consumers and providers to act simultaneously on multiple platforms was mentioned as a factor capable of mitigating the transaction's negative effects.

The Commissioner Cristiane Schmidt, in its dissident vote to block the case, mentioned that Brazil has a high banking concentration and the satisfaction degree of the consumers is very low. Therefore, the approval of the transaction would in theory authorize any other bank to buy other open platforms. XP would be a successful maverick responsible for the emergence of nonbank investment institutions. The Commissioner also identified antitrust risks consisting in the discrimination or even foreclosure of the market by the imposition of exclusivity by the parties after the transaction.

To assure that there will be no discrimination of competitors, Itaú shall display in its website its commercial policy, which shall contain the objective criteria to the selection of platforms, as well as an ombudsman. Finally, Itaú committed not to direct its clients to XP.

The ACC will be in effect until the end of 2022 and the monitoring will be reinforced through an independent auditor, who will have access to periodic information and to the ombudsman provided by Itaú and XP Investimentos. The penalties for the infringement are aligned with other ACCs already signed by CADE.

The structure of the transaction provides a scenario in which the control of XP may be acquired by Itaú. In this event, there shall be a new filing with CADE.

### **CADE terminates investigation against automakers in the vehicle repair and maintenance aftermarket by a narrow majority**

The referred Administrative Proceeding was initiated in 2007, by a report from the National Association of Auto Parts Manufacturers (ANFAPE), under the allegation that the automakers Volkswagen, Fiat Chrysler and Ford were abusing of their intellectual property rights with the intention to prevent the manufacturing and sales of reposition parts in the aftermarket.

In the 116th Judgment Session, which occurred in December 2017, the Reporting Commissioner Paulo Burnier voted for the conviction of the investigated companies in line with the opinions from CADE's General Superintendence (SG), from the Federal Prosecution Office in CADE and from the Federal Public Prosecution Office, arguing that: (i) the manufacturing of identical parts in the aftermarket is essential for the own existence of this type of market; and (ii) the protection of industrial designs in this segment would not only restrict competition but would eliminate it, generating monopoly and creating market power.

After the vote from the Reporting Commissioner, Commissioner Mauricio Bandeira Maia requested the case files for examination. The judgment was then continued in the session on February 7 of this year, in which the Commissioner voted for the termination of the investigation against the automakers. In brief summary, the Commissioner understood that: (i) the alleged abuse of intellectual property rights had already been object of concern of the legislator upon the enactment of the Intellectual Property Law (Law No. 9279/1996); (ii) there was no analysis of non

mustmatch parts, which can also be registered as industrial design – and possible efficiencies of such intellectual property in the aftermarket in contradiction to the automakers' market power.

Commissioner João Paulo de Resende then requested the case files for examination. The judgment was finally continued in this session (119th), during which the Commissioner João Paulo de Resende voted for the conviction of the parties, in line with the Reporting Commissioner. Commissioner João Paulo de Resende considered that the conduct of the automakers could cause harm to competition in the auto parts aftermarket. According to him, although there was no abuse of the intellectual property right by the automakers, there was a misuse. In addition to that, while the protection of intellectual property in the primary market (new vehicles) is justified by the incentive to innovation, in the aftermarket (reposition) the objective would be only to generate market domination, without any efficiency that compensate for it, which ultimately harms the consumer.

Commissioner Cristiane Schmidt, however, voted for the termination of the investigation in line with Commissioner Mauricio Bandeira Maia. According to the Commissioner, (i) it was not clear which anticompetitive conduct of the manufacturers was under analysis; (ii) the affected relevant market was not properly defined; (iii) there was no indication of damages, even if potential, that resulted from the alleged anticompetitive conduct; and (iv) there was no conviction decisions in similar cases from any other antitrust agency in the world.

Commissioner Polyanna Vilanova also voted for the termination of the investigation pointing out that the manufacturers acted at the edge of

what the intellectual property law allows. She concluded that the industrial design is essential for the functioning of the market since the design is an extremely relevant factor for the consumer. Therefore, considering that there was no attempt of licensing by any independent auto part manufacturer, there would be no abuse from the manufacturers either. Finally, she highlighted that the Brazilian legislation does not allow CADE to punish market agents merely for using aggressive market strategies.

Commissioner Paula Farani also voted for the termination, and pointed out that the judicial decisions favored the automakers, reason why it is not possible to talk about sham litigation. In addition, she pointed out that CADE could not judge this case based on potential damaging effects. She also highlighted the applicability of the Intellectual Property Law: it is not CADE's duty to punish the automakers for having exercised their rights legitimately.

President Alexandre Barros followed the Reporting Commissioner's vote for the conviction, highlighting that there was no invasion of the jurisdiction of the Brazilian National Institute of Industrial Property (INPI) and that CADE has the power to analyze conducts involving such matters.

The proceeding was then terminated in favor of the automakers by a narrow majority in a decision that divided the Tribunal.

This case highlights the challenge of CADE's role in proceedings that involve laws enforced by other agencies and the multiple views of the Commissioners on such matters.

### **CADE executes a Cease and Desist Commitment (TCC) with the Brazilian Federal Council of Real Estate Brokers**

CADE executed a Cease and Desist Commitment (TCC) with the Brazilian Federal Council of Real Estate Brokers (COFECI) and all the regional councils in Brazil. The commitment is related to the real estate brokerage market.

The settlement was proposed in the course of the administrative proceeding initiated in 2015 by the SG after identifying, in the websites of the real estate brokers organizations, the existence of regulations that had the potential to be anticompetitive practices. Examples would be the obligation of charging legal fees in accordance with the charts elaborated by the unions and approved by the regional councils, and the imposition of exclusivity in the brokerage service agreements.

The defendants committed to adequate their regulations in conformity with the Brazilian Antitrust Law. In this sense, there will be amendments to the Ethic Code of the Real Estate Brokers with the integral revocation of the resolutions that establish the price charts for brokerage. The TCC also provides the obligation to implement a compliance program, in the term of two years, to avoid future antitrust problems.

Finally, the TCC established the termination of all the administrative proceedings in course in the regional councils regarding the punishment of brokers that did not comply with the fixed legal fees in the charts.

### **120th CADE's Judgement Session**

March 27, 2018

#### **CADE approves the global merge between Luxottica Group and Essilor**

CADE's Tribunal unconditionally approved the global merger between Essilor International and Luxottica Group S.p.A. as per a decision that shall be a reference within the optical segment.

Despite CADE's General-Superintendence (SG) recommendation for the unconditional approval of the transaction, the company Carl Zeiss, third party accepted in the process by the SG, presented an appeal to CADE's Tribunal. The Tribunal, however, maintained the approval decision recommended by the SG.

During the analysis of the transaction by the SG, three main points of concern were identified: (i) vertical integration between the manufacturing and the wholesale supply of frames for eyeglasses and the retail supply of optical services and products; (ii) vertical integration between optical laboratory services and the retail resale of optical services and products; and the (iii) increase of portfolio power against the retail resellers of optical services and products.

Notwithstanding the fact that such concerns were reduced in this case by the technical analysis of the SG, highlighting the complementarity of the companies' activities, it was noted concerns on future movements related to the sector, such as the acquisition of new optical laboratories by Essilor and the potential adoption of exclusionary practices.

During the analysis of the appeal by the Tribunal in the 120th Judgement Session, Carl Zeiss highlighted that the transaction, involving the merger between two leading companies of the optical industry in Brazil, would result in substantial market concentration and integration in virtually all the segments of the production chain of the visual health protection market, raising serious competition concerns. The appeal also highlighted that both companies are already strongly verticalized with a wide range of brands, and the merger between the portfolio of the companies would result in limited competition, creating an illusion of choice to the end consumers.

However, when judging the appeal, the commissioners argued that the allegations of the third party were broad without new elements or documents capable of supporting such arguments. It was also noticed that the SG's decision was well grounded.

According to the commissioners, the profile of the companies indicates a clear complementarity between their products and services and, therefore, the transaction would be incapable of generating market foreclosure incentives. Likewise, the assessment of the transaction demonstrated that the possibility of joint selling could increase competition in the retail market, enabling cheaper or better quality products, and benefiting the consumer.

Finally, the commissioners determined that both Luxottica and Essilor should inform CADE of all future transactions they may perform, regardless of the fulfillment of the correspondent antitrust thresholds, in order to allow the monitoring of the segment.

### **CADE's Tribunal ratifies agreement related to an investigation in the supply market of PVC pipes and connections**

The Cease and Desist Commitments (TCC) requested by the company Mexichem Brasil, which is being investigated in an administrative proceeding for alleged anticompetitive conduct in the supply market of PVC pipes and connections for sanitation and building infrastructure, was confirmed by CADE in its last judgement session by majority of votes. Commissioners João Paulo de Resende and Cristiane Alkmin voted against the execution of the TCC.

For the majority of the commissioners, the requirements of the TCC were met, with the imposition of a fine in case of noncompliance in the amount of BRL95 million (to be paid in a single installment), admission of wrongdoing and collaboration throughout the investigation.

In his vote against the execution of the TCC, the Commissioner João Paulo de Resende reinforced that the cartel lasted more than seven years and affected a wide range of builders and installers. In addition, Commissioner Cristiane Alkmin did not agree with the criteria for the calculation of the contribution and also voted against its execution.

### **CADE's Tribunal ratifies agreement with online travel agencies and terminates investigation regarding price parity clauses**

The Cease and Desist Commitments (TCCs) requested by three of the main online travel agencies (OTAs) acting in Brazil, Booking, Decolar.com and Expedia, were confirmed by CADE in the last judgement session.

The settlement was proposed in the course of the administrative proceeding initiated by the SG in 2016 following a claim made by the Brazilian Forum of Hotel Operators (FOHB) arguing that the hotel chains associated to the Forum were being harmed due to parity clauses imposed by the OTAs.

According to FOHB, the parity clauses did not allow hotel chains to offer, in their direct channels, or even on platforms competing with those of the OTAs, the hosting inventory (rooms) at a lower price or under more competitive and/or more advantageous conditions of sale than those offered by the Defendants on their digital platforms.

FOHB also argued that such clauses were the main contractual provision imposed by the investigated OTAs during negotiations with hotels.

In their legal defenses, the OTAs sustained that the parity clauses aim to guarantee the viability and the effectiveness of the investments on improvements to their partners and clients and to avoid that clients may use their platforms to search for options and afterwards close the deal directly with the hotel or with competitors with better prices or conditions. This practice would be commonly known as “free rider”.

In view of that, the commitments established in the TCCs executed with CADE aim to provide a balance between the potential anticompetitive effects of the parity clauses and the protection of the OTAs against “free riders”.

Within such context, the commitments establish that the agencies may maintain the prohibition for the hotels to offer lower prices in their own

websites, but, on the other hand, the hotels may offer different prices and conditions in areas that are not accessible by the public in general, such as, for example, by requiring registry, login, or for members of loyalty programs.

Among other commitments established in the TCCs, it was determined that the OTAs are not allowed to oblige hotels to offer conditions and prices equal to those offered in their platforms in other channels that are not websites, such as e-mails, WhatsApp, phone, direct mailing and advertising in general.

However, the OTAs may continue to require that the hotels offer the same prices and conditions in the websites called “metasearch”, such as Trivago.com and Tripadvisor.com, as well as in offline reservations made through physical agencies, phone customer services and reservation desks.

The commitments established in the TCCs shall be valid for three years and there was no imposition of penalties.

CADE issues decision on a legal consultation related to the practice of price lists in the freight of cargo and initiates investigation in the market

The CADE's Tribunal, through a unanimous decision, accepted to analyze the legal consultation filed by the Union of Workers in the Civil Construction Industries (SINTRACON) and the Union of Freight Vehicle Companies of Itajaí (SEVEICULOS) and also issued a binding decision determining the commencement of an administrative proceeding.

The Trade Unions presented the legal consultation requesting CADE's position on the practice of establishing a standard price list, in which

only the freight cost is contemplated, following rules established by the Resolution of the National Agency of Land Transportation's (ANTT), applying for the road freight transportation market.

The submission of the legal consultation was the result of an agreement reached between the unions to stop various strikes within the sector. A commitment was made to seek a standard price list that complies with the rules set forth in the mentioned ANTT Resolution 4,810/2015.

However, the commissioners considered that the adoption of minimum price lists has a potential damaging effect for competition and recommended that the conduct should not be put into practice. Also, CADE determined the conversion of the legal consultation into an administrative proceeding for the investigation of price list practices and the prohibition of pricing below cost. The decision was based on public information supporting that the conduct had been occurring even before the legal consultation.

## JUDGMENTS IN APRIL, 2018

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### 121st CADE's Judgement Session

April 11, 2018

#### **CADE approves the acquisition of Eletronet S.A. by Contém Canada after 14 years**

The transaction, performed in 2004, involved the acquisition, by Contém Canada, of the total shares of AES Bandeirantes Empreendimentos Ltda. (AES), the controlling shareholder of Eletronet S.A., which provides Limited Specialized Service (LSS).

The Merger Filing was unconditionally approved by CADE's Tribunal. The delay in approving the transaction, however, did not result from the merits of the case – which did not raise competition concerns – but rather from the context and moment in which it was presented to CADE.

Indeed, the transaction was submitted to CADE in the context of the revoked Law 8,884/1994, which used to adopt a posteriori merger control system (no need of prior approval by CADE).

In addition, according to the legislation in force at the time, there was a legal obligation to wait for the technical decision of the National Telecommunications Agency (ANATEL) before the final judgment of the merger filing by CADE.

Within such context, the competition assessment was suspended for 12 years due to the absence of the technical opinion issued by ANATEL,

which was finally sent to CADE on March 23, 2018, allowing the final judgment by CADE's Tribunal.

### **Decision on cartel investigation in the market for flexible packaging is postponed**

CADE's Tribunal started the judgement of the administrative proceeding which investigates a possible cartel formation in the market of flexible packaging. However, the judgment was postponed by a request of the Commissioner Mauricio Bandeira Maia, who will present a separate vote.

The investigation was initiated in 2006, after a complaint presented by Mr. Paulo Rogério Tucoser, former commercial representative of Inapel, against the following packaging companies (i) Inapel, (ii) Itap Bemis, (iii) Converplast Embalagens, (iv) Celocorte Packaging, (v) Flexible Packaging Diadema, (vi) Empax Packaging and (vii) Santa Rosa Flexible Packaging. According to the report, the companies would be allocating large clients such as Lambert, Danone, Unilever, Kraft-Suchard, Ola Condoms, Sanofi, among others from the food, pharmaceutical and hygiene sectors.

After an in-depth instruction conducted by the General-Superintendence (SG), it was concluded that the Brazilian Association of Flexible Packaging (ABIEF) and the Brazilian Association of Laminated Packaging Manufacturers (ABRAFLEX), influenced the adoption of a uniform commercial conduct towards their associates. Regarding ABRAFLEX, the influence would have been to pass on costs from the sector to customers of the flexible packaging industry. With respect to the ABIEF, the influence was in the direction of seeking maintenance of minimum prices

and passing on the costs of raw materials to customers of the flexible packaging industry.

The SG suggested the condemnation of the associations, as well as several defendants (legal entities and individuals) for cartel formation, and the case records were then sent to CADE's Tribunal for its final decision.

The reporting commissioner of the case, Mr. João Paulo de Resende, presented his vote in the judgement session. All the preliminary arguments raised by the defendants were not considered, including the statute of limitations, since it was argued by the commissioner that CADE tends to consider the deadline established in the criminal law (12 years).

On the merits of the case, the Commissioner agreed with the SG and concluded that the evidences demonstrate that the associations – ABIEF and ABRAFLEX – were indeed coordinating the performance of the players of the affected markets.

Specifically, the Commissioner concluded that (i) ABIEF produced and shared to its members information on costs and price increases of raw materials, recommending to pass them on to the end consumers and (ii) ABRAFLEX acted in a similar way, recommending its members to charge the consumers for the costs of cylinders, including the price to be charged.

Furthermore, the Commissioner concluded that several documents presented as evidences, including third parties' notes, demonstrated the occurrence of infringements related to client division and price increases, proving the cartel formation.

With respect to calculation of fines, the Commissioner presented a brief explanation of the adopted dosimetry, noting that, in the case of

associations, income from contributions or fees paid by its members should not be a precise measure of their economic capacity. In other words, considering only such revenues for the calculation of the fine would have a very low dissuasive nature. Therefore, the Commissioner suggested that the fine should be applied in a higher amount, considering that ABIEF, for example, has more than 110 members who may contribute to its payment.

Finally, Mr. João Paulo de Resende noted that the Federal Public Prosecutor (MPF) suggested the commencement of a new proceeding against more than 121 companies. However, the Commissioner was of the opinion that the statute of limitation would not apply only with respect to ABIPLAST, ALLPAC, Merger Carrun (and the individuals Rogério Mani and Paulo Rossi), deciding to open an administrative proceeding against them. In addition, he determined the remittance of the decision to the MPF, for any further applicable measure (i.e. criminal prosecution).

Commissioner Mauricio Bandeira Maia may bring his separate vote and resume the decision in the coming judgement sessions.

### **CADE prohibits the participation of CSN in Usiminas' Shareholders Meeting**

CADE's Tribunal rejected the request of Companhia Siderúrgica Nacional (CSN) to participate in the Ordinary Shareholders Meeting of Usiminas Steelworks, which was scheduled to occur on May 25, 2018 and would elect members of the Board of Directors and Fiscal Council for the next biennium.

The Tribunal followed the opinion of CADE's Federal Prosecutor's Office (PFE/CADE), who recommended the Tribunal to reject the request.

According to the PFE/CADE, there would be no risk of corporate conflicts among the major shareholders of Usiminas due to an agreement executed between them in February. Also, no possible negative financial impacts were identified for CSN as part of this decision.

The restriction imposed on CSN arises from the Performance Commitment Agreement (TCD) executed between the company and CADE during the analysis of successive acquisitions of shares performed in the stock exchange market. As part of such acquisitions, CSN became a shareholder with 17.43% of the total shares of its competitor Usiminas.

The mentioned TCD was agreed with CADE to allow the clearance of such acquisitions from an antitrust perspective and to preserve competition within the sector, since CSN and Usiminas are direct competitors in the steel market.

It involved CSN's commitment to divest a portion of the acquired shares within a certain period of time. Until this obligation is fulfilled by CSN, the political rights linked to such shares were suspended. In other words, CSN is prevented from (i) exercising its voting rights in decisions that do not aim to protect the financial investment, and (ii) indicating, directly or indirectly, any members to the Board of Directors, Fiscal Council and other management bodies and supervision of Usiminas.

CSN, in previous occasions, requested CADE to waive certain commitments established in the TCD. In only one occasion (2016), CADE's

Tribunal allowed CSN to participate in the Annual Shareholders' Meeting of Usiminas, with the sole purpose of assuring the full representation of minority shareholders, avoiding a governance crisis in Usiminas.

### **CADE's Tribunal challenged the clearance of Vale Cubatão Fertilizantes by Yara International**

The acquisition of Vale Cubatão by Yara International was approved by the SG on March 20, 2018 without the imposition of any restrictions. No authorized opposition from interested third parties were presented before the SG.

However, within the 15-day deadline established in the Brazilian Competition Law (i.e. appeal term), the Commissioner João Paulo de Resende decided to challenge the clearance. The decision was based on a recent statement issued by Petrobras informing of the potential hibernation of its fertilizer plants located in Sergipe and Bahia.

The Tribunal ratified the decision of Commissioner João Paulo de Resende. The Commissioners reinforced the legal prerogative of CADE's Tribunal to challenge any clearance whenever necessary.

The Merger Filing was then distributed to the Commissioner Mauricio Maia, who will be responsible for instructing the case, as needed, and bringing it for final judgement by CADE's Tribunal.

## **122nd CADE's Judgement Session**

April 25, 2018

### **CADE rejects motions in proceeding against automakers in the aftermarket**

CADE's Tribunal rejected the motions for clarification filed by the National Association of Autoparts Manufacturers (ANFAPE) and Orgus Indústria e Comércio Ltda. (Orgus) against the Tribunal's decision that terminated, by majority, the investigation against the automakers Volkswagen, Fiat Chrysler and Ford in the aftermarket, which were allegedly abusing of their intellectual property rights in the aftermarket.

The administrative proceeding had been terminated in favor of the automakers by CADE's Tribunal in the Judgment Session occurred in March 14th, 2018. Commissioner Mauricio Bandiera Maia's vote guided the Tribunal's decision for the termination and was followed by Commissioners Polyanna Vilanova, Cristiane Alkmin J. Schmidt and Paula Azevedo. In its turn, Commissioners Paulo Burnier, João Paulo de Resende and President Alexandre Barreto voted for the conviction of the parties.

The appellant ANFAPE alleged the existence of several vices in the decision. It argued that there is a contradiction in the votes, because at the same time that the Commissioners alleged the lack of individualization of the conduct, they decided that the same conduct could be configured as a mere regular exercise of rights. In summary, ANFAPE understands that both affirmations do not coexist. ANFAPE also questioned the obscurity regarding the possible creation of antitrust immunity by the Intellectual

Property Law and also regarding the meaning and the reason of the protection of industrial designs.

On the other hand, Orgus supported that there is a contradiction in the division of competences between the Brazilian National Institute of Industrial Property (INPI) and CADE. Specifically, Orgus points out a contradiction between a section of a vote in which CADE's competence to act in cases involving abuses resulted from the Intellectual Property Law is recognized and a subsequent section that affirms that CADE would not have jurisdiction to analyze conducts involving such matters.

After examining the appeal filed by Orgus, the Reporting Commissioner Mauricio Bandeira Maia supported the inexistence of contradiction regarding CADE's jurisdiction to punish abuse involving the matter of intellectual property. In that sense, the Commissioner pointed that the vote only stated that it is not CADE's role to assess the quality of the Intellectual Property Law, but rather whether there is any excess in its application.

Regarding ANFAPE's appeal, the Reporting Commissioner also understood that there was no contradiction in the votes. According to him, the of individualization of the conduct – definition of each one of the relevant markets – is independent from the practice adopted by the defendants. In this sense, the investigation analyzed if the imposition of registry right in the “aftermarket involving parts bonded with industrial design registry” would characterize an anticompetitive conduct within the rule of reason.

In relation to the other allegations from ANFAPE, the Reporting Commissioner stated that adjudicative agencies are not intended to

answer the doubts of the parties and should only issue well-grounded decisions, even if they do not address all the matters raised. Therefore, the arguments show mere nonconformity with the line adopted in the decision, reason why he voted to reject them.

Commissioner Polyanna Vilanova however, voted for the rejection of the appeal from Orgus since the appeal did not present precisely the sections of the decision in which there is obscurity, contradiction, omission or contains material error.

### **CADE executes an agreement in the automotive fuels market**

CADE's Tribunal approved, by majority of votes, the execution of a Cease and Desist Commitment (TCC) proposed by gas stations and individuals in the course of the administrative proceeding, which investigates influence for uniform commercial behavior, cartel, resale price fixing, creation of difficulties for the operation of competitors and discrimination of purchasers, in the automotive fuels market in Joinville/SC.

Among the commitments established in the TCC, a pecuniary contribution was established in the amount of BRL 7.133.690,61 along with the obligation to implement a compliance program, according to the CADE's TCC and Compliance Guidelines.

President Alexandre Barreto pointed out that such obligation would represent a means of achieving and disseminating the culture of competition in a market that has a product essential to the consumer.

Commissioner Paulo Burnier however, stressed that the exclusion of diesel from the calculation of the pecuniary contribution, which is punctually divergent from CADE's jurisprudence, was well grounded and does not demonstrate a change of understanding, considering the disproportion between the revenue related to gas and the revenue related to diesel, an understanding shared by the others Commissioners

Commissioner Cristiane Schmidt, the only dissenting vote to the approval, disagreed with the exclusion of the diesel from the calculation and understood that the pecuniary contribution established in the TCC was lower than the value reached by her in the calculation of the benefit obtained by the defendants with the alleged conducts.

### **CADE executes a Technical Agreement with SEPRAC and SEFEL**

CADE executed a Technical Agreement (ACT) with the Secretariat for the Promotion of Productivity and for the Competition Advocacy (SEPRAC) and the Fiscal, Energy and Lottery Oversight Department (SEFEL).

Both departments succeeded the former Economic Oversight Department (SEAE) in the so-called "competition advocacy" for the government agencies and for the society.

The execution of the agreement aimed a harmonic positioning between the agencies and also the measurement of the impacts of the performance of the Brazilian System for Protection of Competition (SBDC).

Among the terms of the ACT, it was defined that a Competition and Advocacy Committee (C-CAC) will be created, composed of three

public servants nominated by CADE and three public servants jointly nominated by SEFEL and SEPRAC. The members of C-CAC will exchange information with the objective of producing a report that presents the different entities' understandings and offers a joint position in the suggestion of public policies related to competition law.

After its drafting, the report will then be made available to CADE's commissioners and the Secretaries of SEFEL and SEPRAC, so that they may deliberate and place the matter to Public Consultation, if they wish. If there is convergence of understandings, the proposal will become a joint position of the SBDC.

## JUDGMENTS IN MAY, 2018

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### 123rd CADE's Judgement Session

May 9, 2018

#### **CADE's Tribunal approves the acquisition of Vale Cubatão Fertilizantes by Yara International**

On April 11, 2018, after the unconditional approval by CADE's General Superintendence (SG) of the acquisition of Vale Cubatão Fertilizantes by Yara International, Commissioner João Paulo de Resende called back the transaction for further analysis by the Tribunal. This type of request has been used in very few cases since the Law 12.529/2011 entered into force.

The Commissioner justified that the request was due to a statement from Petrobras regarding a possible hibernation (interruption in the production) of fertilizer plants located in Sergipe and Bahia. In case it occurs, allegedly the only alternative to the consumers, besides Yara, would be the importation of fertilizers through the TIPLAM port terminal at the Port of Santos.

The request was approved by CADE's Tribunal on April 11, 2018 and the case was then allocated to the Commissioner Mauricio Bandeira Maia, who conducted meetings between the parties' attorneys and the commissioners and performed additional investigation about the affected markets.

Following the additional investigation, the Tribunal unanimously concluded that, even in the remote possibility of hibernation of Petrobras'

plants, the transaction under analysis will not raise any anticompetitive effects on the markets of ammonia, ammonia hydroxide and fertilizers.

The Reporting Commissioner understood that, as indicated in Petrobras' statements, the hibernation of the facilities is a future and uncertain event, and that the company studies other alternatives. In addition, he stressed that TIPLAM, which receives imports of ammonia at the Port of Santos, is not the object of Yara's acquisition within this transaction. Finally, he also mentioned that the ammonia sold by Vale Cubatão does not represent a viable alternative to Bahia's market, which would be affected by the possible hibernation of one of Petrobras' plants. Thus, the possible measure by Petrobras would not cause any change in the market analysis performed by the SG.

Finally, the Reporting Commissioner concluded that the transaction is pro-competitive and beneficial to the consumers. In addition, the possible hibernation of Petrobras' plants is outside the scope of the case and, as already pointed out, has no relation with the markets affected by the transaction under analysis.

Vale Group was advised by Cescon Barrieu in this important precedent.

#### **Decision regarding an alleged cartel in the parking lot market in São Paulo is postponed after a request from a Commissioner to issue a separate vote**

The General Superintendence suggested, in a technical note published on December 19, 2016, that the parties under investigation for an alleged cartel in the market of contracting of services for the operation and commercial

exploitation of parking lots in the city of São Paulo should be convicted by CADE's Tribunal. The proceeding was forwarded to the Tribunal and allocated to the Commissioner Cristiane Alkmin. The commissioner then included the case on the agenda of this judgment session.

After oral statement from the defendants' counsels, CADE Attorney General's Office defended the conviction of the investigated companies and individuals. The Attorney General Walter Agra Júnior highlighted the relevance of solid evidence for the conviction and individualization of the conduct of each of the parties, but acknowledged the difficulty of producing evidence in cases involving cartel.

Reporting Commissioner Cristiane Alkmin, however, voted for the termination of the administrative proceeding. In line with the oral statements of the defendants' counsels, the Reporting Commissioner understood that a minimum set of evidence was not established to confirm the formation of the alleged cartel among the investigated parties. The Reporting Commissioner also pointed out that, out of the 47 e-mails attached to the case records, only one dealt with communication between competitors which, in turn, refers to an invitation letter of a private bid. Thus, the Reporting Commissioner understood that the set of evidence added to the case files was sparse and out of context, making it impossible to condemn the investigated companies and individuals.

After the vote of the Reporting Commissioner, Commissioner Polyanna Vilanova requested the files for review, suspending the trial of the case.

Cescon Barriou is one of the law firms representing one of the defendants.

### **CADE postpones decision regarding an investigation in the market of bovine cattle**

The administrative proceeding was initiated against Mr. José Batista Júnior and Independência Alimentos S.A. (Frigorífico Independência) due to facts known by the then Ministry of Justice's Department of Economic Law (SDE) within the files of another administrative proceeding (Slaughterhouses Investigation) to investigate the formation of a cartel in the national market for the purchase of cattle for slaughter by slaughterhouses.

The then SDE became aware of the facts investigated in this administrative proceeding during the course of the Slaughterhouses Investigation, which was brought as a result of an investigation carried out by the Federal Public Prosecutor's Office of Mato Grosso (MPF-MT), regarding several issues, including an alleged cartel formation in the Brazilian slaughterhouse sector.

According to the MPF-MT investigation files, there were allegations and documents about an alleged cartel formation for the purchase of cattle for slaughter by slaughterhouses. In addition, among the evidence gathered in the scope of this investigation, Mr. José Batista Júnior would have mentioned the alleged participation of Frigorífico Independência.

When analyzing the evidence gathered in the case records, the Reporting Commissioner understood that the only relevant piece of evidence in this administrative proceeding was the transcription of audio recordings, originating from a police investigation that investigates the same facts. However, the audio refers to a meeting other than that used as

evidence in the originating proceeding. In addition, he understood that the recordings effectively added to the records of this administrative proceeding would be insufficient to configure the participation of Frigorífico Independência and José Batista Júnior in the conduct of plus parallelism or to characterize cartel practice.

The Reporting Commissioner then voted for the termination of the administrative proceeding against both defendants.

After the Reporting Commissioner's vote, the Commissioner João Paulo requested the files for review.

### **CADE settles two autoparts cartel proceedings**

CADE's Tribunal unanimously approved two Settlement Agreements (TCCs) in the administrative proceedings that investigate alleged cartel in autoparts markets.

The first one was proposed by the company Leoni Wiring Systems and an individual related to the company, within the scope of the administrative proceeding that investigates an alleged cartel in the market of electric harnesses and automotive electrical and electronic components (that include electronic control units, junction boxes, automotive panels and displays, ABS sensor system, high voltage cables and components for hybrid electric vehicles, antenna cable and connectors).

This is the second TCC proposal in this investigation. The TCC includes the payment of pecuniary contributions in the amounts of BRL 1,942,875.81 for Leoni Wiring Systems and BRL 68,000.00 for the individual.

Commissioner João Paulo de Resende added that there is doubt with regard to the effects of the conduct in Brazil attributed to Leoni Wiring Systems, or, in case they occurred, these effects would have been very small and indirect. Thus, the Commissioner pointed out that, regardless of the amount of the pecuniary contribution, he would vote for the approval of the proposal.

The second TCC proposal involved TRW Automotive and an individual related to the company. The agreement was executed within the scope of the administrative proceeding that investigates an alleged cartel in the market of valves for engine, valve guides and valve seats, both in Brazil and Argentina, which affected the independent national market of spare parts.

The TCC proposal met all the necessary requirements, establishing a pecuniary contribution in the amount of BRL 815,627.83.

Commissioner João Paulo de Resende pointed out that, for the calculation of the pecuniary contribution, he considered TRW Automotive's turnover in the company's business for a period of eight months and adopted a pre-determined overpricing of 10%. Therefore, the Commissioner informed that the estimated expected fine would be BRL 790,000.00, a lower amount than the one proposed in the TCC. Finally, the Commissioner pointed out that the amount he calculated would represent 0.04% of the turnover in the company's business, while the proposed amount corresponds to 0.07%. Thus, he voted for the approval of the TCC.

**CADE's Tribunal decides to review the transaction  
between TIM and Oi in order to discuss the definition  
of associative agreements**

Commissioner Paulo Burnier submitted to the Tribunal a request to review the merger filing involving a contractual amendment between TIM and Oi on 4G Internet network services. The SG had decided not to analyze the merger filing, considering that the contractual amendment could not be considered an associative agreement in this case (due to the absence of a joint enterprise).

According to the Commissioner, this is an opportunity to discuss the scope of the definition of associative agreements, according to CADE's resolution about this subject (Resolution 17/2016).

The request was unanimously approved by the Tribunal and the case was subsequently allocated to Commissioner João Paulo de Resende.

Commissioner Cristiane Alkmin gave her opinion that, although she agreed with the decision of the SG, she preferred to approve the request. The Commissioner considered that the fact that one single Commissioner has doubts about the case is sufficient to justify the need for a new analysis at the Tribunal's level. The Commissioner added that this strengthens the autonomy of CADE's instances and enables a better analysis of cases in which there are controversies.

**124th CADE's Judgement Session**  
May 23, 2018

**CADE condemns companies and associations  
for cartel participation in the national salt market**

CADE's Tribunal unanimously condemned the Brazilian Association of Salt Extractors (ABRESAL), the Union of the Salt Extraction Industry of the State of Rio Grande do Norte (SIESAL) and the Union of the Salt Grinding and Refining Industry of the State of Rio Grande do Norte (SIMORSAL) besides several companies and individuals for the practice of cartel in the national salt market.

The administrative proceeding was instituted following the statements made by Salina Diamante Branco (SDB) in an administrative proceeding investigating the practice of undercutting of freights for distorting the competition and dominating the sea salt bulk market. At that time, SDB stated that the salt producers of Rio Grande do Norte adopted protectionist strategies and limited competition, raising the concern of the then Secretariat of Economic Law (SDE).

The proceeding was then instituted in 2013 after a dawn raid in the headquarters of saline companies and representative entities of the sector. In November 2014, SDB and an employee of the company signed a Cease and Desist Agreement (TCC) with CADE. CADE's General Superintendence (SG) forwarded the case to the Tribunal in March 2017 recommending the conviction of the defendants.

At the judgement session held on May 23, 2018, CADE's Attorney General pointed out that several lawsuits have been filed to try to

impede the judgement of this case and in two of which injunctions were granted (8th district court of Mossoró/RN and 7th district court of the Federal Justice of the Federal District), but CADE Attorney General's Office was able to dismiss them, thus allowing the case to be judged in the past judgement session.

In his vote the Reporting Commissioner João Paulo de Resende stated that the conduct involved several products and agents of the salt production chain, repeatedly reaching the markets of sea salt, coarse salt and refined salt, and involved companies engaged in the extraction, grinding and refining of such products. In addition, according to him, the agreements aimed mainly the wholesale salt market.

Also according to the Reporting Commissioner, the evidence revealed a broad anticompetitive agreement, which lasted from 1982 to 2012, in addition to a specific agreement among other defendants to set prices in public tenders for the acquisition of refined salt by the Government of Bahia between 2005 and 2006. The commissioner verified that the entities of the sector exercised influence for uniform conduct and shared sensitive information. Finally, he emphasized that there is evidence in the records that demonstrate an attempt to prevent the import of Chilean salt into Brazil.

According to the evidence, while the unions SESAL and SIMORSAL recommended certain prices and suggested onlendings, ABRESAL held meetings for market division. In addition, SIMORSAL served as a channel for denouncing prices that were not in accordance with prices previously defined.

The Reporting Commissioner, followed by Commissioner Cristiane Alkmin, voted for the conviction of 21 legal entities and 40 individuals, suggesting the application of fines reaching BRL 358 million. For this calculation, the Reporting Commissioner stated that she considered the duration of the conduct, with a pre-determined surcharge of 10% on each year of participation, in order to calculate the benefit obtained by the parties of the cartel.

Commissioner Paulo Burnier da Silveira, as well as the other commissioners of CADE's Tribunal, followed the vote of the Reporting Commissioner on the merit, but diverged as to the fines to be applied and, in this sense, voted to apply fines reaching BRL 289.5 million.

In his vote, Commissioner Paulo Burnier da Silveira rejected the application of the thesis of the benefit achieved with the cartel, stating that it cannot be considered as a single or even preponderant element to define the fine, and that all mitigating and aggravating factors provided for by law should be considered. He also affirmed that the principle of legality should be respected and possible discontent with the legal text should be addressed by the proper path, the Legislative Power. With regard to practical aspects, he pointed out the high costs for public administration and possible legal uncertainty.

In this specific case, Commissioner Paulo Burnier da Silveira stated that the individualization of the sentences of the different defendants was not properly made. According to the Commissioner, the fines are equivalent, while the evidence gathered in the case shows different degrees of participation.

Lastly, the Commissioner understands that there is a favorable ground for calculating the benefit obtained by the cartel, but with a focus on the agenda of civil damages claims.

Commissioner Paula Azevedo Farani, who followed the vote of Commissioner Paulo Burnier da Silveira, also suggested the removal of the current antidumping measure on imports of coarse salt, so that the decision is referred to the Chamber of Foreign Trade (Câmara de Comércio Exterior – CAMEX).

Finally, the Attorney General asked the Tribunal to send the decision to CADE Attorney General's Office to authorize actions to recover damages. The decision about this request was postponed.

Thus, the Tribunal unanimously condemned the defendants of this administrative proceeding, prevailing the vote of Commissioner Paulo Burnier da Silveira regarding the amount of the fine.

### **CADE postpones decision regarding the formation of an international cartel in the GIS systems market**

The investigation began with the execution of a Leniency Agreement with the then SDE, through which evidence of an alleged international cartel of gas-insulated switchgear, also known as “GIS systems” was presented. The alleged cartel would involve companies like Alstom, Toshiba, Siemens, among others, in addition to several individuals.

During the fact-finding phase of the administrative proceeding, both the SG and CADE Attorney's Office had already suggested the condemnation

of the companies and individuals investigated. The entities also reiterated CADE's jurisdiction to judge proven international cartels that could potentially have effects in Brazil, based on the territoriality theory.

Reporting Commissioner Polyanna Vilanova reinforced CADE's jurisdiction to judge this administrative proceeding. In this sense, the Reporting Commissioner stated that there are indications that approximately 90 Brazilian projects were discussed among the investigated companies, some of which were allocated through an agreement and in others price levels were established.

In addition, the Reporting Commissioner pointed out that only Toshiba and Mitsubishi Electric Corporation did not sign a TCC throughout the administrative process.

Regarding the merits, the Reporting Commissioner stated that the cartel had a preparatory phase, between 1985 and 1988, in which the defendants elaborated materials and calculations of market share, later used to allocate projects. Siemens would also have acted as an assistant of the cartel.

The Reporting Commissioner pointed out that Toshiba and Mitsubishi were condemned by the authorities of the European Union, the Czech Republic and Slovakia and had confessed that they were involved in a worldwide cartel.

Regarding the penalties to be applied, the Reporting Commissioner suggested a fine of approximately R\$ 445 thousand, considering the absence of mitigating factors and the existence of aggravating factors

(duration of conduct and hardcore cartel), with application of a 20% rate on the revenue in the previous year, updated until the moment of the session.

Regarding Mitsubishi, the Reporting Commissioner stated that it was not possible to identify a reliable revenue, since the company did not present its revenue in the segment in 2005. Thus, the Commissioner stated that she took into account the expected fine already discussed in the TCCs, and Mitsubishi's virtual revenue in Brazil, in view of its global revenues, which led to a fine of approximately R\$ 4.7 million.

Commissioner João Paulo de Resende advanced his vote affirming that he follows the vote of the Reporting Commissioner. However, he pointed out that he disagreed with the Reporting Commissioner's vote regarding the dosimetry in the sense that he understood that the fine should be calculated by applying a pre-determined surcharge over the duration of the conduct, and considering a virtual revenue, based on the level of imports of the product. The final fine would then be approximately R\$ 3.18 million for each company.

Commissioner Mauricio Bandeira Maia requested the case for review, thus postponing the final decision of the Tribunal.

**CADE terminates investigation against  
alleged anticompetitive conducts  
in the automotive fuel resale market in Natal/RN**

CADE's Tribunal unanimously decided to close the administrative proceeding against Messrs. Keines Alves Garcez and Eduardo Augusto de

Viveiros Pinheiro Lopes, related to a possible infringement to the economic order through the adoption of potential uniform commercial conduct.

The referred administrative proceeding was brought by an original proceeding, which had the purpose of investigating conduct consisting on potential influence for uniform commercial conduct, the formation of a cartel, the creation of barriers to entry and of difficulties in the operation of competitors in the market of resale of fuels in the city of Natal/RN.

The abovementioned measures would have been triggered by the various attempts to block the approval of the Bill No. 411/09, which would make it possible to set up gas stations in supermarkets and hypermarkets.

In the course of the investigation against the two individuals, both the SG and the Federal Public Prosecutor's Office suggested the termination of the administrative proceeding because of a decision by CADE's Tribunal already issued in the scope of the original administrative proceeding, which has preclusive effect regarding the investigated facts. At that time, CADE's Tribunal understood that the investigated conduct was lawful.

In her vote, the Reporting Commissioner Paula Farani identified that, unlike the SG's understanding, the fiveyear statute of limitation period is verified in this case. According to her, the limitation period is restricted to the scope of the proceeding. Otherwise, there would be no limits and the SG could unlimitedly open new proceedings, under the guise of investigating the same facts.

In addition, the Reporting Commissioner understood that the effects of the initiation of an administrative proceeding should not be extended

to others investigated in another proceeding, even if both arose from the same evidence. She also stressed that it would be different if the defendants were part of the original administrative proceeding and if this proceeding was dismembered.

The other Commissioners and the president followed the vote of the Reporting Commissioner and the administrative proceeding was terminated with acknowledgment of the ending of the statute of limitation period.

## JUDGMENTS IN JUNE, 2018

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### 125th CADE's Judgement Session

June 13, 2018

#### **Owens-Illinois and Nadir Figueiredo give up on their transaction and CADE investigates Gun Jumping**

The proposed transaction would involve the transfer of a domestic glass household appliances production plant from Owens-Illinois to Nadir Figueiredo, in addition to the acquisition, by Nadir, of the remaining commercial stocks of the products traded by Owens-Illinois, which are located in plants in Rio de Janeiro and São Paulo. The case was submitted to CADE on August 18, 2018.

Both companies operate in the production and commercialization of glass. The reason for the transaction was that part of Owens-Illinois's strategy was to focus on its core business in Brazil: the production of glass packaging.

CADE's General Superintendence (SG) decreed, in November, that the transaction was a complex one. During its analysis, the SG identified a high concentration in the glass household appliances market and the possible reinforcement of exercise of market power by Nadir.

Because of the lack of supporting elements to challenge a probable exercise of market power, the SG recommended that CADE's Tribunal should block the transaction, highlighting that there were not effective remedies to avoid the identified antitrust concerns.

After a long case investigation by the Tribunal and several meetings, a day before the judgement session, the parties filed a petition giving up on the transaction. Reporting Commissioner, Polyanna Vilanova, stated at the Tribunal's session that the merger filing had lost its object.

In addition, in order to prevent the violation known as gun jumping, that could involve among other actions the exchange of competitively sensitive information prior to CADE's approval, the Reporting Commissioner Polyanna Villanova issued an official letter to the applicants requesting confirmation if all necessary steps were taken to avoid the exchange of this type of information during the negotiation, in particular the ones related to costs, productive capacity and commercial strategies of the parties.

Finally, due to the loss of object of the merger filing, CADE's Tribunal unanimously decided to dismiss the case, without analyzing the merits.

CADE's Tribunal approves merger between Praxair, Inc. and Linde AG subject to conditions negotiated with the parties

CADE's Tribunal unanimously followed SG's opinion and approved, upon the execution of a Merger Control Agreement (ACC), the merger between the multinational companies Praxair, Inc. and Linde AG, which operate in the gas and on-site market.

The companies Air Liquide Brasil Ltda., ESHO – Empresa de Serviços Hospitalares S.A., Companhia Brasileira de Alumínio, Braskem S.A. and Magnesita Mineração S.A. were admitted as interested third parties and opposed to the transaction.

The analysis carried out by the SG concluded that the Brazilian market for industrial and special gases is highly concentrated, with the parties of the transaction as main players. However, the SG did not analyze the probability of exercise of market power, since it considered that the ACC submitted by the parties addressed the main competition concerns.

In a nutshell, the ACC presented has a structural nature and provides the assets to be divested. The terms of the ACC allow the buyer to continue with the activities of the companies and to compete effectively in the regional markets of industrial and special gases in bulk and cylinders.

The Reporting Commissioner Mauricio Oscar Bandeira Maia also understood that the proposed ACC includes broad divestment and is capable of mitigating all identified competition concerns. In addition, his staff requested additional information about the assets, especially to verify the non-occurrence of cherry picking as well as information on gas surplus trading by the remaining on-site plants.

Among the provisions, the ACC establishes that the transaction can only be closed after the execution of a binding agreement with the buyer and establishes an obligation for the new company not to re-acquire all or part of the assets that are part of the divested business, nor participate in bids for renewal of existing agreements related to on-site divestment plants.

Finally, Commissioner Polyanna Vilanova and Commissioner João Paulo de Resende praised the well-designed solution, presented in advance by the parties, which allowed CADE to solve the case quickly.

CADE approves three agreements in the FX offshore market

CADE's Tribunal unanimously approved three Settlement Agreements (Termos de Compromisso de Cessaçã- TCCs), negotiated with the SG, presented in the course of the investigation of an alleged manipulation of exchange rates in the foreign currency market known as the Foreign Exchange Market (Forex or FX), specifically in the FX spot market.

Under the terms of the approved agreements, Banco Morgan Stanley undertook to pay, as pecuniary contribution, the amount of BRL 30,280,093.73; Royal Bank of Canada, the amount of BRL 12,585,956.52; and Pablo Frisanco de Oliveira, the amount of BRL 60,000.00.

### **CADE's Tribunal dismisses cartel investigation on beef purchase market**

The authority initiated the Administrative Proceeding to investigate the alleged cartel practice in the Brazilian market of beef purchase for processing in slaughterhouses located in main producing centers of the country.

It should be noted that in 2007, CADE convicted some slaughterhouses and individuals for the attempt to standardize discounts, which occurred after a meeting held in 2005.

With regard to this case, the vote had begun at the judgement session of May 9, 2018, when the Reporting Commissioner, Polyanna Vilanova, voted for the dismissal of the case against Frigorífico Independência and José Batista Júnior.

Based on the analysis of the evidence in the case records, the Reporting Commissioner concluded that there was no evidence that the defendants

participated in any infringement to the economic order, since there was no price list from the Frigorífico Independência that was identical or similar to the competitors spreadsheets, and did not find evidence of participation of the defendants in the meeting in 2005. The Reporting Commissioner also stated that she had not found any other evidence in the case records that could be considered as "parallelism plus" in the conduct of the agents (i.e., there was no strong evidence or evidence of a collusive event leading to parallel behavior).

After the vote of the Reporting Commissioner, the judgment was suspended due to the request of Commissioner João Paulo de Resende to further review the case.

Once the judgement was resumed, at the session held on June 13, the Commissioner considered that the main evidence in the case records consists of transcription of audio and video tapes that were submitted by the recording author himself to an expert and this procedure was not duly supervised by the Public Prosecutor's Office or by the defendants.

Thus, the evidence did not comply with the rights to full defense and to appeal and, in case CADE convicted based on this evidence, it would be violating the same constitutional rights. Therefore, he voted for the dismissal of the case due to insufficient evidence.

Commissioner Mauricio Oscar Bandeira Maia followed the reviewer vote and stated that the case could have been closed in the preliminary arguments, since there is no physical or material evidence that gave rise to the transcript.

In the end, the Tribunal unanimously dismissed the proceeding, in accordance with the vote of Commissioner João Paulo Resende.

### **CADE's Tribunal dismisses investigation in the domestic market for shock absorbers**

The administrative proceeding was initiated on September 28, 2015 to investigate an alleged cartel practice in the market for front and rear shock absorbers for the automotive sector, which would be demonstrated through the exchange of e-mails, telephone contacts and face-to-face meetings between the companies Affinia, Dana, Magneti Marelli Cofap and Tenneco.

The case was initiated with the execution of a leniency agreement with the company Tenneco and related individuals. Subsequently, the rest of the defendants presented TCC, which were all approved.

Based on this scenario and for procedural economy purposes, the SG decreed the end of the procedural instruction and the case records were sent to the Tribunal for judgment.

The Reporting Commissioner João Paulo de Resende, who was unanimously followed by the Tribunal, voted for the approval of the Leniency Agreement and extinction of any punitive action by the public administration in favor of the signatories, considering the full compliance with its requirements. He also decided to dismiss the case in relation to the defendants Dana, Affinia, Schertel, and individuals, due to the full compliance with the TCC. Finally, he voted for the suspension of the proceeding, bearing in mind the pending payment of all pecuniary contributions, in relation to Magneti Marelli and individuals.

### **CADE's Tribunal convicts companies for cartel practice in the domestic market for cell phone recharge**

The administrative proceeding was initiated on May 20, 2010, against the companies Check Express, Rede Digital (current Rede Transações Eletrônicas) and Rede Ponto Certo, with the purpose of investigating a cartel in the market for distribution of prepaid cell phone recharge, from 2007 to 2009. It should be noted that this investigation started from a leniency agreement executed between CADE, the Federal Prosecutor's Office and Telecom Net.

During the procedural instruction, the TCC proposals were submitted by Getnet Tecnologia em Captura e Processamento de Transações, Rede Transações Eletrônicas, Beira Mar Participações and RV Tecnologia, as well as by their related individuals, who contributed to the evidence collected during the case.

The investigation and the evidence attached to the case records showed that meetings between competitors resulted in agreements for the purpose of dividing the market and agreeing the fees that would be practiced between distributors and selling locations, which would have the effect of mitigating competition and harm consumers. Therefore, the SG suggested the conviction of the other defendants.

The Reporting Commissioner Cristiane Schmidt considered that the bargaining power of the selling locations depended on its market power. In this sense, the end consumer was not affected by the conduct, but the selling locations were. The Commissioner also pointed out that there is explicit evidence that competitors agreed that they would not compete on price margins against the selling locations. Thus, she

concluded that the distributors fixed the prices that they would pass on to the selling locations, with regard to what they received from the telephone companies.

The Tribunal, by majority, in accordance with the vote of the Reporting Commissioner Cristiane Schmidt, decided to convict Rede Digital, Check Express and related individuals, as well as for the dismissal of the case with regard to Rede Ponto Certo and individuals, for failing to find evidence of infringement to the economic order.

Regarding the fines applied, the Tribunal, by majority, followed the vote of Commissioner Mauricio Bandeira Maia, who understood that a suitable method would be to consider a percentage on the turnover of the defendant in the affected period.

### **CADE approves settlement presented by the association of soft drink producers**

CADE's Tribunal approved, by majority, the TCC submitted by the Brazilian association of soft drink producers (AFEBRAS), within the scope of the administrative proceeding that investigates alleged anticompetitive practices of the association aiming at standardizing the commercial performance of its associates. The investigation was initiated in 2015, after a complaint of the company Beertech, which is currently controlled by AmBev.

Among the commitments established in the approved TCC, a pecuniary contribution of BRL 110,000.00 was set to the Diffuse Right Defense Fund (Fundo de Defesa dos Direitos Difusos).

Commissioners Cristiane Schmidt and João Paulo de Resende were the only ones who voted against the approval, since they considered that the contribution would not be sufficient and should consider the sum of the turnover of all the associates.

## JUDGMENTS IN JULY, 2018

### 126th CADE's Judgement Session

July 4, 2018

#### **CADE condemns cartel in the market of flexible packaging and Commissioners discuss the statute of limitations and the standards of proof**

CADE's Tribunal, by majority of votes, condemned companies and individuals for participating in a cartel in the Brazilian flexible packaging market, as well as two associations of the sector for influencing the adoption of uniform commercial conduct.

The case's judgement initiated in April this year, when Reporting Commissioner, João Paulo de Resende, voted for the conviction of several of the defendants. The judgement was then suspended, after Commissioner Maurício Bandeira Maia requested to see the records, motivated by doubts over the applicable statute of limitations<sup>17</sup> and the sufficiency of the evidentiary set.

<sup>17</sup> According to Law No. 9.873/1999 the term for the filing of a punitive lawsuit by the Federal Public Administration ends in five years. However, when the violation is also characterized as a crime, the statute of limitations shall respect the term provided in the criminal law. Cartel is characterized as a crime in the Law No. 8.112/1990, which establishes a penalty from 2 to 5 years. On the other hand, the Criminal Code establishes a statute of limitations of 12 years for crimes in which the maximum penalty is higher than four years but not higher than eight years. This was the term adopted by the Reporting Commissioner in the first Judgement Session related to this case, following the most recent jurisprudence from CADE.

In its vote, by making an analogy with other laws and analyzing precedents of the Brazilian Superior Court of Justice, Commissioner Maurício Bandeira Maia argued that CADE could only apply the statute of limitations set forth in the criminal legislation if the Public Prosecution Office had at least filed a complaint. Furthermore, the criminal limitation would only apply to those criminally investigated. Otherwise, there would be unlawful extension of the effects of the criminal suit against all the defendants. For the same reason, the criminal limitation should never be applied to legal entities, which cannot be authors of the crime of cartel.

In the specific case, Commissioner Maurício Bandeira Maia concluded that the administrative process was time-barred by the five-year statute of limitation and should be closed against all defendants.

Commissioner Maurício Bandeira Maya also analyzed the question of intervening limitation. In this regard, the respondents alleged that the administrative process remained paralyzed between August 2009 and August 2012. The Reporting Commissioner, however, understood that an order from 2010, demanding information about the revenues of the defendants, was enough to interrupt the limitation, since it had the purpose of investigating the market.

Even though Commissioner Maurício Bandeira Maia did not recognize the intervening limitation in this case, he indicated that a simple order, requiring punctual information not related to the investigated period, would not be enough to interrupt the limitation period.

Finally, in relation to the standard of proofs acceptable by CADE, Commissioner Maurício Bandeira Maia argued that it should not be so

high as to impede the persecution of infractions, but neither be so low as to generate frivolous convictions. In the specific case, he affirmed that the evidentiary set is very reduced and centered in the notes of a single notebook and apocryphal meeting minutes.

About the practice of influence to adopt uniform conduct, the Commissioner highlighted that there is no equivalent infraction in the criminal legislation, which reinforces the thesis of the investigation being time-barred. However, he also analyzed the evidence against the associations.

In this regard, he argued that the mere production and dissemination of material about raises in the costs of inputs is a legitimate activity of monitoring the market. However, there are other evidences against the associations, such as e-mail inviting for price readjustments and notices informing that some costs would be responsibility of clients, which demonstrate interference in the commercial policies of the associates. That said, surpassed the priority issue of limitation, it would be the case of conviction.

The other Commissioners diverged of the vote and accompanied the Reporting Commissioner on the merits. They highlighted that the legislation about the administrative statute of limitations does not emphasize the subject of the conduct, but the object. That said, and since the law defines cartel also as a crime, the criminal statute of limitations, of twelve years, should apply. They reinforced this is a pacific understanding in CADE's case law. For the president of the Counsel, Alexandre Barreto, case law is not a "straitjacket", but should be considered to preserve legal security.

Commissioner Paulo Burnier, however, diverged about the measure of punishment proposed by the Reporting Commissioner, which calculated the fines based on the advantages obtained by the defendants.

Using a more traditional approach, Commissioner Paulo Burnier voted for the application of fines of 12% or 15% over the gross revenues of the companies, in the year prior to the opening of the administrative process, depending on the level of participation in the cartel. Two companies had their fines reduced in half because they are under court-supervised reorganization.

Concerning the associations, in sight of their economic size and the importance of the sector for the Brazilian economy, Commissioner Paulo Burnier voted for the application of fines of approximately BRL 2.5 million, to each one.

The majority of Commissioners accompanied the penalties proposed by Commissioner Paulo Burnier. Fines totaled approximately BRL 306 million.

Finally, the Tribunal, unanimously, determined the closing of the process against some defendants, due to lack of evidence, and the expedition of a letter to the Federal Prosecution Office in São Paulo for acknowledgement and proposal of the applicable civil and criminal suits. In addition, by majority of votes, the Tribunal determined the opening of a new investigation against company Allpac and an individual.

### **CADE closes investigation about sham litigation by taxi drivers against Uber**

The investigation was initiated in 2015, by the SG, after a complaint made by student's central directorates from University of Brasilia and Centro Universitário de Brasília. The directorates alleged that taxi-drivers were practicing sham litigation and using violence and threats aiming to drive Uber out of the market.

Based in police reports and news, SG confirmed that violence and serious threats effectively happened and counted with the consent and support of the taxi-drivers associations. However, SG argued that such conducts had no effect over competition, since they lacked the potential to raise difficulties for the establishment of Uber.

Concerning sham litigation, all opinions issued in the case converged in the sense that actions against Uber were proposed in a context of broad discussions about the validity of functioning, in Brazil, of this type of ride-sharing platform. That said, the judicial demands were considered legitimate because they were not groundless.

In the judgement session, CADE's Tribunal unanimously followed mentioned opinions, closing the procedure due to lack of evidence of any infraction against the economic order.

### **CADE's Tribunal postpones decision about cartel in the passenger transportation market**

The SG initiated the administrative proceeding in 2016 to investigate alleged cartel between radio associations of the city of Curitiba, in Brazil.

In addition, the Association of Taxi Radio Centers – ACERT supposedly facilitated agreements between companies, influencing the adoption of uniform conduct.

The Reporting Commissioner, Paula Farani, initially voted in the sense that the investigation was time-barred against all defendants. She stated that the only evidence of wrongdoing dates from 2003 and, in the absence of a criminal investigation under way, or even of a complaint by the Public Prosecution Office, the criminal time limitation does not apply. The Reporting Commissioner also stated that said statute of limitations could not be applied to legal entities and in the case of ACERT, since it is only a matter of influence to adopt uniform conduct, there is no criminal definition.

On the merits, Commissioner Paula Farani pointed out that the cartel evidences consisted on minutes of the meeting held by ACERT in January 2003, in which managers of the taxi associations met to define price ranges to be applied in public biddings. However, for the Reporting Commissioner, there is no evidence to indicate that the cartel was institutionalized and perpetuated. Therefore, it was diffuse. For this reason, she voted for the application of fines of approximately BRL 160 thousand to the legal entities and BRL 16 thousand to individuals.

The Commissioners, by a majority, rejected the priority issue of statute of limitation raised by the Reporting Commissioner, prevailing the understanding that the applicable statute of limitations for cartel cases is 12 years, even if there is no criminal investigation in progress.

On the merits, the final decision of the Court was postponed at the request of Commissioner Cristiane Alkmin, who intends to better analyze the measure of punishment and the definitions of classic cartel.

### **CADE rejects Air Liquide's appeal in the merger between Linde and Praxair**

The merger between the multinationals Linde AG and Praxair, Inc. was approved by CADE at the judgement session held on June 13, conditioned to the execution of a Merger Control Agreement (ACC) in order to fix antitrust concerns arising from the merger.

Air Liquide Brasil Ltda., a third party interested in the merger, filed a motion for clarification against the vote of the Reporting Commissioner, arguing that it did not present the list of assets to be divested by the Applicants, without stating the grounds for the confidential treatment of such information.

CADE's Tribunal unanimously voted to reject the motion. According to the Reporting Commissioner, the subject was already discussed, during the analysis of the case, and an order was issued denying the request of the interested third party to access the confidential records of the case.

### **CADE approves settlement on the market for means of payment**

CADE's Tribunal, by majority, approved a Cease-and-Desist Agreement ("TCC" in its acronym in Portuguese) proposed by Itaú Unibanco and Redecard, in an administrative proceeding investigating discriminatory practices and refusal to contract in relation to provision of banking and accreditation services in Brazil.

The investigated practices consist of: (i) refusal to read the receivables agenda of small creditors; (ii) using a lock of bank domicile to retain

customer receivables at the financial institution; (iii) charging discriminatory tariffs for large and medium-sized competitors; (iv) use of a dominant position to hinder the migration of consumers to competitors; (v) tied-sales; and (vi) imposition of high exit and termination costs to perpetuate the relationship between establishments and accreditors.

Under the terms of the settlement, the companies agreed to cease the investigated practices, as well as to collect approximately 21 million BRL, the largest pecuniary contribution ever charged by CADE in cases of unilateral conduct. It should be noted that, under current rules, the pecuniary contribution is not mandatory for this type of conduct.

Commissioner João Paulo de Resende was the only one to vote against the approval of the settlement. In his view, the investigation involves numerous and serious anticompetitive conducts, implemented in order to undermine competition. In addition, considering the companies to be recurrent, and the pecuniary contribution to be low compared to their revenues, he argued that the proposal would not effectively solve the identified problems.

## JUDGMENTS IN AUGUST, 2018

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### 127th CADE's Judgement Session

August 8, 2018

#### **CADE's Tribunal terminates cartel investigation against several investigated parties in the parking lot market in São Paulo**

On May 9, 2018, in CADE's Judgement Session, Reporting Commissioner Cristiane Alkmin voted for the termination of the administrative proceeding considering the fragility of the evidences, which were not sufficient to condemn the investigated companies and individuals.

The trial of the case was suspended until the last session, when Commissioner Polyanna Vilanova issued her vote. According to the Commissioner, who had justified the request for review on the need to assess the content of evidence, the contacts between representatives from Allpark, Netpark and Rod demonstrated the existence of cartel between such companies.

Commissioner João Paulo de Resende, on the other hand, understood that the intention of Netpark in a supposed fraud to the private bidding of Centro Empresarial Nações Unidas (CENU) was not clear. However, he pointed out that Rod and Allpark exchanged sensitive information (i.e. the invitation letter of the private bidding), and identified that the proposals to be presented to CENU were preset, and that there was no economic rationality in that communication, except to distort this competition.

After a wide debate about the probative standard, CADE's Tribunal unanimously decided (i) to terminate the administrative proceeding against Allpark and individuals who signed the Cease and Desist Agreements (TCCs), due to the fulfillment of the obligations therein established; (ii) to terminate the administrative proceeding against Garage Inn, Multipark, Zig Park and related individuals, due to the lack of evidence of infringement of the economic order and, by majority (i) to terminate the administrative proceeding against Netpark and related individuals; and (ii) to condemn Rod and Márcio Tabet, with the application of fine in the amount of BRL 437.018,47 and BRL 52.442,22, respectively, for participating in a cartel in the market of contracting of services for the operation and commercial exploitation of parking lots in the City of São Paulo.

Cescon Barrieu advised Zig Park and its director in this important precedent which involves an extensive discussion about the probative standard to condemn defendants in cases involving cartel by CADE.

#### **CADE's Tribunal condemns taxi associations from Curitiba for participation in a cartel**

The proceeding was initiated on April 26, 2010 to investigate an alleged cartel between radio taxi associations arranged by the Association of Radio Taxi Centers (ACERT), which supposedly facilitated agreements between companies in the passenger transportation market in the City of Curitiba.

In the judgement session held on July 4, 2018, Reporting Commissioner Paula Azevedo initially voted to terminate the administrative proceeding due to the expiry of the statute of limitation against all the defendants, since there is no criminal investigation in progress and, therefore, the

criminal statute of limitations would not be applicable. The Reporting Commissioner also stated that the criminal statute of limitations could not be applied to legal entities, and in the case of ACERT's conduct, which consisted on the exercise of influence for uniform conduct, there would be no legal criminal definition.

Regarding the merit, in case this preliminary issue is disregarded, Commissioner Paula Azevedo pointed out that the cartel was proven in the minutes of a meeting held by ACERT, in which leaders of the radio taxi associations met to define price ranges to be applied in public biddings. However, according to the Reporting Commissioner, there is no evidence that indicates the institutionalization and perenniality of the cartel, that makes it a diffuse cartel. For this reason, she voted to apply fines of 150 thousand UFIR to companies and 15 thousand UFIR to individuals. Finally, she voted for the termination of the administrative proceeding against ACERT and its director due to the expiry of the statute of limitation.

In order to calculate the fines described above, the Reporting Commissioner Paula Azevedo clarified that, under the Brazilian civil law, the cooperative associations do not exercise commercial activities and, therefore, cannot be fined as a company, but should be fined as legal entities that do not carry out commercial activities.

After the request for review by Commissioner Cristiane Alkmin, the trial of the case was resumed in this last session. Commissioner Cristiane Alkmin diverged from the Reporting Commissioner and stated that this case could be characterized as hardcore cartel, voting for the conviction of the defendants in higher levels. In her vote, she proposed the use of the calculation that would be applied in the case of companies.

CADE's Tribunal, by majority of votes, rejected the preliminary issue highlighted by the Reporting Commissioner, prevailing the understanding that the statute of limitations applicable for cartel cases is of 12 years, even when there is no criminal investigation under way.

Regarding the merit, the administrative proceeding was unanimously terminated against ACERT due to the statute of limitations, since in the case of this association, the conduct consists on the exercise of influence for uniform conduct and does not represent a cartel. On the other hand, the other associations were convicted, by majority of votes, in the terms of the vote of the Reporting Commissioner, while Commissioners Cristiane Alkmin and João Paulo de Resende's votes were defeated.

#### **CADE's Tribunal condemns Siemens and Toshiba for the formation of an international cartel**

The case refers to the investigation of an international cartel with effects in Brazil, involving companies such as Toshiba Corporation, Mitsubishi Electric Corporation and Alstom Hydro Energia Brasil Ltda. in the market of gas-insulated switchgear, also known as GIS. The investigation began in 2006 with the execution of a Leniency Agreement with ABB Group companies.

In CADE's Judgement Session held on May 23, 2018, Reporting Commissioner Polyanna Vilanova stated that the companies Mitsubishi and Toshiba had participated in the discussions and anti-competitive arrangements that generated anticompetitive effects in Brazil. The Reporting Commissioner defined the cartel as hardcore and suggested the

application of a 20% rate on the revenue in the year prior to the initiation of the administrative proceeding, the maximum level established by the Brazilian law.

Commissioner João Paulo de Resende, on the other hand, understood that the fine should be calculated by applying a pre-determined surcharge over the duration of the conduct, and considering a virtual revenue, based on the level of imports of the product.

During the same judgement session, Commissioner Mauricio Bandeira Maia requested the case for review in order to better understand the evidence collection and the reports of the Leniency Agreement, and in this last judgement session followed the vote of the Reporting Commissioner.

With the trial of the case restarted, Commissioner Cristiane Alkmin opened a divergence for the termination of the proceeding considering that the evidence is insufficient to lead to the conclusion that the international cartel produced effects in Brazil. The Commissioner argued that the additional information suggests a conduct independent to the international cartel.

Finally, the Tribunal, by majority of votes, followed the vote of the Reporting Commissioner to condemn Mitsubishi and Toshiba, with the application of fines that amount up to approximately BRL 4.9 million, and diverged from Commissioner João Paulo de Resende regarding the dosimetry and from Commissioner Cristiane Alkmin regarding the merit. By unanimity, the administrative proceeding was terminated against the companies and individuals related to ABB Group, signatories of the Leniency Agreement.

### **Port operators from Port of Rio Grande and Port of Santos are fined for abuse of dominant position**

CADE's Tribunal, by majority of votes, applied a fine to Rodrimar S/A in the amount of BRL 972 thousand for the collection of additional amounts to the Terminal Handling Charge (THC) in detriment of the customs facilities which would require to withdraw goods in transit. This rate imposed by the port operator would have created obstacles to the supply of dry port services by post-port customs terminals, by the increase of costs.

The trial of the case began in 2016 and was suspended until this session, after supplementary investigation required by Commissioner Cristiane Alkmin, who requested the case for review. There was extensive discussion over a question of order which sought to establish eventual configuration of new facts that would consequently lead to the non-subsistence of votes previously issued by commissioners who no longer integrate the Tribunal. However, the question of order was dismissed by the lack of legally new facts able to change the decision-making context.

Regarding the merit, Commissioner Cristiane Alkmin argued that do not fall under the competence of CADE review public policies in the scope of the sanctioning proceeding (the so-called antitrust immunity thesis). In addition, the Commissioner emphasized that Rodrimar only had 10% of market share which would prevent it from affecting competition. Finally, the effects of the alleged anticompetitive conduct have also not been proven. Likewise, Commissioner João Paulo de Resende concluded that the anticompetitive effects have not been proven and voted to terminate to the case against the defendant.

In another proceeding, TECON Rio Grande S/A was also condemned, by the majority of the Tribunal, for abuse of dominant position which originated from the collection of bona-fide depositary fee, been applied a penalty of BRL 4,788.450.

Commissioner Cristiane Alkmin argued that the economic thesis for this case would be similar to the one used on the case in the Port of Santos. In this case, the amount of bona-fide depositary fee charged by TECON was validated by the regulator. The Commissioner also mentioned the lack of evidence able to demonstrate the anticompetitive effects, despite TECON being in a position to exercise market power, having the monopoly, unlike Rodrimar.

In both cases (Rodrimar and TECON), the antitrust immunity thesis was unsuccessful and the Tribunal determined, in addition to the imposition of fines, the abstention of charges considered abusive, under penalty of a daily fine of BRL 20 thousand in case of continued of collection.

### **CADE's Tribunal analyzed 39 motions filed against conviction for cartel in the national salt market**

On May 23, 2018, in CADE's Judgement Session, the Tribunal unanimously condemned 18 companies, 39 individuals and 3 entities of the sector for the practice of cartel in the national salt market, with the amount of fines reaching BRL 289.5 million.

Reporting Commissioner Paulo Burnier argued that the existence of monitoring mechanisms, the possibility of reports to the trade union on prices below the agreed and the application of sanctions as a fine

and disruption of supplies to companies that did not comply with the determinations enables to classify the cartel as hardcore.

At the present judgement session, CADE's Tribunal unanimously accepted the motions.

Regarding the merit, Commissioner Paulo Burnier partially accepted some arguments. There were corrections of the fines imposed on individuals who did not held the position of administrator during the anticompetitive conduct period, but who had been considered as such.

Finally, the Reporting Commissioner advised that, although several motions addressed the dosimetry used in the calculation of the fines, such debate cannot be discussed in the scope of the motions.

### **CADE rejects motion filed against the conviction of trade unions for price fixing in the cargo and container transportation market in the Port of Santos**

The motion for clarification represent the fourth appeal filed by the Union of Autonomous Road Carriers (SINDICAM) against the decision that corrected the fine imposed from 100 UFIR to 100.000 UFIR.

Petitioners argued that the decision would have substantially changed the context of the case, and that the changing of the value should be considered as a new fact, considering that the penalty is a thousand times more, which would not be consistent with the level of culpability imputed to SINDICAM.

CADE's Tribunal unanimously accepted the motion, but rejected the arguments regarding the merit, considering that there was no contradiction, omission or obscurity in the decision. It was also pointed out that any delaying tactics with new appeals will be subject under the Brazilian procedural code.

### **CADE approves agreements in the scope of gun jumping**

CADE's Tribunal unanimously, approved agreements within the scope of a merger review proceeding. The agreements, through which the companies recognize that they had broken the rules "by jumping the gun" (a practice known as gun jumping), were presented by the following companies: Rede D'Or São Luiz S.A.; GGSH Participações S.A.; Expresso Guanabara S.A.; Empresa de Ônibus Nossa Senhora da Penha S.A.; Supermercado BH Ltda. and Opção Comércio de Alimentos Ltda.

Commissioner Cristiane Alkmin highlighted the need for the criteria for the calculation of penalties under merger review proceeding should be more clear and proposes the drafting of a formula.

In the agreement signed with Rede D'Or and GGSH the proposed pecuniary contribution was in the amount of BRL 700 thousand. In the agreement signed with Expresso Guanabara and Nossa Senhora da Penha, the proposed pecuniary contribution was in the amount of BRL 280 thousand and considered mitigating factors, such as spontaneous notification by the companies, compliance programs, length of time and term of the contract.

In the agreement proposed by Supermercado BH and Opção, the pecuniary contribution was in the amount of approximately BRL 1 million. In this case, the Reporting Commissioner João Paulo de Resende pointed out that the likelihood of the approval of the transaction should substantially impact the calculation of the fine to be applied and proposed a change in CADE's Resolution on the subject (Resolution 13/2015). Therefore, an approval in the fast track procedure would generate a quite distinct fine when compared with a blockage, for example.

### **CADE executes agreement in the scope of the cartel investigation in the automotive filter market**

The TCCs were proposed in the course of the administrative investigation in the automotive filter distribution markets. CADE's Tribunal, by majority of votes, approved the proposals submitted by Nakata Automotiva S.A., in the approximate amount of BRL 578 thousand; Sofape Fabricantes de Filtros Ltda., in the approximate amount of BRL 37 million; and Robert Bosch Ltda., in the approximate amount of BRL 2 million.

On the other hand, Commissioners João Paulo de Resende and Cristiane Alkmin, whose votes were defeated, understood that the proposed pecuniary contributions were less than adequate, especially because there was flexibility in the business of the companies and the same amount was applied to Sofape, which had the position of leader in the investigated cartel.

### **CADE executes agreement in investigation in the market of freight agency services**

CADE's Tribunal, by majority of votes, approved the proposal of the TCC presented by Wagner Roberto Moreira de Brito in the administrative proceeding that investigate an alleged cartel in the market of agency services for air and sea international freight of cargo, which have Brazil as origin or destination. The agreement established the payment of pecuniary contributions of approximately BRL 233 thousand.

Commissioners João Paulo de Resende and Cristiane Alkmin voted against the execution of the TCC. The Commissioners understood that the contribution should be at least BRL 350 thousand, since the arbitrator held a position of director at the time of the investigation.

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### **128th CADE's Judgement Session**

August 22, 2018

CADE decreased the pecuniary penalty in the conviction of a company for cartel in the flexible packaging market

In the 126th Judgement Session, CADE's Tribunal condemned eight companies and eight individuals for the practice of cartel in the flexible packaging market. The Tribunal also condemned the Brazilian Association of Flexible Packages (ABIEF) and the Brazilian Association of the Laminated Packages Producers (ABRAFLEX) for inducing a uniform conduct. After the trial, several motions for clarification were filed against

the vote from Commissioner Paulo Burnier, which were analyzed in this last session.

Paulo Burnier only accepted one motion for clarification, which was filed by Santa Rosa Embalagens Flexíveis, one of the eight condemned companies. The Commissioner agreed with the company about the possible mistake committed with the calculation of the pecuniary penalty. According to the winning vote, Santa Rosa was in the process of judicial restructuring. However, the company was declared bankrupt on May 25, 2018, being this fact informed to CADE on June 14, 2018.

On the other hand, the Commissioner denied the Santa Rosa's claims about the omission in the vote for having disregarded the evidence produced by the company about their independent performance in relation to the other competitors in the flexible packaging market.

In view of the motion for clarification, Commissioner Paulo Burnier acknowledged the mistake in the calculation and determined the reduction of the penalty applied, from 6% to 3% of the revenue in the year prior to the beginning of the administrative proceeding. However, the Commissioner voted to reject the omission claim for not identifying any obscurity, omission or contradiction in the vote in relation to the analysis of the evidence. At the end, the board followed the Commissioner's vote unanimously.

**CADE condemns companies for cartel  
in the international market for the manufacture  
and sale of color picture tubes for television (CPT)**

CADE's Tribunal unanimously decided to condemn the companies Toshiba Corporation, MT Picture Display and Mr. Seong Dae Lim for cartel in the international market for the manufacture and sale of color picture tubes for television (CPT).

The investigation was initiated in 2010 to ascertain the alleged collusive conduct based on regular contacts between CPT manufacturers. Those contacts sought to coordinate pricing, tubes production, and customer allocation. These contacts sought to coordinate pricing of pipe production, and customer allocation.

The conducts investigated by CADE's General Superintendence (SG) were: (i) meetings and conversations between CPT competitors in Taiwan, South Korea, Malaysia, China, Thailand, Indonesia and other countries to discuss CPT prices, with the conclusion of agreements; (ii) exchange of commercially sensitive information between the competitors to implement, monitor and enforce the agreements; (iii) issuing of price quotations in line with the agreements reached; and (iv) application of measures to prevent such conducts from becoming public.

During the instruction of the proceeding, several Cease and Desist Commitments (TCC) were signed with CADE, which resulted in the request, by the SG, for termination of the investigation in relation multiple individuals and companies, such as Koninklijke Philips N.V., Philips do Brasil Ltda., LP Displays Amazônia Ltda. e LP Displays International

Limited. The SG also suggested the termination of the investigation against ARV Representações Ltda. and Mr. Airton Rodrigues Veras for lack of proof.

Finally, the SG suggested the conviction of Chunghwa Pictures Tubes Ltd., Technicolor S.A. (new name of Thomson S.A.), MT Picture Display Co. Ltd. (new name of Matsushita Toshiba Picture Display), Toshiba Corporation and Mr. Seong Dae Lim.

In this last session, the Reporting Commissioner Paulo Bunier, affirmed that the administrative proceeding contained evidence of worldwide division in the CPT market with express reference to Brazil. Furthermore, the data indicated direct imports (amounting to US\$ 2 billion or 30 million CPT units) and indirect imports of the product, through the purchase of televisions by Brazilian consumers. Regarding this last matter, information collected by the SG indicated that the input represented up to 50% of the value of the final product.

The Reporting Commissioner also pointed out evidence of constant meetings between competitors, held in Brazil, in the participants' offices or in restaurants.

Lastly, the Reporting Commissioner highlighted a set of ten precedents involving international cartels, which affirm that the mere participation of companies in international cartel, even if they do not make direct exports to Brazil, gives structural support so that the product that arrives in Brazil is more expensive. Regardless of these precedents, it has been proven that all the companies investigated in the proceeding actually exported the product to Brazil in the period of the conduct, showing the direct and indirect effects in the country.

In relation to the fines applied, the Reporting Commissioner understood that, regarding Toshiba, the fine should be calculated based on the last year of participation in the conduct instead of the revenue of the company in the year prior to the initiation of the administrative proceeding, since in 2009 the company no longer produced the product. In order to estimate the amount of the fine, a 15% rate was applied on sales volume in the last year of participation in the conduct. Thus, the fine was applied in the total amount of BRL 3.1 million. The fine imposed to MT Picture Display followed the same logic, with a small increase due to the leading role of the company in the conduct. The final fine imposed on the MT Picture Display was BRL 1.3 million.

Finally, regarding Mr. Seong Dae Lim, a fine of BRL 513.7 thousand was applied.

The Reporting Commissioner's vote was followed by the other members of CADE's Tribunal, except for the calculation of the fines, which there was divergence manifested by two commissioners.

Commissioner Cristiane Alkmin disagreed with the fines applied to Toshiba and to MT Picture Display. According to the Commissioner, in accordance with the thesis of the benefit accrued by the company during the cartel, the fine applicable to Toshiba would amount to BRL 17.3 million and BRL 5.7 million to MT Picture Display. However, such values would be higher than 20% of the percentage of revenue provided by law. Following this parameter (maximum of 20% of revenue in the year prior to the initiation of administrative proceeding), the fines would be at BRL 9.1 million and BRL 5.2 million, respectively.

Commissioner João Paulo Resende agreed with Commissioner Cristiane Alkmin regarding the calculation of the fine. According to Joao Paulo, the amounts suggested by the Reporting Commissioner make the calculation basis for the affected product more flexible and is not based on the previous year of the administrative proceeding. João Paulo highlighted that the calculation of the fine must take into account the surcharge generated by the cartel. The Commissioner considers that the surcharge on international cartels is higher because there is no payment of taxes in Brazil. In addition, it would be more difficult to detect and punish such cartels, which would justify a stronger State intervention. Thus, for the calculation of the fine that, in its view, would be correct, the Commissioner applied the 20% percentage over the sales during the period of the conduct, and reached amounts very close to those suggested by Commissioner Cristiane Alkmin.

Only Commissioner João Paulo de Resende and Cristiane Alkmin had divergent votes and all the other Commissioners followed Paulo Burnier's vote.

CADE terminates investigation of cartel in the international market for the manufacture and sale of color display tube for television (CDT)

This investigation is based on the same Leniency Agreement, which initiated the investigation of cartel in the international market for the manufacture and sale of color picture tubes for television (CPT). In this administrative proceeding, the objective is to investigate the formation of cartel in the international market for the manufacture and sale of color display tube for television (CDT). Both products CPT and CDT would be part of a largest market called cathode ray tube (CRT).

In summary, the alleged conducts investigated by the SG were: (i) meetings and conversations between CDT competitors in Taiwan, South Korea, Malaysia, China, Thailand, Indonesia and other countries to discuss CDT prices, with the conclusion of agreements; (ii) exchange of commercially sensitive information between competitors to implement, monitor and enforce the agreements; (iii) discontinuation of CDT production lines with the aim of reducing production and increasing the price, with many of these interruptions being witnessed by individuals linked to competitors to make sure that production interruptions occurred as agreed; (iv) indication and approval of the presence of subordinate employees in the collusive acts; (v) issuing of price quotations in line with the agreements reached; and (vi) application of measures to prevent such conducts from becoming public.

Due to all of the Cease and Desist Agreement (TCC) signed during the proceeding, the only company remaining as defendant was MT Picture Display. The SG, then, issued a legal opinion recommending the termination of the proceeding against the company due to the lack of proof. CADE's state attorney's office agreed with the opinion from the SG, and also recommended the termination of the proceeding. The Public Prosecutor Office, however, disagreed with the opinions under the argument that there were elements for the conviction, especially since, in its view, the product was part of the CRT market in which the companies investigated operates, to the detriment of the argument that the company did not act in the cartelized segment (CDT).

The Reporting Commissioner Maurício Bandeira Maia understood that the evidences do not prove that MT Picture Display has participated in the cartel in the CDT market.

The Reporting Commissioner highlighted that the generic conviction for a cartel in the CRT market would not make sense the investigation had been split in two different proceedings to segment the markets (CDT and CPT). Finally, the Reporting Commissioner highlighted that, although the European Commission analyzed both cartels in a single proceeding, the markets were also segmented, separating the conducts between the CDT and CPT markets.

Thus, the Reporting Commissioner voted for the termination of the administrative proceeding due to the lack of evidence of economic violation. His vote was followed by the other commissioners

Lastly, Paulo Bunier emphasized that the materiality of the cartel in the CDT market was proven, but that the participation of MT Picture Display was not proven.

### **CADE dismisses consultation requested by the National Federation of Security and Transport Companies (FENAVIST)**

The National Federation of Security and Transport Companies (FENAVIST) presented to CADE a consultation with the objective to confirm the legality of the booklet in which it provides tips and guidelines for participation in public bidding procedures.

The Commissioner Paula Azevedo considered that the entity did not present all the material necessary for the analysis by CADE. In view of the lack of studies necessary to analyze the matter, the Commissioner voted to reject the consultation, pointing out that FENAVIST may present a new consultation, provided it is duly instructed.

The other Commissioners unanimously followed Paula Azevedo's vote.

### **CADE approved settlements in cartels investigations**

Cease and Desist Agreements (TCC) were required in two different investigations.

The first investigation referred to an alleged cartel in resins for coating and resins for compounds' market, while the second investigation is related to an alleged cartel in the distribution of liquefied petroleum gas (LGP) in the Federal District.

Regarding the first agreement, the company committed to collect the amount of BRL 25,412,871.98. In this case, only Commissioner Cristiane Alkmin voted against the approval of the TCC, for disagreeing with the proposed value, which, in her opinion, should be about 60% higher.

In the second investigation, the TCC agreements were signed by one distributor of liquefied petroleum gas and by two individuals. The fine established were BRL 2,200,150.64 for the distributor and BRL 50,000.00 for each individual.

In this case, Commissioner João Paulo de Resende highlighted that, since this is a conduct that would have lasted only 8 months, the value calculated converges with the values reached according to the methodology used, despite of the flexibility of the relevant market definition regarding the geographic dimension.

Commissioner Cristiane Alkmin, on the other hand, voted against the approval of the agreements, claiming that the value reached by her was

much higher than the one proposed, since it would take into account the dissuasive factor and the monetary restatement through the SELIC rate.

## **JUDGMENTS IN SEPTEMBER, 2018**

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### **129th CADE's Judgement Session**

September 5, 2018

### **CADE dismisses investigation of cartel in the national market of sodium carbonate**

In this last Judgement Session, CADE's Tribunal unanimously decided to dismiss the investigation related to an alleged cartel in the national market of sodium carbonate.

The investigation was initiated in 2010 to examine an alleged agreement among the companies Tronox Alkali Wyoming, Tata Chemical (Soda Ash) Partners, Ciner Resources Corporation and Solvay Chemicals USA. The conducts would have been practiced by the combined exports of such companies, through the association American Natural Soda Ash Corp. (ANSAC), established in accordance with the US law. The alleged conducts would have had direct effects in Brazil.

According to the Reporting Commissioner Paulo Burnier, ANSAC was established in early '80s, formed by four American companies that produce sodium carbonate, aiming to reduce transportation costs and providing a unique logistic structure to the flow of their production to American ports.

Furthermore, Commissioner Paulo Burnier considered that there are at least 51 (fifty-one) countries that allow the creation of exports associations, some of them with explicit or implicit exemptions. In the USA, where ANSAC was established, there is an explicit exemption, including the registration of this type of association before the Federal Trade Commission – FTC.

However, the Reporting Commissioner highlighted that there is no antitrust exemption in Brazil for this type of arrangement, and it is not possible to exclude the application of the Brazilian law in case the conduct has effects in the Country, noting this analysis should be conducted by CADE. The analysis has to consider the different effects generated, depending on the configuration of the association and the affected markets.

Following the recommendations of CADE's General Superintendence (SG), CADE's General Attorney Office and the Public Prosecution Office, the Reporting Commissioner voted to dismiss the investigation, since there was no evidence of any anticompetitive effects within the Brazilian market.

Finally, the Reporting Commissioner highlighted that the conclusion could be different if the association was created aiming to set prices or split the international market.

The Reporting Commissioner's vote was followed by the other CADE's Commissioners.

**CADE partially accepts motion for clarification  
presented by Tecon Rio Grande against the condemnation  
decision related to the collection of bona-fide depositary fee**

On August 8, 2018, as part of the 127th Ordinary Judgement Session, Tecon Rio Grande S.A. was condemned due to the collection of bona-fide depositary fee, and CADE imposed a pecuniary penalty in the amount of BRL 4,788,450.00 (four million, seven hundred eighty-eight thousand and four hundred fifty Brazilian reais), besides other penalties.

On August 28, 2018, Tecon Rio Grande presented a motion for clarification against the decision, alleging omission, obscurity and contradiction, based on: (i) the delay for the availability of the votes of some Commissioners, which affected the right of appeal; (ii) the erroneous understanding about the content of the decision of the Brazilian National Waterway Transportation Agency (ANTAQ, in its acronym in Portuguese), which was noted as a supervening fact able to significantly modify CADE's decision context; and (iii) on the absence of CADE's manifestation about the requests of specific diligences argued by the Defendant, among other reasons.

The Reporting Commissioner, Paulo Burnier, did not identify major obscurity, omission or contradiction in the decision, except for the object of the decision, which should be amended, and so granted the motion partially. Accordingly, the Reporting Commissioner concluded that the extract of the decision – “refrain of charging the liberation of containers from the independent custom enclosures” should be amended to “refrain of practicing the conduct condemned in the administrative proceeding, which is the collection of bona-fide depositary fee” (free translation).

The Reporting Commissioner's vote was followed by all the other Commissioners.

**CADE rejects motion for clarification presented  
against the condemnation decision related to a cartel formation  
in the market of gas-insulated switchgear (GIS)**

On May 23, 2018, during the 124th CADE's Judgement Session, CADE's Tribunal has condemned Mitsubishi for its participation in the international cartel of electronic instruments of direction of electric energy flow with gas isolation (gas-insulated switchgear – GIS).

On August 24, 2018, Mitsubishi opposed a motion for clarification. According to the motion, the vote did not perform an individualized analysis of the conducts and applied a fine for Mitsubishi higher than the fine applied to Toshiba, although both of them have had similar engagement in the alleged cartel.

The Reporting Commissioner Polyanna Vilanova clarified that the fine considered the virtual turnover of Mitsubishi, which is related to its worldwide market share projected over the Brazilian market estimate, updated by the Brazilian Special Clearance and Escrow System (SELIC, in its acronym in Portuguese). This calculation took into account standards already used by CADE to calculate the estimated fines within the negotiation of the three Cease-and-Desist Agreements (TCCs, in its acronym in Portuguese) executed in the case. The Reporting Commissioner also considered that the proportionality criterion is not related to the amount achieved but rather to the methodology used.

Therefore, the Reporting Commissioner Polyanna Vilanova decided to reject the motion presented by Mitsubishi and noted potential penalties in case of appeal reinforcement, since the legal requirements were not fulfilled by the motion, which are the demonstration of obscurity, contradiction or omission in the decision.

This understanding was followed by the other CADE's Commissioners.

**CADE rejects appeal and confirms decision  
for the submission of the transaction between SM  
Empreendimentos Farmacêuticos and All Chemistry Brasil**

The appeal was presented within the context of the proceeding to investigate a potential reportable transaction (APAC) and was presented by SM Empreendimentos Farmacêuticos Ltda. (SM), following the July 31st SG's decision which determined the submission of the transaction related to the acquisition by SM of an equity in All Chemistry do Brasil Ltda. (All Chemistry).

According to the appeal, the transaction would not result in antitrust concerns that could justify the ex post submission. Likewise, the companies do not fulfill the legal thresholds that would lead to a mandatory submission.

The Reporting Commissioner Polyanna Vilanova stated in its analysis that the legal requirements of the appeal were attended, so there could be a formal position of CADE's Tribunal. With respect to the merits, it was indeed recognized that the groups involved were below the turnover thresholds and that the submission of the transaction was not

mandatory. However, the Reporting Commissioner noted that the SG concluded by the ex-post submission based on certain specificities of both the transaction and the market. The Reporting Commissioner noted the specific provision of the Brazilian Antitrust Law that allows CADE to review within 1 (one) year of its consummation transactions related to groups which were below the turnover thresholds.

Regarding the affected market of distribution of pharmaceutical raw materials, the Reporting Commissioner noted that the share of SM before the transaction was already above the combined shares of the other nine competitors acting within this market. Therefore, the acquisition of All Chemistry would only reinforce this leading scenario. In relation to the merits of the investigation, the Reporting Commissioner agreed with the appellant that the assessment should focus only in the acquisition of All Chemistry and that the potential antitrust concerns about the current functioning of the market should be a matter of repressive action.

Following the vote of the Reporting Commissioner, CADE's Tribunal decided through a unanimous decision to reject the appeal of SM, and so maintaining the decision which determined the ex-post submission of the merger filing.

CADE ratifies agreements related to cartel investigations in the markets of exhaustion systems and autoparts components and refrigeration hermetic compressors

The settlement agreements (TCCs) were requested in relation to two different investigations.

The first investigates the exchange of competitive sensitive information in the market of exhaustion systems and autoparts components. The company Faurecia, first to submit a settlement proposal to CADE, agreed to pay a total amount of BRL 15,6 million as part of the pecuniary contribution. The individual Manoel da Silva, the second to submit a proposal, committed to pay the amount of BRL 50 thousand.

In the second investigation, which investigates an alleged international cartel in the market of refrigeration hermetic compressors, the individual Keishi Masuda was the first to submit a settlement proposal, committing to pay the amount of BRL 33.5 thousand as part of the pecuniary contribution.

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### 130th CADE's Judgement Session

September 19, 2018

#### **Judgment of Google's Scraping Case postponed after request for examination of the case records**

On September 19, 2018, CADE's Tribunal started to analyze the proceeding against Google Brasil Internet Ltda. (Google), based on the complaint filed by E-Commerce Media Group, owner of the websites Buscapé and Bondfaro. The proceeding investigates if Google was involved in anticompetitive conduct through the scraping of content.

According to the complaint, Google replicated reviews from the websites Buscapé and Bondfaro on its own price research platform, the Google Shopping, aiming at extending its dominant position in the market of general search to the market of price comparison service. This could divert traffic from rival price comparison services, harming their advertising revenues. Consequently, the practice could reduce the incentives of competitors to innovate and improve their services, ultimately harming consumers.

In its defense, Google stated that the replication was an isolated incident, caused by a technical failure that was promptly corrected. In addition, the dissemination of reviews only occurred after a research in the Portuguese language made on the website google.com and not in the Brazilian website google.com.br, removing any anticompetitive logic from the conduct. Google also argued that: (i) the Brazilian Judiciary dismissed the hypothesis of copyright violation; (ii) there was no damage to Buscapé's market growth; (iii) websites can opt-out of having their content showed on Google's results; and (iv) the defendant does not have market power.

Reporting Commissioner Polyanna Vilanova claimed that the definition of relevant markets in the digital economy is not a trivial task, since the sector is characterized by high level of dynamism, innovation and differentiation. In any case, the potential distinction between general search services and price comparison services would not substantially affect the analysis of the case, since it should focus on the potential effects of Google's conduct.

Even after finding the existence of market power by Google, the Reporting Commissioner highlighted that only a few reviews were disseminated and they were immediately removed from the internet.

In addition, it only occurred on the website google.com. Therefore, even if scraping of content may be considered an anticompetitive conduct, there would be no sufficient evidence, in this case, to demonstrate its systematic occurrence. To conclude, Reporting Commissioner argued that the Brazilian antitrust legal system does not allow the condemnation of hypothetical, future and theoretical acts, without demonstration of concrete or presumed damages.

After the Reporting Commissioner's vote, Commissioner Paula Farani requested the case records for further examination.

**CADE's Tribunal rejects motion for clarification  
and confirms condemnation for cartel formation  
in the market of parking lots in São Paulo**

Rod Estacionamentos Ltda. and an individual filed a motion for clarification against CADE's decision that, by majority of votes, condemned them for participating in a cartel in the market of parking lots in São Paulo. The decision was delivered during the 127th Judgement Session, held on August 2018.

The parties alleged nullities related to the taking of votes, material mistakes in the record of the judgment and a variety of contradictions, omissions and obscurities.

However, Reporting Commissioner Polyanna Vilanova dismissed the allegations arguing that the casting vote from CADE's President was correctly taken, considering the existence of a tie. In addition, a number of arguments brought by the parties could not even be admitted, in sight of

their clear intent to discuss again the merits. To conclude, the Reporting Commissioner dismissed all the alleged contradictions, omissions and obscurities.

That said, CADE's Tribunal admitted the motion exclusively to correct a material error in the record of the judgment, related to the amount of the penalty proposed by one of the Commissioners. All the other terms of the condemnation were confirmed.

**CADE settles the investigation of alleged cartel in the maritime and air freight market with two defendants**

CADE's Tribunal unanimously approved two Cease and Desist Agreements (TCC in its Portuguese acronym) related to the investigation of alleged international cartel in the maritime and air freight market with effects in the Brazilian market. The administrative proceeding was opened in 2010 and investigates two conducts: (i) discussions related to passing-on of different fees, surcharges and taxes; and (ii) participation in public bids.

The proposals were presented by Uti do Brasil Ltda. and ABX Logistics Saima S.A.

The companies admitted their participation in the cartel and committed to cease the practices. They will also pay approximately BRL 3.6 million and BRL 1.5 million, respectively. The negotiations took into account CADE's Settlement Guidelines and a discount was applied over the expected penalty in case of potential condemnation.

CADE settles the investigation of alleged cartel in the national market of salt with one investigated company and individual

CADE's Tribunal, by majority of votes, approved an agreement proposed by SPO Indústria e Comércio Ltda. and an individual in the investigation of alleged cartel in the national market of salt. Cescon Barrieu Advogados assisted the parties in this settlement.

This investigation is an extension of an administrative proceeding already judged by CADE's Tribunal, in which 18 companies from the sector were condemned for participating in the cartel.

CADE's President affirmed that the proposal attended all legal requirements and highlighted the delivery of documents that will contribute with the ongoing investigations. The pecuniary amount was approximately BRL 1.59 million to SPO and BRL 65 thousand to the individual.

Commissioners João Paulo de Resende and Cristiane Alkmin voted for the rejection of the proposal, considering the low amount of the pecuniary contribution vis-à-vis the duration of the conduct and the benefits hypothetically gained while the conduct lasted.

**CADE settles investigation with the Union of brokerage of real estate sector**

CADE's Tribunal unanimously approved an agreement with Sindicato das Empresas de Compra, Venda, Locação e Administração de Imóveis e dos Condomínios Horizontais, Verticais e de Edifícios Residenciais e Comerciais no Estado de Goiás – SecoviGoiás.

The investigation demonstrated that class associations from the sector imposed rules, price charts and behavioral proceedings that were able to create a concerted practice between competitors.

In addition to ceasing the practice, SecoviGoiás will pay BRL 6,384.60, which corresponds to the minimum penalty established in the Brazilian Antitrust Law for this type of legal entity. CADE's Commissioners claimed that the pecuniary contribution is not legally mandatory in cases involving unilateral conducts and the proponent also demonstrated good faith when it opposed to the imposition of fixed fees by regulatory counsels of the sector, and even proposed lawsuits related to this matter.

**CADE settles investigation with Cielo, Bradesco  
and Banco do Brasil, but indicates stricter analysis  
of conducts in the banking sector**

Cielo, Bradesco and Banco do Brasil proposed settlements in the investigation of discriminatory practices and refusal to contract related to banking and accreditation services in the Brazilian market. CADE has previously settled with Itaú Unibanco S.A. and Redecard S.A. for the same conducts.

According to the investigations, Itaú, Bradesco and Banco do Brasil were refusing to read the receivables data from the rivals of their controlled payment processing companies (Rede, in Itaú's case; and Cielo in the case of the other two banks). In addition, they created difficulties for the access to their own receivables agenda by other banks.

The investigations also examined other anticompetitive practices, such as: (i) use of banking domicile locking to limit competition amongst

financial institutions; (ii) retaliation to clients that tried to use services provided by rivals; (iii) tied sales of products and services of banks and payment processing companies; (iv) charge of discriminatory fees from competitors; and (v) agreements executed by payment processing companies seeking to acquire customers' loyalty by imposing high costs for termination of the contract.

Besides the commitment to cease some of these conducts and to adjust others, the parties will pay pecuniary contributions of approximately BRL 33.8 million in total. This amount represents the biggest contribution involving unilateral conducts in CADE's case law. The Brazilian Antitrust Law establishes mandatory pecuniary contribution only in settlements involving coordinated practices, such as cartels.

Commissioner João Paulo de Resende was the only one to reject the proposal. He argued that the final amount was not deterrent enough and also criticized the constant attempts of financial institutions to limit competition.

Despite ratifying the agreements, the other Commissioners warned that CADE will be stricter in the analysis of unilateral conducts, especially those involving the banking sector.

Commissioners Maurício Bandeira Maia and Paula Farani claimed that they share the concerns of Commissioner João Paulo de Resende, but approved the agreement to keep consistency in relation to other settlements in the same case.

## JUDGMENTS IN OCTOBER, 2018

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### 131st CADE's Judgement Session

October, 3rd 2018

#### **Judgement of appeal against decision that rejected request for injunctive relief in the market of bonded warehouse was postponed**

The company Marimex – Despachos, Transportes e Serviços Ltda. appealed against decision of CADE's General Superintendence (SG) that rejected the request for injunctive relief in administrative proceeding opened against BTP – Brasil Terminal Portuário, an operator in Porto de Santos (Santos' Harbor).

Marimex claims that BTP obligated it to pay an extortionate fee, informally called THC2 which is not provided in the contract, as a condition to the liberation of the containers in the harbor.

Reporting Commissioner Cristiane Alkmin voted for the appeal dismiss. According to her, the periculum in mora was not demonstrated, since Marimex maintained its dominant position in the market not becoming clear which is the danger of irreparable damage. In addition, the Commissioner did not verify the existence of *fumus boni iuris*, since indeed exist normative prevision for charging the tax of segregation and deliver of containers, which was authorized by National Waterway Transportation Agency (ANTAQ).

After Reporting Commissioner's vote, Commissioner Paulo Burnier requested the case records for further examination.

#### **CADE dismisses investigation of sham litigation in the sector of antidepressant medicines**

CADE unanimously dismissed the investigation opened against Lundbeck Brasil Ltda. to examine supposed practice of sham litigation or abuse of petition rights. The case was initiated from a representation by Associação Brasileira das Indústrias de Medicamentos Genéricos (Pró-Genéricos).

According to investigations, Lundbeck filed extrajudicial and judicial motions against the non-authorized use by National Health Surveillance Agency (ANVISA in its Portuguese acronym) of its data package in proceedings for the concession of registration of generic and similar drugs.

In the mentioned motions, Lundbeck alleges that would have unfair competition by laboratories that obtain registration in ANVISA using data package of its property. According to Lundbeck, the producer of generic and similar medicines should produce its own dossier or get the license from the owner of the data package.

Reporting Commissioner, Polyanna Vilanova, highlighted that there is not a unanimous understanding about the protection of data package by industrial property. In this sense, Reporting Commissioner understood that the practice did not configure sham litigation cause: (i) there were no multiplicity of motions that could generate anticompetitive effects; and (ii) there were no omissions or contradictory positions on Lundbeck motions aiming to confuse the judiciary or harm competitors.

However, Reporting Commissioner clarified it does not mean that CADE agrees unrestrained with the data package thesis argued by Lundbeck, since the debate could have important competitive consequences. That said, ANVISA's position benefits the entry of generic and similar medicines in the market, improving consumer welfare. On the other hand, it is not up to CADE to decide about the matter.

Reporting Commissioner was followed unanimously by the other members of the Tribunal and the proceeding was dismissed.

#### **CADE ratifies agreement in gun jumping investigation and advices about changes on penalties calculation**

CADE's Tribunal unanimously ratified agreement related to Administrative Proceeding for Merger Filing Investigation (APAC).

The APAC was initiated after an anonymous report made on CADE's website to verify if Grupo Enzo and Grupo Smaff consummated their transaction before the antitrust clarification.

Grupo Enzo informed that the transaction was not submitted to CADE due to its unawareness about the obligation to present transactions that involve assets acquisitions. After the report, the company submitted the transactions which are under SG analysis.

In relation to the gun jumping practice, the companies proposed an agreement in which they commit to pay BRL 700 thousand.

Reporting Commissioner Paula Azevedo claimed that there are no clear rules to calculate penalties on gun jumping cases. However, she ratified

the agreement considering CADE's jurisprudence and some issues as the excessive delay on transactions' submission, the involved amounts, parties' turnover and the practice's level of harm.

Commissioner João Paulo de Resende followed the Reporting Commissioner and suggested a modification on CADE's Internal Regulation. He considers that the Merger Filing should be analyzed before the judgement of the APAC which could allow the verification of transaction's impact in the market.

Tribunal's President highlighted that there is a guide draft in progress about calculation of penalties on gun jumping cases.

#### **Judgement of investigation in the sector of supplementary health postponed after request for examination of the case records**

CADE's Tribunal also analyzed the Administrative Proceeding, initiated in 2010, to investigate the imposition of table of prices, by doctors, representative entities of doctors' category and hospitals, in their negotiation with health plans operators (HPO).

According to investigations, the parties coordinated strike threats and collective terminations, besides the imposition of coercive and punishment mechanisms to doctors that do not agree with those coordinated practices. The practice occurred in Espírito Santo from January 2003 to December 2005.

During the investigations, União Nacional das Instituições de Autogestão em Saúde – UNIDAS was also investigated for conducting collective negotiations using HPO's name.

Reporting Commissioner Cristiane Alkmin affirmed that the practice of table of prices accomplished with coercive mechanisms should be considered an illicit by object. However, she analyzed the existence of market power of the parties, founding that UNIDAS congregated less than 15% of HPOs in Espírito Santo and did not have dominant position in order to adopt practices capable of harming competition.

That said, Reporting Commissioner voted: (i) for dismissing the proceeding in favor of those who signed the Cease and Desist Agreements (TCC, in its Portuguese acronym) with CADE, depending on the execution of the commitments; (ii) for dismissing investigations in relation to some entities and hospitals due to the absence of evidence; (iii) for dismissing investigations in relation to UNIDAS for absence of dominant position; and (iv) for condemning Conselho Regional de Medicina do Espírito Santo – CRM/ES, Sindicato dos Médicos do Espírito Santo – SIMES, Associação Médica do Estado do Espírito Santo – AMES and Unimed Sul Capixaba.

Commissioner João Paulo de Resende and Paula Azevedo disagreed from Reporting Commissioner, voting for the condemnation of UNIDAS, independently of its market share.

After that, Commissioner Mauricio Maia request the case for further examination of the records.

### **CADE's Tribunal answers consultations of Redecard and determines the opening of Administrative Proceeding against credit card flags**

Redecard S.A. (Rede) questioned CADE if some contractual obligations imposed by Visa do Brasil Empreendimentos Ltda., Mastercard Brasil Soluções de Pagamento Ltda., Elo Serviços S.A. and American Express Brasil Assessoria Empresarial Ltda. (together referred as "Credit Card Flags") would configure violations against the economic order.

According to Rede, the Credit Card Flags required the collection of competitive sensitive information of payment facilitators, alleging the necessity to ensure system's rigidity. Since facilitators could be seen as competitors of accreditors, such as Rede, the company is afraid of violating competitive rules when accessing such sensitive data.

Reporting Commissioner Paula Azevedo accepted the consultations and affirmed that they fulfilled all criteria of CADE's Resolution No. 12 about the subject.

In relation to the answer, she highlighted that CADE is limited to say whether the practice is licit, illicit by object or if it carries potential harm. In this sense, Reporting Commissioner remembered that the exchange of information between competitors should be analyzed carefully, because it could facilitate coordination and configure an important competitive advantage.

According to Reporting Commissioner, the analysis depends on information's nature, market's dynamic and the tools used for sharing it.

In this sense, she claimed that the most worrying information are those related to prices, future quantities, sales volume, pricing policies, costs structure, clients, strategic planning, among others. Besides, specific and individualized information are more worrying.

In the concrete case, she affirmed that requested information are large and diverse, while the gathering and sharing of data will occur through rules established on technical manuals. Another difficulty is that it would be necessary to update the consultation every time the rules are altered.

Thus, Reporting Commissioner's answer was that the obtainment of information and previous and compiled data could generate the application of antitrust norms and, through conduct's analysis, configure antitrust violation. Furthermore, she voted for sending the case to be converted, by SG, in an investigation of eventual antitrust violation committed by the Credit Card Flags.

Commissioners Paulo Burnier and Polyanna Vilanova disagreed with the Reporting Commissioner. They affirmed that CADE's answers to consultations should be binary: "yes" or "no". Considering the scope and reaching of Rede's question, the absence of sufficient elements in the records and the impossibility of processual instruction, they voted for dismissing the consultation.

Commissioners João Paulo de Resende and Cristiane Alkmin, by their turn, followed Reporting Commissioner and claimed that it is important to CADE to fulfill cases of regulatory emptiness. They also agreed that the opening of Administrative Proceeding is important to give the possibility of defense to the Flags and to verify the existence of efficiencies in

the conduct. The others Commissioners also followed the Reporting Commissioner.

### **CADE signs agreement in investigation of cartel in the market of ceramic substrates**

CADE's Tribunal ratified, by majority, the TCC proposed by Corning Inc. e Nobuhiko Niwa in the scope of Administrative Proceeding that investigates international cartel in the market of ceramic substrates used on automotive vehicles.

The agreement establishes the termination of the conduct, penalty for noncompliance, contribution with the investigations and the admission of participation, besides the pecuniary contribution of BRL 2.3 million from the company and BRL 59 thousand from the individual.

It is the first agreement signed in the case and the discount applied over the expected penalty in case of condemnation was 41%.

Commissioners João Paulo de Resende and Cristiane Alkmin were the only to dismiss the agreement, arguing that the amount of contribution was lower than the necessary, considering the duration of the conduct and a probable advantage earned by the company.

### **By majority, CADE's Tribunal signed agreement with B3 in investigation involving the market of stock exchange**

CADE's Tribunal also ratified, by majority, TCC proposed by B3 S.A. – Brasil, Bolsa, Balcão, in the scope of inquiry that investigates an alleged

conduct of refusal to contract in the market of compensation and clearing (of mobile deposits).

B3 is also investigated for discriminatory practices and crossed benefits every time a competitor tried to entry in the market dominated by it, which is the monopolist in the Brazilian market of stock exchange.

CADE's President highlighted that the proposal fulfilled all criteria, including termination and adjustment of some practices, besides the penalty for noncompliance.

TCC also establishes a pecuniary contribution, calculated under the higher aliquot of expected penalty already applied by CADE involving unilateral conducts – which the pecuniary contribution is not obligated for signature of the agreement. According to President, the amount of BRL 9.4 million represents a strong signalization that unilateral conducts will be stricter analyzed by CADE.

Commissioner João Paulo de Resende voted for dismissing the agreement, criticizing the amount of contribution. Specially, he argued that there was an incorrect relaxation of B3's turnover and the aliquot of 2% to calculate the expected penalty was too low in front of the gravity of the conduct.

Commissioner Cristiane Alkmin also voted for dismissing the agreement, arguing that TCC does not resolve the main competitive problem, which is the exchange of entitlement. According to her, TCC should eliminate barriers to potential competitors of B3, allowing in particular the effective entry of ATS group that initiated and arbitral motion against B3. Commissioner also criticized the performance of Brazilian stock exchange

and considered the pecuniary contribution insufficient.

However, the other Commissioners voted for ratifying the agreement. Commissioner Mauricio Maia remembered that, while the administrative inquiry could last 10 years until its conclusion, the TCC is more effective when protecting competition. Besides, Commissioner Paula Azevedo affirmed that the duty to contract with a competitor is not absolute and a variety of problems of the sector should be faced by the regulator and not by CADE.

**CADE partially grants motion for clarification  
of the judgement in case involving an international  
cartel in the market of television tubes**

The companies MT Picture Display Co, Ltda., Koninklijke Phillips N.V., Phillips do Brasil Ltda. and Technicolor S.A. opposed a motion for clarification of the judgement against the decision of the Tribunal, issued on August 22, 2018. In the occasion, CADE condemned companies and individuals for the formation of an international cartel in the market of colored images television tubes.

Reporting Commissioner Paulo Burnier partially granted the motion, only to remedy two omissions: the period of participation in the conduct by Phillips and LG Phillips Displays and the period of the exchange rate used to calculate the penalty applied to Toshiba.

### **CADE's Tribunal calls back two Merger Filings and a Preliminary Investigation**

The Tribunal unanimously ratified requests of Commissioner João Paulo de Resende to exam two Merger Filings previously approved without restrictions by SG. The “call back” institute is applied when Tribunal members want to review decisions of the SG, which could or not be changed.

The called back Merger Filings involve transactions between: (i) Brink's Segurança e Transporte de Valores Ltda. and Rodoban Segurança e Transporte de Valores Ltda.; and (ii) Prosegur Brasil S.A. and Transfederal Transporte de Valores Ltda. Both of them involve the market of value transport.

Commissioner João Paulo de Resende justified the called back due to the use of different relevant market definitions in the analysis of the transactions. According to him, CADE could not adopt different definitions of relevant market to cases approved almost simultaneously and in the same market segment.

In addition, another request for call back of Commissioner Polyanna Vilanova was ratified, this one related to a Preliminary Investigation initiated to investigate evidence of sham litigation and abuse of industrial property rights in the market of dental implants. SG has suggested the dismissal of the proceeding due to insufficient evidence of violation against the economic order. However, the Commissioner considered that the sufficiency of evidence should not be analyzed under a Preliminary Investigation, which only function is to verify if the facts and documents presented are within CADE's jurisdiction.

Since the conducts of sham litigation and abuse rights should generate competitive harm, Commissioner considered that it is CADE's jurisdiction and determined not only the conversion of the investigation into an Administrative Proceeding but also additional instruction of the case.

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### **132nd CADE's Judgement Session**

October 16, 2018

### **CADE grants, partially, injunctive relief in the customs warehouse segment**

In the 131st CADE's judgment session, held on October 03, 2018, CADE's Tribunal analyzed the appeal presented by Marimex – Despachos, Transportes e Serviços Ltda. against decision of the SG that rejected the request for injunctive relief in administrative proceeding opened against BTP – Brasil Terminal Portuário, an operator in Porto de Santos (Santos' Harbor).

Marimex claims that BTP obligated it to pay an extortionate fee, informally called THC2, which is not provided in the contract, as a condition to the liberation of the containers in the harbor. Marimex also claims that BTP was harassing its clients through the sending of e-mails and communications.

Reporting Commissioner Cristiane Alkmin had voted for the appeal dismiss. According to her, the periculum in mora was not demonstrated, since Marimex maintained its dominant position in the market not

becoming clear which is the danger of irreparable damage. In addition, the Commissioner did not verify the existence of *fumus boni iuris*, since indeed exist normative prevision for charging the tax of segregation and deliver of containers, which was authorized by ANTAQ.

However, after the Reporting Commissioner's vote, the analysis of this case was suspended by a request for review from Commissioner Paulo Burnier. In this last judgment session, the Tribunal resumed the analysis and decided, by the majority, to partially grant the injunctive relief requested by Marimex.

Regarding the matter of the appeal, Commissioner Paulo Burnier understood that the charging of the THC2 has a high anticompetitive potential. According to him, with this fee, the port operator uses its monopolist position to impose unjustified costs to its rivals in the customs warehouse market.

Furthermore, the Commissioner highlighted that CADE has already condemned the charging of the THC2 fee in, at least, three other cases and that the prohibition thesis is already consolidated for more than ten years, considering that there isn't a decision in contrary. Being that, the Commissioner understand that the claim of the appellant has clear a lawful plausibility – *fumus boni iuris*.

In result, the Commissioner voted for the partial provision of the injunctive relief, demanding the immediate discontinuance, by BTP, of any acts aiming the charge of fee for the performing of alleged services of delivery of cargo in customs warehouses. The injunctive relief also provides a daily penalty of BRL 20 thousand in case of noncompliance.

However, Commissioner Paulo Burnier voted for the rejection of the request for the discontinuance of the sending of e-mails by BTP. According to the Commissioner, the verification of the effective occurrence of such practice should not be performed in the scope of the injunctive relief, since it would require a separate instruction, respecting the right of defense. The Reporting Commissioner's vote was defeated by the majority of the other commissioners.

### **CADE partially grants motion for clarification and maintains the call back of a Preparative Proceeding in the dental implants segment**

131st CADE's judgment session, the Tribunal confirmed the order from Commissioner Polyanna Vilanova for the call back of a Preparative Proceeding initiated to investigate evidences of sham litigation and abuse of industrial property rights in the market of dental implants.

The SG had suggested the dismissal of the proceeding due to insufficient evidences of violation against the economic order. However, the Commissioner considered that the sufficiency of evidences should not be analyzed under a Preparative Proceeding, which only function is to verify if the facts and documents presented were CADE's jurisdiction. Since the conducts of sham litigation and abuse rights should generate competitive harm, Commissioner considered that it is CADE's jurisdiction and determined not only the conversion of the investigation into an Administrative Proceeding but also additional instruction of the case.

The companies JJGC Indústria e Comércio de Materiais Dentários S.A. and Straumann B.V. filed a motion for clarification, alleging that the

decision that determined the initiation of the Administrative Proceeding was grounded in a legal instrument not applicable to this case that refers to an act of exclusive jurisdiction of the SG.

When analyzing the motion, the Reporting Commissioner Paula Azevedo (designated due to the justified absence of Commissioner Polyana) concluded that the decision should be rectified only for that the case returned to the SG for the initiation of an Administrative Inquiry, in the terms of CADE's Bylaws (which refers to the call back of terminated preparative proceedings), instead of determining the initiation of an Administrative Proceeding.

The Reporting Commissioner's vote was unanimously followed.

**CADE unanimously condemns Unilever and absolves  
Nestlé in an administrative proceeding  
involving the impulse ice cream market**

The case involved an Administrative Proceeding initiated against Unilever and Nestlé for the investigation of alleged violation against the economic order in the impulse ice cream market, also known as for immediate consumption.

The proceeding was initiated after a complaint presented by Della Vita alleging that it was facing artificial obstacles for acting in the market due to the existence of exclusivity agreements, of several types, agreed between Kibon (Unilever) and Nestlé, on one side, and retails located in the cities of São Paulo and Rio de Janeiro on the other side.

The SG recommended the termination of the proceeding against the companies, concluding that the companies presented relevant arguments with economic rational to justify the exclusivity agreements involving freezers and sales. Also, it concluded that the other types of contracts, involving merchandising (privileged exposition) and minimum volume of sales, in the practiced limits, would not have the potential to close a relevant part of the points of sale (POS).

Due to the low market shares of Nestlé, the Reporting Commissioner João Paulo de Resende also voted for the termination of the proceeding in relation to the company. However, regarding Kibon, the Reporting Commissioner concluded for the existence of dominant position that justified the continuation of the analysis, focused in the contractual or verbal relations with the POS.

In this sense, the Reporting Commissioner highlighted that there were indications of exclusivity of sales even when such exclusivity was not formally provided in the contractual clauses, considering that, from the 57 of the POS consulted by the SG, 18 affirmed being subject to an exclusivity, and that only 6 presented a contract.

The instruction also indicated that a third of Kibon's POS understand that they can only sell products from Kibon. In addition, it was also noticed that Kibon chooses the POS with higher and better access to the consumer for the supply of subsidies.

In view of such consideration, the Reporting Commissioner voted for the conviction of Unilever, and for the application of a penalty of 5.4 million UFIR (Fiscal Unity of Reference), calculated based on the estimate of

expected gains of the company with the practice of the exclusivity. The Reporting Commissioner highlighted that the degree of the damage of the conduct was low, considering that it had limited effects and that it is a superfluous good.

Commissioner Paula Farani diverged from the Reporting Commissioner regarding the calculation of the penalty, and voted for the application of a 1% aliquot over the gross revenue of the company with the activity involved, in the year prior to the initiation of the proceeding. In this sense, the penalty reached BRL 29.3 million. The Commissioner also determined the auditing of all the existing contracts between Unilever and the POS that should be notified of the terms of the decision. The Commissioner's vote was followed by the other commissioners, except for Commissioner Cristiane, who followed integrally the vote of the Reporting Commissioner.

In this sense, the Tribunal unanimously determined the termination of the administrative proceeding in relation to Nestlé and the conviction of Unilever. The Tribunal, by the majority of the votes, adopted the penalty and determinations suggested by Commissioner Paula.

**CADE's Tribunal answers a consultation from  
Continental and understands that the company's  
"Announced Price Policy" is legal**

Continental do Brasil questioned CADE regarding the legality of the so called "Announced Price Policy" that it intends to implement to its resellers of tires for light commercial and passenger vehicles.

According to Continental, the referred policy aims to prevent the retail sellers of the brand of announcing prices lower than those established

by the manufacturer, under the penalty of suspension of sales to the reseller. As informed by the company, the objective of the policy would be the preservation of its brand and of its business model, and also the appreciation of the resellers, that perform constant investments for the improvement of its stores. Finally, the policy would generate efficiencies by inhibiting the acting of not specialized free riders.

It is worth highlighting that the policy includes only announced prices, and not those effectively practiced, in the sense that the reseller will remain free to negotiate the final price with the clients, being it in the physical store, by telephone, e-mail or online chat.

The Reporting Commissioner Paulo Burnier initially highlighted that this type of policy is a hot topic that has been analyzed in other countries, especially in the United States.

Considering the similitude between Continental's policy and the conduct of resale price fixation, the Commissioner followed a similar analysis procedure. In this sense, he highlighted that vertical restrains related to prices produce ambiguous effects over the well-being of the consumer and, therefore, the analysis should be performed in three steps: (i) verifying the existence of market power; (ii) examination of potential negative effects; and (iii) evaluation of efficiencies.

Following these steps, the Reporting Commissioner identified that the Continental's market shares are below 20%. Being that he understood that Continental does not hold market power and that it would not be necessary to continue with the analysis.

Therefore, Reporting Commissioner voted for the legality of the conduct. However, he noted that the answer from CADE is necessarily conditioned to three conditions presented by Continental that, if altered, may implicate in the review of the decision: (i) inexistence of market power, being it unilateral or coordinated; (ii) unilateral and non-coordinated application of the price policy; and (iii) absence of discrimination between the resellers that will be affected by the policy.

Commissioner Cristiane disagreed with the vote of the Reporting Commissioner and affirmed that any fixation of minimal obligatory prices must be condemned per se. Furthermore, according to her, “announced prices” and “practiced prices” cannot be easily separated by CADE, especially]

if they are offered online. Lastly, the Commissioner compared the practice to the issuance of a minimum obligatory price table, a type of conduct that has already been condemned multiple times by CADE.

The other Commissioner, however, followed the vote from the Reporting Commissioner. In this sense, the Commissioner Mauricio Bandeira Maia highlighted that it was clear that the retail sellers will be free regarding the prices offered in the moment of the sale. Commissioner João Paulo added that it would be necessary to have market power for the conduct to generate competitive issues, since in the current situation, consumers have many other options in case they consider that the announced prices are much higher.

## JUDGMENTS IN NOVEMBER, 2018

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### 133rd CADE's Judgement Session

november 7, 2018

#### **CADE unconditionally approves amendment to the ran sharing agreement between Tim and Oi**

In 2013, CADE approved the original contract, which set forth the construction and reciprocal and onerous assignment of network infrastructure between the parties, for the deployment and provision of telephone and broadband services (Radio Access Network sharing or Ran Sharing), under 4G technology.

The current case represents an extension of the mentioned agreement, which will incorporate radiofrequency sharing.

The SG decided that the transaction did not fill the requirements for the notification of associative agreements. However, one of CADE's Tribunal Commissioners decided to call back the case, which was, then, assigned to Commissioner João Paulo de Resende.

Initially, the Reporting Commissioner disagreed with the SG, claiming that the agreements between competitors that set forth the sharing of assets and the joint decision-making over factors that influence supply in the markets where they compete must be submitted to CADE.

Commissioner João Paulo affirmed that this position does not affect agreements already defined by CADE as of non-mandatory notification,

such as code share agreements in the aviation market or slot charter agreements in the sector of maritime transportation. In those agreements, each company individually decides matters regarding their own supply.

Concerning the merits of the case, the Commissioner highlighted that this kind of agreement may rise antitrust concerns, such as: (i) facilitation of coordinated conducts, reducing competition for quality; (ii) decreasing incentives to compete if the remuneration from the use of network compensates the loss of a client; (iii) elevation of barriers to entry since new players will have to make integral investments of infrastructure, while the Applicants won't; and (iv) irreversibility of the transaction, transforming it into a de facto merger, since the operators would take a long time to be able to individually supply consumers again.

However, Commissioner João Paulo also recognized that ran sharing agreements bring efficiency gains, such as agility in the expansion of 4G networks, reduction of costs for the deployment and maintenance of infrastructure, lower risks associated to this kind of business, less impact on urban spaces and better utilization of a scarce asset, which is the radiofrequency spectrum. In this regard, there is evidence that sharing reduced costs for final consumers.

The Reporting Commissioner concluded that there is a trade-off between efficiency gains and antitrust concerns. However, the sectorial regulator (the Brazilian Telecommunications Agency – “Anatel”) is more capable of finding the balance point, since the matter involves expertise and constant revisions.

Commissioner João Paulo voted for the approval without restrictions, but asked Anatel to analyze: (i) the limits of ran sharing; (ii) the possibility

of entry; (iii) the form of adhesion, by third-parties, to the agreements; and (iv) the form of remuneration between the parties.

CADE's Tribunal followed the decision unanimously.

### **CADE rejects motions for clarification against decision that granted injunctive relief in the customs warehouse segment**

Brasil Terminal Portuário – BTP filed the appeal against a decision rendered by the Tribunal on October 16, which granted an injunctive relief requested by Marimex against the appellant. CADE determined the cease of any acts related to the charge of a fee, informally called “THC2”, and of any other values for alleged additional expenses for the delivery of containers to independent customs warehouses, located under the influence of Porto de Santos zone.

Reporting Commissioner, Paulo Burnier, rejected the motion. According to him, there is no irregularity in the decision generating effects to third parties, since the decision correctly based such amplitude and because CADE protects diffuse rights. In addition, for the Commissioner, the allegation that the decision creates economic unbalance between the appellant and other players is a tentative to discuss the merits again. Finally, Reporting Commissioner argued that it is not up to CADE to draft an exhaustive list of prohibited fees, since new kinds of charges could be created.

Commissioner Cristiane Alkmin, however, partially disagreed with the Reporting Commissioner. She argued that the order imposed by the judgement was obscure, since: (i) the term “THC2” is not legally defined, being, in her opinion, inappropriate and biased; (ii) the order for cessation

must be precise, and therefore CADE should have listed the customs warehouses that are affected by the decision; and (iii) it is not correct to discuss “alleged services”, since they exist or they do not. Additionally, according to Commissioner Cristiane Alkmin, expressions such as “other values” are not accurate and may involve a broad range of services and prices. Therefore, the decision could potentially harm players’ finances and reputation.

The other Commissioners, however, followed the Reporting Commissioner for the complete rejection of the motion. In this regard, Commissioner João Paulo de Resende highlighted that the order should be read together with the vote in its entirety, which by its turn was sufficiently clear.

After vote for condemnation, judgement of alleged collusive practices between medical cooperatives and associations is suspended

The administrative proceeding was opened by the SG against Sociedade Brasileira de Cirurgia Torácica (SBCT), Sociedade Brasileira de Cirurgia Cardiovascular (SBCCV), Cooperativa dos Cirurgiões Cardiovasculares do Estado do Paraná (Coopcardio/PR) and Cooperativa dos Cirurgiões Cardiovasculares do Estado do Rio de Janeiro (Cardiocoop/RJ).

According to SG, there is evidence that the associations were influencing uniform conduct between doctors in relation to prices. On the other hand, the cooperatives allegedly promoted mass de-accreditations to health plans operators and established minimum remunerations for their cooperators.

Reporting Commissioner, Cristiane Alkmin, defined the market as thoracic and cardiovascular surgery. For the associations, the market had national dimension, while each cooperative acted in its respective state.

In the sequence, the Commissioner argued that market power should be analyzed in all cases, regardless the type of conduct. In this direction, she claimed that associations grant certifications that are much valued by doctors, while also encompassing a significant share of professionals. Cooperatives were also regarded as having market power, in sight of the large quantity of doctors they represent.

Concerning evidence against the associations, Commissioner Cristiane highlighted minutes of meetings, which indicated that minimum prices were coercive and could submit the professionals to ethical proceedings, news about general stoppages and finally statutes that contain affirmations about minimum prices.

However, regarding cooperatives, Reporting Commissioner argued that they were only trying to assist doctors to do their negotiations individually, since those negotiations were taking place only between health plans operators and hospitals. Furthermore, an in-depth analysis of the de-accreditations suggests that they were non-significant. Another mitigating factor is that there was no exclusivity between doctors and cooperatives.

In conclusion, Commissioner Cristiane voted for the condemnation of the associations. To calculate the fines, she considered the average remuneration of the associates during the period of the conduct, also applying overprice and deterrence factors. Since fines would exceed legal limits, the Commissioner set them in BRL 6 million for SBCCV, which had a bigger role in the conduct, and BRL 903,000 for SBCT.

Commissioner Cristiane also determined the delivery of an official letter to the Federal Public Prosecutor of São Paulo and the wide diffusion of the decision to the associates.

After the vote, Commissioner Polyanna Vilanova requested the case records for further examination.

Request for examination postpones decision about alleged cartel in public bids of a Brazilian Traffic Agency

Traffic Department of Rio de Janeiro (DETRAN/RJ) promoted the investigated bids, between 2003 and 2010, to contract outsourced services. Amongst the companies that allegedly participated in the conduct, there are providers of security, cleansing, reception and other services.

According to investigations, such companies practiced acts in order to benefit the Facility Group in those bids. Coordination happened in the phase of presentation of proposals, guaranteeing the companies' classification to the next phase and the formation of the desired price of reference, and in the bid phase, through the abstention or removal of bids already performed.

Reporting Commissioner Polyanna Vilanova affirmed that the criminal limitation period of 12 years for cartel cases should be considered, regardless of an ongoing criminal proceeding or eventual decision dismissing the crime, considering the principle of independence between the judicial and administrative spheres.

Concerning the case, the Reporting Commissioner affirmed that, even if familiar relations among partners may be the subject of analysis by CADE, they are not sufficient to characterize an anticompetitive conduct. For this purpose, there must be additional evidence of illegal activities.

In this regard, the Commissioner identified bids with very similar proposals. In some cases, there were even the same orthographic

mistakes. However, Commissioner Polyanna concluded that price similarities could be a result of the characteristics of the market, such as the adoption of references prices for quotations and contracts.

That said, even considering that indirect evidence is important in cartel investigations, the Reporting Commissioner concluded they were not sufficient, in this case, to demonstrate the existence of an anticompetitive agreement. In addition, according to Commissioner Polyanna, there is no economic rationale in forming a cartel for participating in the investigated bids, since they did not depend on invitation letters and there were 20 other companies participating in the bids, which are not being investigated.

After the vote, Commissioner Cristiane Alkmin requested the case records for further examination.

### **CADE postpones judgement of motion for clarification related to a cartel in the market of flexible packages**

The motion was presented by Bemis do Brasil Indústria e Comércio de Embalagens Ltda. (Bemis) against a decision that condemned companies for forming a cartel in the market of flexible packages. The main point questioned by Bemis was the application of joint and several liability with Alcoa Alumínio S.A., due to corporate succession.

The Reporting Commissioner, Paulo Burnier, highlighted that CADE already discussed the subject before, concluding that corporate succession entails joint and several liability between the involved companies.

Therefore, Reporting Commissioner understood that there is no more space for discussion of the matter, since it was debated for around 10 years in the investigation. He also did not find any omission, obscurity or contradiction to be fixed, voting for the rejection of the motion.

After the vote, Commissioner Polyanna Vilanova requested the case records for further examination.

### **CADE signs agreement in investigation of exchange of sensitive information in the autoparts aftermarket**

CADE's Tribunal ratified, by majority, two proposals of Cease and Desist Agreements (TCC) in an administrative proceeding that investigates the exchange of commercial sensitive information between competitors in the independent market of automotive spare parts. The proposals were presented by Sogefi Filtration do Brasil Ltda. (Sogefi), TMD Friction do Brasil Ltda. (TMD) and individuals related to the companies.

In addition to recognizing participation in the conduct and collaborating with the investigations, companies will pay pecuniary contributions of approximately BRL 2.2 million and BRL 2.8 million, respectively.

Commissioner João Paulo de Resende highlighted that there is a variety of ongoing investigations related to alleged anticompetitive practices in the market of automotive spare parts. In this regard, he pointed that Sogefi is also investigated in another administrative proceeding, but regarding different conducts. The TCC contribution does not affect an eventual fine imposed in the investigation against the company.

Cristiane Alkmin was the only commissioner that voted for rejecting the agreements, considering the amount of contribution inappropriate. Additionally, she disagreed with SG's definition of the conduct. According to her, since the alleged exchange of information involved highly sensitive matters, such as quantities and revenues, the real damage was underestimated. In her opinion, it would be more appropriate to consider the conduct as a facilitator of a softcore cartel.

The majority of the Tribunal ratified the agreements.

### **CADE signs agreement in investigation of cartel in the market of capacitors**

CADE's Tribunal ratified, by majority, TCC presented by Nichicon Corporation related to an administrative proceeding that investigates cartel in the market of capacitors.

The agreement involves recognition of participation in the conduct, collaboration with the investigations, fines for non-compliance and a pecuniary contribution of approximately BRL 784,000.

Commissioners Cristiane Alkmin and João Paulo de Resende voted against the agreement, considering the contribution low in comparison with the alleged gains with the conduct.

The majority of the Tribunal ratified the agreement.

### **CADE signs, by majority, agreement in investigation of cartel in the sector of electric energy**

CADE's Tribunal ratified, by majority, TCC presented by Schneider Eletric Brasil Ltda. (Schneider) and by WEG S.A. (WEG) in an administrative proceeding that investigates cartel in the Brazilian market of products destined to the transmission and distribution of electric energy.

Among other obligations, Schneider and WEG agreed to pay approximately BRL 12 million and 46 million, respectively.

Commissioner João Paulo de Resende voted for the rejection of Schneider's TCC, considering the pecuniary contribution too low. Commissioner Cristiane Alkmin voted for the rejection of both agreements due to the contribution values.

All other commissioners ratified the proposals.

### **CADE signs agreement in investigation of cartel in the market of automotive fuels**

CADE's Tribunal unanimously ratified a TCC proposal by Alesat Combustíveis S.A. regarding an administrative proceeding that investigates cartel, influence of uniform commercial conduct and resale price maintenance in the markets of distribution and resale of automotive fuels, in Belo Horizonte, state of Minas Gerais and neighbor cities.

The proponent committed to pay BRL 48 million as pecuniary contribution.

### **134th CADE's Judgement Session**

November 21, 2018

### **CADE approves acquisition of Rodoban by Brinks with no restrictions, by majority**

On this judgment session CADE's Tribunal analyzed the acquisition, by Brink's Segurança e Transporte de Valores Ltda. (Brink's) of 100% of the shares of the companies Rodoban Segurança e Transporte de Valores Ltda., Rodoban Serviços e Sistemas de Segurança Ltda. and Rodoban Transportes Terrestres e Aéreos Ltda. (jointly, Rodoban).

The SG had recommended the approval of the transaction with no restrictions. However, upon request of the commissioner João Paulo de Resende the case was requested for further analysis of CADE's Tribunal. On the official order requesting the case the Commissioner clarified that this action was taken because of the different market definitions used by the SG for two different transactions that were practically simultaneous and in the same sector, what could lead to legal uncertainty (the other transactions involved Proseguir and Transfederal). Besides that, the Commissioner highlighted the high concentration resulting from the transaction, which should be analyzed in more detail.

Throughout the trial, the Reporting Commissioner Paulo Burnier pointed out that the transaction involved the markets of: (i) electronic monitoring services, and monitoring and closed television circuit in Brazil; (ii) patrimonial surveillance services, in the states of Goiás, Rio de Janeiro, São Paulo and Minas Gerais; and (iii) transportation and custody services in the same state.

According to Paulo Burnier, it was not necessary to deepen the analysis for most of these markets, in view of the low concentrations. Nevertheless, the transportation and custody service in the market of Minas Gerais' state deserved more attention, because this market is already concentrated and where the combined shares of Brink's and Rodoban exceed 20%. In this scenario, the transaction would represent the acquisition of the leading company in the sector by the fifth company in the sector.

Commissioner also identified that the entrance of new players in this market would be unlikely, considering the low growth prospects of the sector and the high idle capacity of already existing. However, despite the high rivalry at this market, the commissioner highlighted the entrance of Tbforte Segurança e Transporte de Valores Ltda., a company that owns as shareholders the largest Brazilian banks, which are precisely the main customers of the parties to the operation under analysis in Minas Gerais.

About the market rivalry, Paulo Burnier pointed out that the situation is more worrisome in the state of Minas Gerais, where there are few companies able to compete with the company resulting from the transaction. However, these concerns are mitigated by the fact that Brink's only has bases in the city of Belo Horizonte. Thus, the transaction does not affect directly the low rivalry in the countryside of the state of Minas Gerais, once that in the capital, Belo Horizonte, where there is actually a base overlap, the number of rivals is higher.

Regarding the hypothesis of increasing risk of coordination among competitors in this market, due to the reduction of players caused by the transaction, the Commissioner concluded that the complementary

services profiles of the parties' keeps away or at least mitigates the chances of coordination. In addition, there is no evidence of coordinated conduct and there are no cases of conviction involving the industry throughout CADE's case law.

Before concluding his vote, the Commissioner criticized Law Project no. 4238/2012, which seeks to prohibit financial institutions from holding any equity of securities carriers – which is the case of Tbforte – because he believes that there are no technical studies justifying such competition restriction. Finally, he voted for the approval without any restrictions.

Commissioner João Paulo de Resende disagreed with the Reporting Commissioner. According to Commissioner João Paulo, there are several elements facilitating the coordination between the competitors in this market, such as homogeneous products or services and low relevance of innovation, in addition to high concentration – with the transaction, only four companies will now own 98% of market in Minas Gerais. In addition, the Commissioner rebutted SG's arguments to rule out the risks of the transaction, understanding that: (i) the customers bargaining power, which are financial institutions, is not that relevant; (ii) Tbforte entrance may not be a good solution, once it is an integrated company with financial institutions; and (iii) it does not make sense to consider a statewide geographic dimension and then remove concerns based on complementarity activities in the countryside of the state. In the Commissioner's view, Brink's potential competition from Rodoban in the countryside would be eliminated.

Lastly, considering similar cases that were disapproved by the tribunal, the Commissioner argued that the transaction could only be approved if

Brink's sells its assets located in Minas Gerais, including contracts in force and armored cars. Commissioner Cristiane Alkmin agreed with his vote.

The other commissioners fully followed the Reporting Commissioner. The transaction was, then, cleared without any conditions.

### **International cartel in ODD has again the trial suspended after the second condemning vote**

CADE's Tribunal resumed this session the administrative proceedings initiated in 2011 by Secretariat of Economic Law to investigate the alleged international cartel in optical disk drivers (ODD), with effects in Brazil.

Reviewer commissioner João Paulo de Resende, at the 118th Judgment Session held in February 2018, voted: (i) condemning of Hitachi LG Data Storage (HLDS), Toshiba Samsung Storage Technology Corporation (TSST) e Quanta Storage Inc (QSI); (ii) filed the proceedings, for lack of evidence, of Teac Corporation (Teac); (iii) initiate a proceeding made out to Philips & Lite-on Digital Solutions Corp., Rooyal Philips Electronics V.V, Lite-On IT Corporation (PLDS) and others individuals, due to the enter into leniency agreements; (iv) suspension of the administrative proceeding with respect to Sony Optiarc Inc, due to the signing of Cease and Desist agreements (TCC); and, finally, (v) for the elimination of the administrative proceeding, due to the limitation to BenQ. commissioner Paula Azevedo then requested for review.

Commissioner Paula Azevedo in the review vote agreed with João Paulo de Resende. The commissioner also consider that the cartel operated through bilateral agreements in bid promoted by the main customers and exchanging sensitive information. So, Paula Azevedo pointed out

that how the affected product ODD was exported to Brazil, the cartel brought forth negative effects to the national territory.

Commissioner also agreed with BenQ proceeding filed, due to the limitation and agreed with de condemning of HLDS, TSST e QSI, highlighting several evidences of the cartel, such as e-mail exchanges and telephone calls between managers.

Regarding the TEAC company, however, the commissioner diverged from the reviewer commissioner João Paulo de Resende and voted for the condemning. While the reviewer considered that the evidence against TEAC did not prove effecting in Brazil, commissioner Paula Azevedo considered enough evidences of exchanging information and split the market to condemn.

Paula Azevedo also diverged from the reviewer commissioner regarding monetary penalty. About the penalty the commissioner understood that were several inaccuracies regarding the import values and pointed that restricting the calculation basis to the investigated product could result in an underestimation of the values, since the production of ODD was already in decline in the year prior before the initiation.

In conclusion the commissioner voted on the values of monetary penalty in BRL 10.2 million to HLDS, BRL 19.2 million to TSST, BRL 624 thousand to TEAC – considering good faith, as the contacts were similar to the joint development agreement between the company and PLDS, and BRL 13.4 million for QSI.

lastly, the commissioner agreed with the reviewer commissioner regarding to filed made out to PLDS and suspension of Sony's proceedings.

After the TEAC's legal representative raised a point during the trial, specifically about the initiate date of the partnership between TEAC and PLDS, commissioner Mauricio Bandeira Maia requested for review.

### **CADE's judgment session wrapping fuel station union is suspended after vote for filing**

The proceeding was initiated by the SG to investigate uniform business practices in distribution and resale of fuels market in detriment of Sindicato do Comércio Varejista de Derivados de Petróleo do Estado de São Paulo (Sincopetro/SP) and José Alberto Paiva Gouveia.

The investigations started after Sincopetro/SP's director have made a few statement in a press interview, which he claimed increasing in petrol and diesel prices for final consumers.

According to the reviewer commissioner Paulo Burnier, the doctrine recommends that t conduct, known as "unilateral disclosure", must be analyzed in the occurred context.

In that regard, the defense claims that such statements would have been intuitive allegations, onde that the price increases would be a natural market consequence.

According to the reviewer, the proceedings proofs are not enough to condemn. From his view, the consumers were the target of the statements, not the gas stations directors. In addition, the president position was based on analysis of the gas stations' stock flow.

Still in conforming with commissioner, although the director press interview statements could sound as an anti-competitive conduct the difference is subtle. Analyzing the context demonstrates that the statements were only estimates on the impact of the readjustments for the final consumers. which is not to characterize as a cartel, the proceedings proofs must be more robust and, to prove the issuance of a statement to the members.

Lastly, the commissioner pointed out that are no minimum elements to show that the price increases occurred as a result of Mr. Alberto Gouveia's statements.

After the reviewer commissioner vote for filed the proceeding, the commissioner Paula Azevedo requested for review.

### **CADE reject motion for clarification of judgment in administrative proceedings at ice cream market**

The motion for clarification were filed against CADE's Tribunal decision at 132ª judgment session held on in October 16, 2018 condemning Unilever Brasil Ltda. (Unilever).

According to Tribunal's decision, Unilever would be using its dominant position in ice cream market on impulse (products of individual and immediate consumption) to hinder the access for competitors to distribution channels through exclusive agreement with retailers in São Paulo and Rio de Janeiro. The company was sentenced to pay approximately BRL 29.3 million.

Unilever claimed several inconstancies, obscurities and omissions in the commissioner vote: (i) limited of the scope of traditional sales outlets

research; (ii) omission of the using reasons for a particular database for the calculation of market shares; and (iii) default of grounds to filed the proceeding in the presence of Nestlé.

The reviewer commissioner Paula Farani received the motion of clarify and dismissed all the claims. The others commissioners agreed with Paula Farani. Tribunal maintained the condemning.

### **CADE homologated the investigation agreement on international cartel in the thin-film transistor market**

CADE's Tribunal by majority homologated the Cease and Desist Agreement (TCC) proposed by Japan Display Inc., in an administrative proceeding investigating the alleged international cartel on the thin-film transistor market., with effect in Brazil.

The company undertook to pay a monetary contribution in the amount R \$ 8.2 million.

The reviewer commissioner Mauricio Maia pointed out that only the turnover of the company with the cartelized product was considered, and not that related to the industry activity, which would be broader than the scope of the cartel. In addition, the company's estimate of turnover was used as the calculation basis, considering that it does not have any subsidiary in the national territory.

The commissioners João Paulo de Resende and Cristiane Alkmin voted against the TCC to consider insufficient the value.

### **CADE homologated by majority the 16 Cease and Desist Agreement agreements in cartel investigations related to Lava-Jato operation**

CADE's tribunal homologated by majority 16 TCC proposals by companies and individuals in 6 different investigations in bid cartel, all within the scope of Operation Lava-Jato.

Approximately BRL 897.9 million will be collected in monetary penalty, of which: (i) BRL 175 million by OAS S.A ; (ii) BRL 68.9 million by Carioca Christiani Nielsen Engenharia S.A.; (iii) BRL 578 million by Construtora Norberto Odebrecht S.A; and (iv) BRL 75.7 million by Andrade Gutierrez Engenharia S.A.

Tribunal's president pointed out that this is the first case in which the proponents will receive discounts if they prove antitrust compensations in civil court. Besides that, the president emphasized that the agreements meet all the TCC'S requirements. Therefore, he voted to homologate the proposals.

Differently stated the commissioner João Paulo de Resende. According to him the agreed terms were not sufficient once that we are dealing with the largest investigations in bid cartels. About that the commissioner pointed out that the agreements billing works in question was approximately BRL 25 billion. Therefore, the amounts of the monetary penalty represent only 3% of those that were billed at the time and will also be parceled out over 20 years. In addition, the commissioner questioned the calculation methodology used to define the expected fines. Carrying out its own calculations, and allowing some approximations, the Board member voted for the ratification of only three TCC proposals, voting against the others.

The commissioner Cristiane Alkmin was even more incisive and voted to reject all proposals. For the commissioner, the calculation basis used did not consider the amounts cartel's billed. According to the calculations, the values should have reached a total value of BRL 4 billion. In addition, Cristiane Alkmin criticized the payment installment for more than 4 years, considering the CADE's Guide term.

The other tribunal commissioners voted to homologate the proposals, highlighting the predisposition of the proponents to repair the caused damages and the importance of the payment installment to ensure that the amounts are correctly paid.

## JUDGMENTS IN DECEMBER, 2018

### 135th CADE's Judgement Session

December 5, 2018

#### **CADE recognizes the absence of joint liability between Bemis and Alcoa for cartel in the flexible packaging market**

The company Bemis do Brasil (Bemis) filed a motion for clarification against CADE's Tribunal decision, issued at the 128th judgement session, which dismissed the Alcoa Alumínio S.A.'s motion for clarification against the decision condemning it and seven other companies and eight individuals for cartel in the flexible packaging market.

According to Bemis, there were contradictions in the vote of Commissioner Paulo Burnier, who analyzed the motion for clarification filed by Alcoa, by which the company requested the clarification regarding an omission in order to consider Bemis as jointly responsible for the fine imposed on Alcoa due to corporate succession.

During the analysis of Alcoa's motion for clarification, the then Reporting Commissioner Paulo Burnier acknowledged that Bemis's joint liability had not been affirmed in his winning vote in the decision that condemned Alcoa for cartel. However, considering that the conducting vote fully followed Commissioner João Paulo Resende's vote regarding the merits, there was implicit recognition of Bemis' joint liability.

Subsequently, during the 131st Judgment Session, when analyzing Bemis's motion for clarification, the Commissioner Paulo Burnier pointed

out that CADE had already stated that corporate succession entails joint liability among the companies involved.

Commissioner Polyanna Vilanova, however, requested the files for review, and the judgement was suspended until this last session.

In her vote, which was followed by the majority of the other commissioners, Commissioner Polyanna pointed out that the corporate succession would only be applied in the full demerger of a company, which did not happen in the present case. Thus, the Commissioner voted to accept the motion for clarification, granting immediate effects to recognize the absence of joint liability between Bemis and Alcoa.

#### **CADE postpones decision on alleged cartel in public bidding held by the Secretariat of Penitentiary Administration of the State of Rio de Janeiro**

This is an administrative proceeding initiated in 2012 to investigate the possible formation of a cartel in a public bidding performed by the Secretariat of Penitentiary Administration of the State of Rio de Janeiro (SEAP-RJ) to hire companies for the supply of packed meals in the prisons of the State of Rio de Janeiro. According to the investigation, the illicit would consist of a prior agreement by the bidders of the result of the public bidding.

CADE's General Superintendence (SG) had issued a legal opinion understanding that there was a lack of evidence to prove the occurrence of the illicit conducts, and recommending the termination of the proceeding regarding all of the defendants.

During this last session, the Reporting Commissioner Cristiane Alkmin issued her vote, whereby she diverged from the SG and suggested the conviction of the defendants with the imposition of fines that totaled BRL 413,924,289.00. The Commissioner identified a series of irregularities in the procedures of the public biddings, which indicate manipulation for the success of the companies involved, with the collaboration of SEAP-RJ itself.

The decision was postponed by the request for review by Commissioner Mauricio Maia.

#### **CADE condemns several individuals for antitrust violations in the automotive plates market in Salvador**

CADE's Tribunal unanimously decided to condemn 7 individuals for preparing and disclosing price lists and dividing the market between competitors for the manufacture and sale of automotive plates in Salvador. Also, the Tribunal decided, by majority of votes, to terminate the investigation in favor of A.A.A. Nortear – The Signaling Framework (A.A.A. Nortear) and other two investigated individuals.

The proceeding was initiated in 2015, due to a decision from CADE in a previous administrative proceeding, in order to investigate the participation of other individuals and companies that were not included as defendants in the original proceeding.

During the investigation, the SG issued a technical opinion recommending the conviction of the company A.A.A. Nortear and other several individuals and the termination of the proceeding regarding the other investigated individuals. The Federal Attorney General Office and Public Prosecutor Office agreed with the SG recommendations.

During this last session, Reporting Commissioner Cristiane Alkmin voted for the conviction of 9 individuals and the termination in relation to the others.

Commissioner Paula Farani, however, issued a divergent vote in relation to the characterization of the cartel. Furthermore, the Commissioner clarified that, because AAA Nortear is a company formed as an individual entrepreneur, it does not have a distinct juridical personality from its partner, who already appears in the proceeding as defendant. Therefore, she voted for the termination of the proceeding due to the passive illegitimacy of the company. Commissioner Paulo Burnier agreed with her vote.

Thus, in an unanimous decision, the Tribunal decided to terminate the proceeding regarding 9 individuals and the conviction of the others 7 individuals, and, by the majority of votes, to apply the fine proposed by Commissioner Paula Farani. Furthermore, by the majority of votes, the Tribunal determined the termination of the proceeding in relation to two defendants, including A.A.A. Nortear.

CADE condemns the Regional Medical Council of the State of Espírito Santo for the imposition of price tables and other conducts

In this last session, CADE's Tribunal resumed the discussion regarding the proceeding that investigates anticompetitive practices conducted by the Regional Medical Council of the State of Espírito Santo, the Union of Medical Doctors of the State of Espírito Santo, Medical Association of the State of Espírito Santo – AMES, Unimed Sul Capixaba Cooperativa de Trabalho Médico and the National Union of Health Self-Management Institutions – UNIDAS.

The investigated entities would have imposed price tables in negotiations with health plan operators, coordination of threats of strikes and collective terminations, and imposition of mechanisms of coercion and punishment on non-aligned doctors. The infringement would have occurred in Espírito Santo, from January 2003 to December 2005.

At the 131st Judgment Session, the Reporting Commissioner Cristiane Alkmin had issued her vote (i) for the termination or suspension of the proceeding against the defendants that entered into Cease and Desist Agreements (TCC) with CADE; (ii) the termination of the proceeding in relation to certain entities and hospitals due to lack of evidence; (iii) the termination of the proceeding in relation to UNIDAS for the lack of dominant position; and (iv) the conviction of the Regional Medical Council of the State of Espírito Santo – CRM/ES, of the Union of Medical Doctors of the State of Espírito Santo, of the Medical Association of the State of Espírito Santo – AMES and of Unimed Sul Capixaba.

The Commissioners João Paulo de Resende and Paula Azevedo both presented divergent votes, and voted for the conviction of UNIDAS, regardless of its market share. After these three votes, Commissioner Mauricio Maia requested the case records for review, and the judgement was suspended until this last session.

The judgement was resumed in the last session, when Commissioner Mauricio Maia voted for the conviction of all the defendants, except for UNIDAS. Regarding UNIDAS, the Commissioner voted for the termination of the proceeding by concluding that the entity is a group of final consumers, with the purpose of reducing risks and, therefore, does not form a link in the production chain on which the antitrust authority should direct its analysis.

Thus, in a unanimous decision, CADE's Tribunal condemned the Regional Medical Council of the State of Espírito Santo, the Union of Doctors of the State of Espírito Santo, the Medical Association of the State of Espírito Santo and the Unimed Sul Capixaba Cooperativa de Trabalho Médico for anticompetitive practices. Finally, by majority of votes, the administrative proceeding was terminated in favor of UNIDAS.

### **CADE approves TCC proposals in several cartel investigations**

In this last session, CADE approved the following TCCs:

- (i) agreement with individuals in the proceeding that investigates the practice of cartels in public biddings in several states for medicine acquisition;
- (ii) agreement with Federal-Mogul Sistemas Automotivos Ltda. and two individuals in a proceeding related to the automotive spare parts and original parts segment; and
- (iii) agreement with individuals in the proceeding investigating cartel practice and uniform commercial conduct in the markets of distribution and resale of automotive fuels in the city of Joinville/SC.

The total amount of the agreed pecuniary contributions was BRL 9,342,426.33.



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