

Judicial review of CADE's decisions: Appeal RE no. 1.083.955

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A recent decision by Brazil's constitutional court, the Supreme Federal Court (STF – *Supremo Tribunal Federal*), in appeal RE no. 1.083.955, occasioned much surprise. Many have interpreted the STF's decision as an absolute prohibition against review of the merits of decisions by CADE, Brazil's competition authority (*Conselho Administrativo de Defesa Econômica*). We propose a closer reading of the actual circumstances of the case and of the court's decision.

When the case first arrived at the STF, the reporting justice, Luiz Fux, dismissed the appeal on the grounds that the court below had made its decision on the facts of the case and the evidence presented. In Justice Fux's view, there was no procedural defect in the proceeding before CADE, and the STF does not have the jurisdiction to re-examine the facts and evidence (Restatement of Precedents 279).

The appellant filed a petition for review of Justice Fux's decision, and the matter came before the STF's 1st Panel for judgment. The panel agreed with Justice Fux and dismissed the appeal, upholding the court's position that judicial review of administrative acts is possible, but is limited to the legality of the act.

The context of the decision makes it clear that (i) the STF did not examine the merits of the appeal, give the rule under Restatement of Precedents 279 ("*An appeal to the Supreme Federal Court does not lie for a simple reexamination of the facts*"); (ii) the STF did not change its interpretation of the law; and (iii) the case did not have "general repercussion" status, and therefore the decision binds only the parties to the appeal.

In truth, the 1st Panel's decision states that the courts may examine administrative acts to determine whether they are legal or abusive, and to ensure that they meet other legal requirements such as jurisdiction, purpose, form, subject matter, and reasons for decision. What does attract our attention in the decision is that the 1st Panel suggests that the courts should show "deference" to the merits of decisions made by CADE, because of CADE's "technical expertise" and its "institutional capacity in matters of economic regulation".

It seems to us that this part of the decision shows some conceptual confusion with respect to competition law and CADE's role, since it seems to equate CADE to regulatory agencies, and so arrives at a conclusion based on

an incorrect premise. Moreover, the decision does not go into the question of what constitutes the “merits of an administrative act” and the extent to which examining the merits is different from “legal analysis of administrative acts”. It’s also worth noting that because of the constitutional guarantee of access to the courts, parties that wish to challenge CADE’s decision have the right to ask for judicial review.

Last, we note that this part of the decision is simply an obiter dictum – the ratio decidendi is that the view that the STF will not re-examine the facts and evidence of a case. Thus, although the STF’s decision can have persuasive weight, it is not binding on lower courts, and there is still room to challenge CADE’s decisions in the courts, which may well continue to review them, on a case-by-case basis.

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