

COVID-19 and its impacts on Competition Law

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This newsletter presents the main impacts that the COVID-19 crisis has had so far on Brazil's competition authority, CADE, and Brazilian competition law, and the measures taken to deal with those impacts.

CADE is operating normally

CADE (the *Conselho Administrativo de Defesa Econômica* or Administrative Council for Economic Defense) continues to function normally even though most of its staff are working remotely, and in-person meetings have been replaced by audio and video conferences. Judgment sessions will also take place remotely during the crisis (see Resolution no. 26/2020, approved on 1 April 2020, which amends CADE's Internal Regulation – Portuguese only).

Changes in application of the Antitrust Law (Law 12.529/2011)

On Friday, 3 April, Brazil's Senate approved Bill 1179/2020, which makes temporary changes in legal relations governed by the private law by reason of the COVID-19 pandemic. The Bill will now be reviewed by the Chamber of Deputies.

With respect to competition matters, the Bill aims to alter the parameters used in evaluating anticompetitive practices. The Bill proposes that CADE's decisions on competition offences take into consideration the extraordinary circumstances brought about by the pandemic, and consequently that, in the future, certain conduct might not be considered illegal in view of the crisis caused by COVID-19.

In particular, the Bill proposes the following changes in the application of the Antitrust Law:

- Suspension of (i) the prohibition against sale of products and services at prices that are unjustifiably below cost (predatory pricing), which could stimulate a reduction in prices, and (ii) the prohibition against partial or total shutdown of business activities without good cause. In normal circumstances, these practices would constitute competition offences under article 36 §3(XV) and (XVII) of the Antitrust Law; and
- Suspension of the obligation to notify CADE of consortia, joint ventures, and "associative agreements", as required under article 90(IV) of the Antitrust Law. In practice, this means that, if the Bill is approved, CADE will not review collaboration agreements made between competing businesses that would normally have to be submitted to the competition authority. The proposed provision would not, however, prevent CADE from conducting a subsequent merger review or investigation into anticompetitive conduct with respect to the collaborative arrangement (as provided for in article 36 of Law 12.529/2011), in which case CADE would determine whether the arrangement was actually necessary to

mitigate the consequences of the COVID-19 pandemic.

The proposed changes would apply **from 20 March 2020 to 30 October 2020 or until the end of the state of public emergency** declared in Legislative Decree no. 6 of 20 March 2020.

Investigations into abusive pricing in the medical/pharmaceutical products sector

On 18 March 2020, CADE opened preliminary investigations into alleged arbitrary and abusive price and profit increases in the health sector. To date, CADE has sent more than 80 information requests to businesses in the sector (hospitals, laboratories, pharmacies, manufacturers and distributors of surgical masks and alcohol-based hand sanitizer, and manufacturers of medications for treatment of COVID-19 symptoms), requiring the submission of invoices issued on purchase of the products. The proceeding is still in the early evidence-gathering stage. According to CADE, the investigation was opened "because of the elevated demand for these products as a result of the need for emergency care due to the increase in COVID-19 cases in Brazil."

The investigation shows that CADE is paying attention to movements in the market in these times of crisis, particularly in segments of the industry that can be considered essential. For more information, [click here](#) (Portuguese only).

Other proposals: freezing the price of medications and creating a price caps for items essential to fighting COVID-19

In addition to Bill 1179/2020, there are two other bills under discussion in the Brazilian Congress that could affect competition matters.

- Bill 881/2020 proposes to freeze prices of medications during the coronavirus pandemic (Portuguese only).
- Bill 1008/2020 proposes to cap the price of items that are essential to deal with the pandemic or the public emergency, such as medications, masks, and gel alcohol (Portuguese only).

The Congress requested CADE's comments on the two bills, which were provided by CADE's Department of Economic Studies (DEE – *Departamento de Estudos Econômicos*). According to the DEE, "freezing prices or establishing price caps can have a strong negative effect, as it may disincentive the production, distribution and marketing of goods, if there are increases in costs that are not followed by the possibility of passing on those cost increases. In such cases, supplies of medications and other essential items could run out, which would be worse in economic terms than the possibility of permitting prices to fluctuate." For more information, [click here](#) (Portuguese only).

Procedural deadlines

CADE has issued an Information Note in connection with Provisional Measure 928/2020, stating that procedural deadlines will not run against respondents in: (i) administrative proceedings related to anticompetitive conduct; (ii) administrative proceedings related to non-filed mergers (APACs); or (iii)

administrative proceedings for failure to provide information or documents or for providing false or misleading information or documents.

In contrast, CADE stated that **there will be no change** in the procedural deadlines in (iv) merger reviews; (v) **preliminary** investigations and proceedings into anti-competitive conduct; (vi) leniency agreements; (vii) administrative settlements with respect to anti-competitive conduct (TCCs) and monitored merger review agreements (ACCs); (viii) consultations; and (ix) merger review agreements made under the former legislation (Law 8,884/94). Specific situations that may require an extension of deadlines will be examined on a case-by-case basis, on application by the interested party.

The Note points out that the fact that ***procedural deadlines will not run against respondents does not mean that proceedings will come to a halt with respect to procedural steps for which CADE is responsible, nor will it prevent judgment in proceedings that are ready for decision, by means of virtual judgment sessions while the crisis lasts.***

Merger reviews do not seem to have suffered significant impacts to date. Although CADE has set the target not to extend merger reviews because of the pandemic, delays can be expected in some cases, especially those that require information from third parties, since many businesses have established work-from-home policies and are facing many other challenges at the moment. Indeed, CADE has been more flexible in granting extensions for replies to its requests for information, both for the parties involved in the transaction and for third parties consulted in the review.

Collaboration with other authorities

Given the national and transnational dimensions of the COVID-19 pandemic, CADE can be expected to collaborate closely with other authorities. This collaboration could take the form of joint initiatives and exchange of information between CADE and other Brazilian authorities involved in the efforts to contain the pandemic, such as the Public Prosecution Service, the consumer protection policy secretariat SENACON, and federal, state, and municipality regulatory agencies and authorities. The exchange of information between CADE and foreign authorities and international institutions may also intensify, to trade experiences and identify best practices.

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