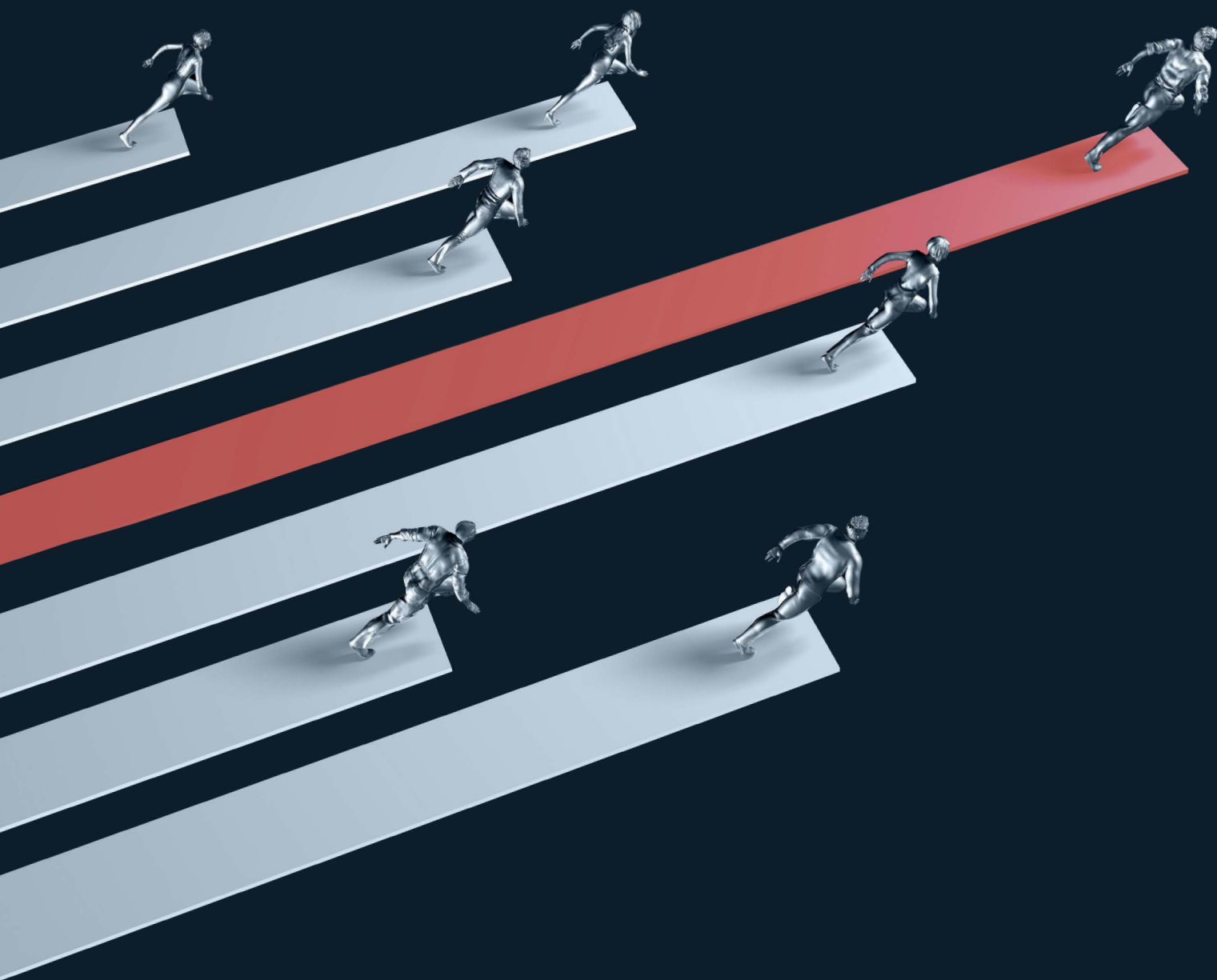


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Antitrust Newsletter

Highlights from CADE | 2023 Third Quarter

Highlights from CADE

Third Quarter of 2023

This newsletter aims to provide an overview of the highlights of the activities of CADE (Brazilian Antitrust Authority) in each quarter, including:

- discussions and trends;
 - major numbers of mergers and investigations analysis;
 - high-profile events; and
 - the most important decisions.
-

01

Relevant numbers for the third quarter of 2023:

Q3 2023 data confirms a downward trend in the number of merger reviews conducted by CADE (number of decisions dropped 16.5% compared to the same period in 2022) but it also shows conduct activity remains stable in administrative proceedings and settlement agreements.

02

Vertical restraints (such as Resale Price Maintenance – “RPM”) remain on CADE’s radar

Although CADE’s Tribunal has closed an investigation into a commercial policy involving possible resale price maintenance/fixing (RPM), after receiving a complaint against a wristwatch manufacturer (Technos), the authority reinforced some competitive concerns and red flags when it comes to restrictive pricing practices in commercial distribution policies and relationships.

03

CADE imposes rare non-pecuniary penalty on individuals prohibiting them from exercising businesses in their own name

In a recent ruling that convicted individuals and legal entities for the involvement in a price-fixing cartel among gas stations in the state of Santa Catarina, CADE’s Tribunal imposed, in addition to fines, harsh non-pecuniary penalties on the individuals, prohibiting them from exercising businesses in their own names (including as representatives of legal entities) for a period of five (5) years.

04

Bidding consortium is on CADE Tribunal’s agenda

Commissioner Luis Braido has called up the administrative inquiry closed by the General Superintendence that investigated the formation of a consortium among Raízen, Petrobras Distribuidora and Ipiranga to participate in auctions to lease port areas. The investigation was launched by the General Superintendence following weak competition in the auctions for leasing port areas in Cabedelo/PB and Vitória/ES. The issue of the formation of bidding consortia was also discussed by the Tribunal when analyzing a motion for clarification filed by Claro, Oi and Telefônica against a conviction involving the formation of a consortium to compete in a bid conducted by the Brazilian Post Office company. The decision resulted in a substantial reduction in the fines imposed.

05

Joint negotiations between competitors are debated in CADE's trial sessions: Tribunal clears with restrictions extension of JV Simba Content's joint negotiation in licensing channels

In two separate trials by the Tribunal, joint negotiations between competitors were the central theme of CADE's analysis, demonstrating a trend towards greater scrutiny of these types of partnerships. The first one involved the clearance with restrictions of the continuation of the activities of Simba Content JV, composed of SBT, Record and RedeTV, whose main objective is the intermediation and representation for the distribution and sale of free-to-air and/or pay TV signals to pay TV service providers. The other trial referred to the preliminary injunction imposed by the General Superintendence against the Association of High Complexity Hospitals of the state of Goiás (Ahpacog), ordering the association of hospitals to cease collective price negotiations with health insurance providers.

06

What's next

(I) if at least one new commissioner is not appointed and confirmed by Senate, as of November 4, 2023, CADE's Tribunal will lack a quorum, preventing sessions from being held and suspending all of its decisions

With less than a month to go, the new commissioners have not yet been appointed, and they still must go through confirmation and approval proceedings in Congress. As noted in the July 2023 edition of this publication, if at least one new commissioner is not appointed by early November, the lack of quorum will prevent trial sessions from being held and will suspend procedural deadlines and pending cases at the Tribunal, including fast-track mergers, which will impact the entire market.

(II) IBRAC's traditional yearly event will discuss how to make leniency agreements more attractive

In 2023, authorities have been seeking to recover the attractiveness of leniency agreements, following a steep decline in their adoption in the last decade. Partner Patricia Carvalho will moderate a panel on the subject at the 29th International Seminar on Competition Policy hosted by the IBRAC on November 9th and 10th in São Paulo. Panelists include the General-Coordinator of the Antitrust Leniency Program, Felipe Roquete, the Executive Secretary of the Office of the Federal Controller General (CGU), Vânia Vieira, as well as foreign specialists in the field bringing in perspectives from the US and Europe.

(III) Partner Marcelo Calliari will attend event at the London School of Economics

Partner Marcelo Calliari will attend the launch of the **Competition Law in Latin America - A Practical Guide – Second Edition** book, which he co-edited alongside Julian Peña (partner at Allende & Brea, Argentina) and whose chapter "Competition Law in Brazil" he co-authored with partner Marcel Medon Santos. The book will be launched on November 7th.

1.

Relevant numbers for the third quarter of 2023:

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- 128 mergers submitted;
- Average review time for fast-track cases: 15 days
- Average review time for non-fast track cases: 113 days
- No new Administrative Proceedings were launched;
- New settlement agreements amounting to BRL 24,288,664.57;
- One adhesion contract and two leniency agreements were signed (effective date Oct. 3rd, 2023).

Releases

- **Guidelines on Cartel Penalties** ([link](#)): CADE has released its new guidelines on how to establish sanctions in cartel cases, based on its decision-making practice. Partner Patricia Carvalho was part of the IBRAC working group that provided suggestions for the Guidelines.
- **V+ Guidelines issued for comments** ([link](#)): CADE has asked for comments on its proposed non-horizontal merger guidelines (named the V+ Guidelines). V+ Guidelines are expected to be soon published.
- **Study on Digital Platform Markets** ([link](#)): CADE has updated its study on its case law on sectors that use digital platforms.
- **Working Draft from the Economic Studies Department on “Conglomerate Mergers”** ([link](#)): The ESD has issued a study debating the theories of harm analyzed by CADE in conglomerate mergers between 2012 and 2022, as well as aspects related to conglomerate mergers in digital markets.

Publications

- **Partners Marcelo Calliari, Vivian Fraga and associate Nicholas Cozman** have published an article on the Brazilian Competition Defense System's experience with leniency programs in a book commemorating the 10 years of the current Brazilian Competition Law (book only published as hard copy).

- **Partners Vivian Fraga and associate Marco Volpini Micheli** have published an article in the Competition Defense Journal (1st semester edition). The paper discusses CADE's role in addressing the liability of entities being imposed cartel convictions in several areas of law, including debates on the Anticorruption Law and Law No. 14,470/2022.

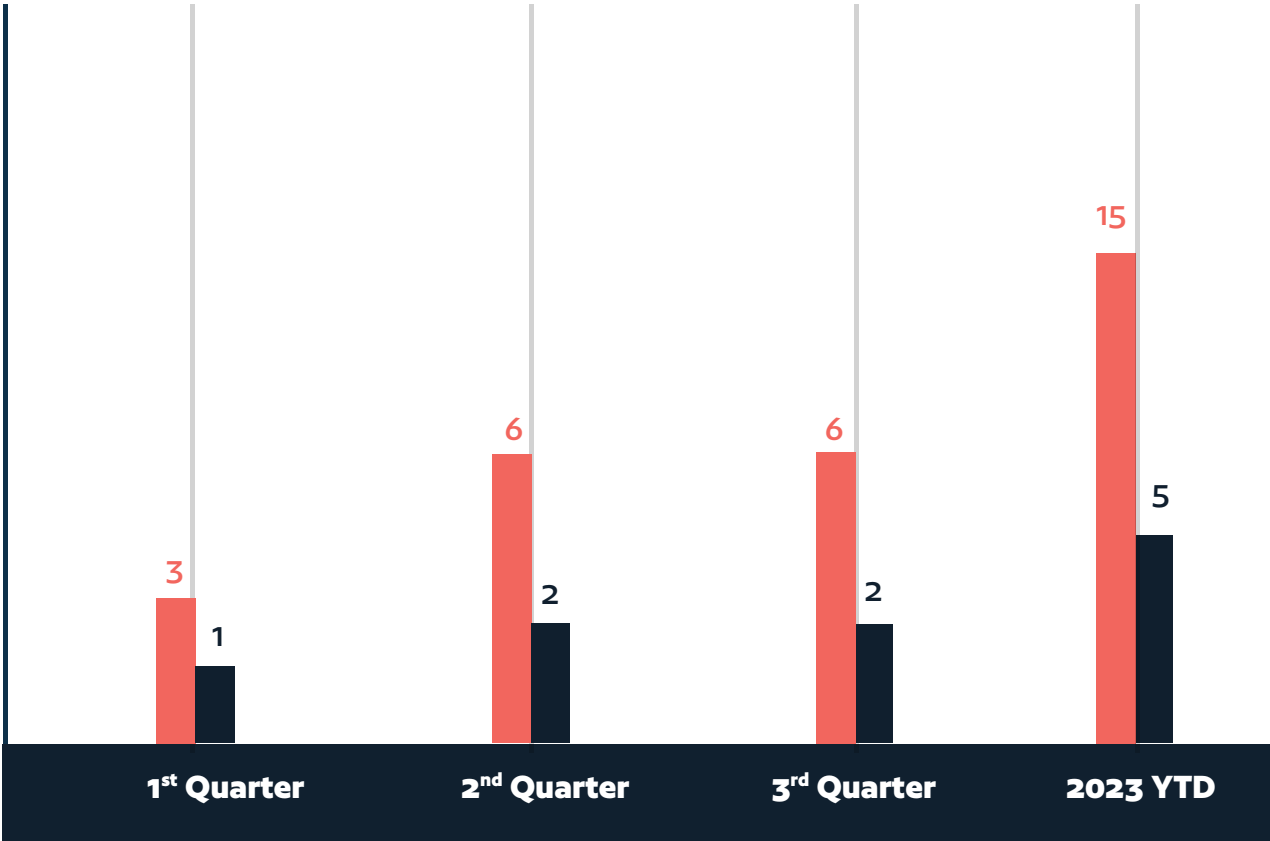
- **IBRACCAST:** partner Vivian Fraga hosted three editions of the IBRAC podcast: (i) Future of Antitrust Investigations ([link](#)); e (ii) Overview of CADE's Ruling Sessions No. 217 ([link](#)) and No. 218 ([link](#)).

Main events

- **IBRAC – 23rd Seminar on International Trade:** partner Marcelo Calliari attended the conference hosted by the IBRAC – Marcelo is also a former IBRAC president (2010-2011).
- **IBRAC – Webinar on the 20-year anniversary of CADE's first search and seizure** ([link](#)): partner Guilherme Ribas, IBRAC's Competition Director, spoke at the webinar hosted by the institute
- **ICC Brazil – Commission Leaders' Breakfast (Aug. 2nd, 2023) and Competition Commission Meeting (Aug. 24th, 2023):** partner Tatiana Lins co-chairs the Competition Commission of the International Chamber of Commerce, Brazil Chapter (ICC Brazil) and attended the events.
- **International Bar Association (IBA) – 27th Annual Competition Conference:** partners Marcelo Calliari, Marcel Medon and Vivian Fraga attended IBA's International conference on September 15 and 16, 2023 in Florence, Italy.
- **Women In Antitrust (WIA) – Annual Event** ([link](#)): TozziniFreire sponsored the annual WIA (network of female antitrust practitioners) event, and partner Tatiana Lins and associate Natália Felix attended the event.

Graphic 1.

Cases ruled on in the first three quarters of 2023

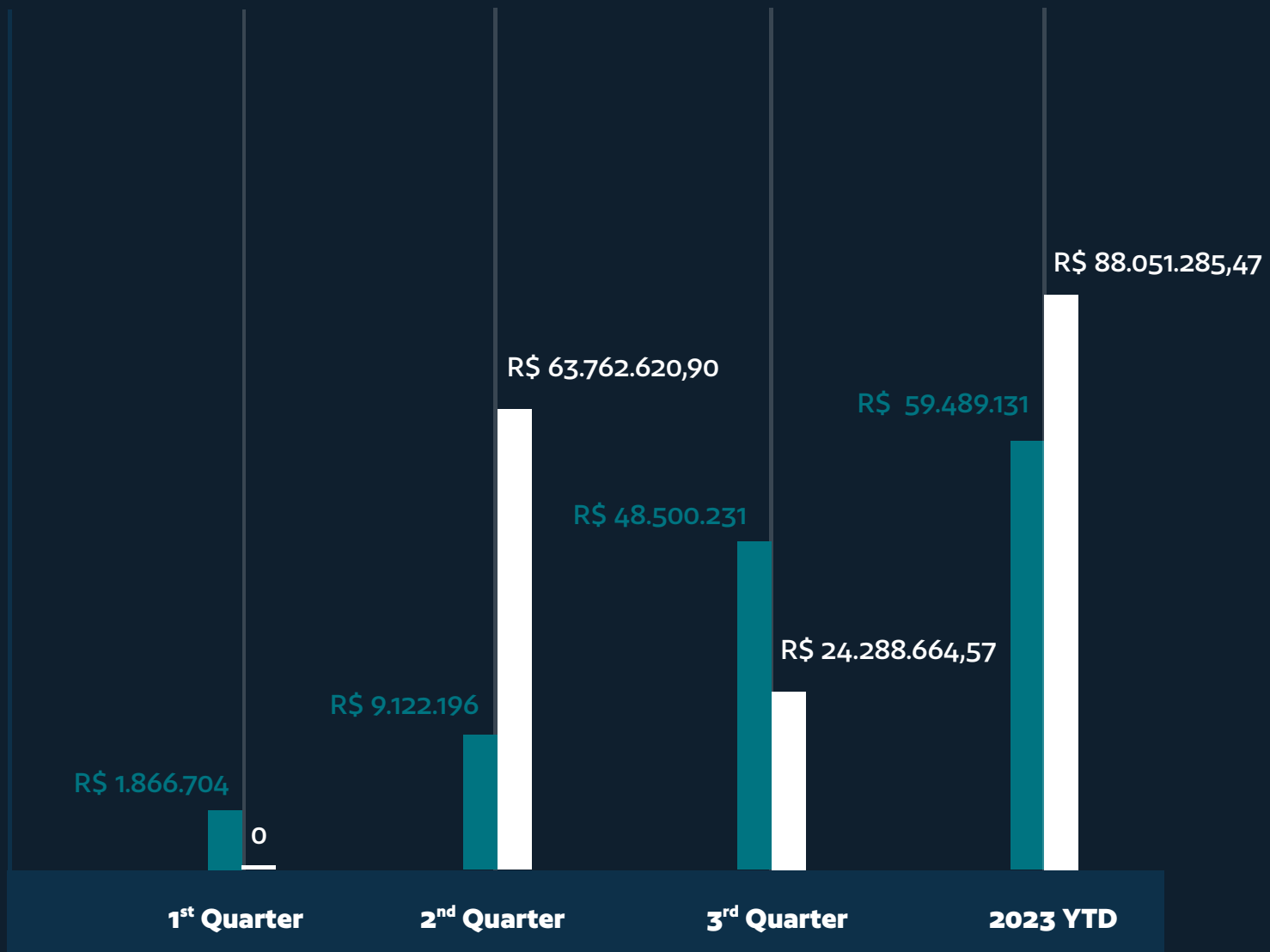


● Decisions in Administrative Proceedings

● Settlement Agreements in Conduct Cases

Graphic 2.

Fines and settlement payments in the first three quarters of 2023



Fines Imposed (BRL)



Settlement amounts

2.

Vertical restraints (such as, Resale Price Maintenance – “RPM”) remain on CADE’s radar

- Although CADE’s Tribunal has closed an investigation into a commercial policy involving possible resale price maintenance/fixing (RPM), after receiving a complaint against a wristwatch manufacturer (Technos), the authority reinforced some competitive concerns and red flags when it comes to restrictive pricing practices in commercial distribution policies and relationships.
- The dismissal of the case by CADE’s Tribunal in August 2023 mainly considered that the conditions of rivalry in the market in question (such as non-homogeneous products, continuous launches of products/brands, presence of rivals with well-known brands, elastic demand for products, etc.) **would make any exercise of unilateral market power by Technos unlikely** (even though the company held a market share of more than 20% in some segments – a proxy usually considered by CADE for analyzing a dominant position).
- The conclusion regarding the absence (or low impact) of potential anticompetitive effects, in the investigation in question, also took into account: (i) the short term of the commercial policy, (ii) the limited scope of the commercial policy, (iii) the decrease in average prices in relation to the sales made by the supplier to its resellers, and (iv) enforcement of the commercial policy to a limited number of resellers.

- Despite this outcome, CADE's Tribunal reinforced that restrictive pricing practices, especially in the form of RPM, are and will continue to be analyzed by CADE with great rigor (and a certain degree of skepticism), and that there is no "safe harbor" for the market resulting from this trial.

- Thus, when analyzing the case, CADE's Tribunal reinforced the following views on the matter:

- » RPM practices should be analyzed by the so-called "rule of reason" (and not the "per se rule"), but with a **presumption of illegality and shifting of the burden of proof** to the investigated party;

- » Greater competitive concern when pricing policies are imposed (i.e., existence of mechanisms of control, monitoring and/or retaliation, either formal or informal), in comparison when they are merely suggestive;

- » Less competitive concern when pricing policies originate from a unilateral initiative by the supplier (based on some economic rationale/justification), rather than collective claim(s) from distributors/resellers; and

- » Minimum price policies represent a greater competitive risk, followed by fixed prices, while maximum price policies normally raise less concerns based on CADE's case law.

- The decision reinforces the need for companies to be cautious when structuring commercial policies for resale networks, always establishing well-defined scopes supported by technical analyses that confirm the economic rationale and expected efficiencies for the commercial policy in question.

3.

CADE imposes rare non-pecuniary penalty on individuals prohibiting them from exercising businesses in their own name

- In a recent ruling that convicted individuals and legal entities for their involvement in a price-fixing cartel among gas stations in the state of Santa Catarina, CADE's Tribunal imposed, in addition to fines, ancillary penalties on the individuals, prohibiting them from exercising businesses in their own names (including as representatives of legal entities) for a period of five (5) years.
- When deciding to apply such disqualification sanction on individuals, the Commissioners from CADE's Tribunal recognized that the ancillary penalties established in article 38 of the Brazilian Antitrust Law can have significant consequences on free enterprise (especially the sanctions that may lead to the inhibition of individual rights). Therefore, ancillary penalties would not be applicable to every single case. The Commissioners also indicated that, between 1999 and 2022, CADE would have applied the director disqualification sanction only on three (3) occasions.

- In the case in question, CADE's Tribunal decided to apply the ancillary sanction of disqualification especially due to:
 - (i) the recurrence or repeated conduct under investigation;
 - (ii) the level of reprehensibility verified in the modus operandi of the conduct (e.g., there were several and direct communications among the offenders about the cartel);
 - and (iii) the history of CADE's investigations in the related sector/industry (such as the fuel resale market).

- It should be noted that, in another recent trial involving an alleged cartel in public bids for the purchase of garbage bags, CADE's Tribunal decided not to apply the director disqualification sanction on the investigated individuals, as such application was considered too disproportionate to the case. Nevertheless, CADE's Tribunal applied against the companies the penalty of prohibition from participating in public bids and/or from entering contracts with the Government for a period of up to five (5) years.

4.

Bidding consortium is on CADE Tribunal's agenda

- **Raízen, Petrobras and Ipiranga case:** Commissioner Luis Braido has called up the administrative inquiry closed by the General Superintendence that investigated the formation of a bidding consortium between Raízen, Petrobras Distribuidora and Ipiranga to participate in auctions to lease port areas. The call up was endorsed by a unanimous vote of the Tribunal at the 217th Trial Session held on August 2nd, 2023, but the Tribunal subsequently decided to keep the investigation closed at the 220th Ordinary Trial Session held on September 27th, 2023, for the following reasons:

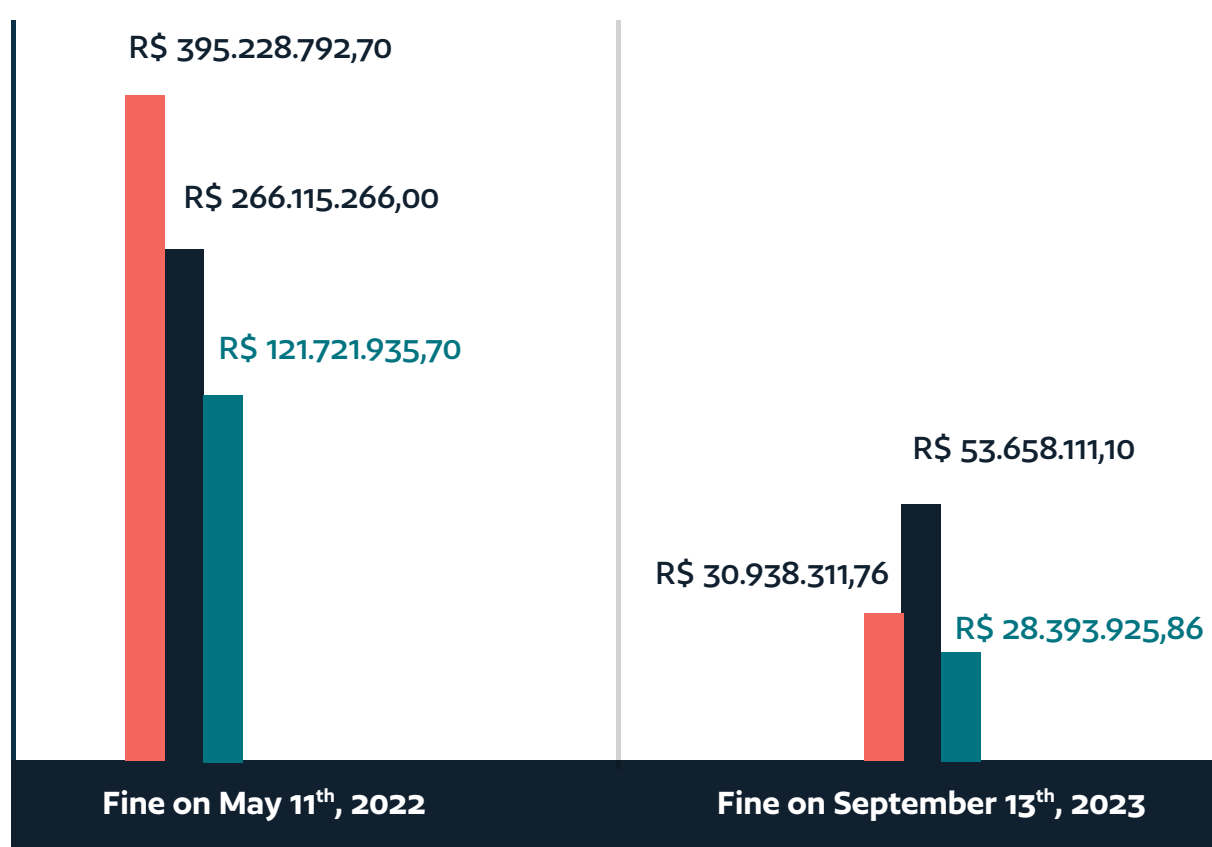
- The investigation was launched by the General Superintendence on October 17th, following weak competition in the auctions for leasing port areas in Cabedelo/PB and Vitória/ES. The General Superintendence noticed that all the tenders were won by the consortia formed by the defendants and, of the four port areas auctioned, only two had competing bids.

- After almost four years since the launch of the inquiry, the General Superintendence decided to close the investigation since the conduct differed from the case against Claro, Oi and Telefônica related to the bid conducted by the Empresa Brasileira de Correios e Telégrafos (“Post Office”) in fundamental aspects.

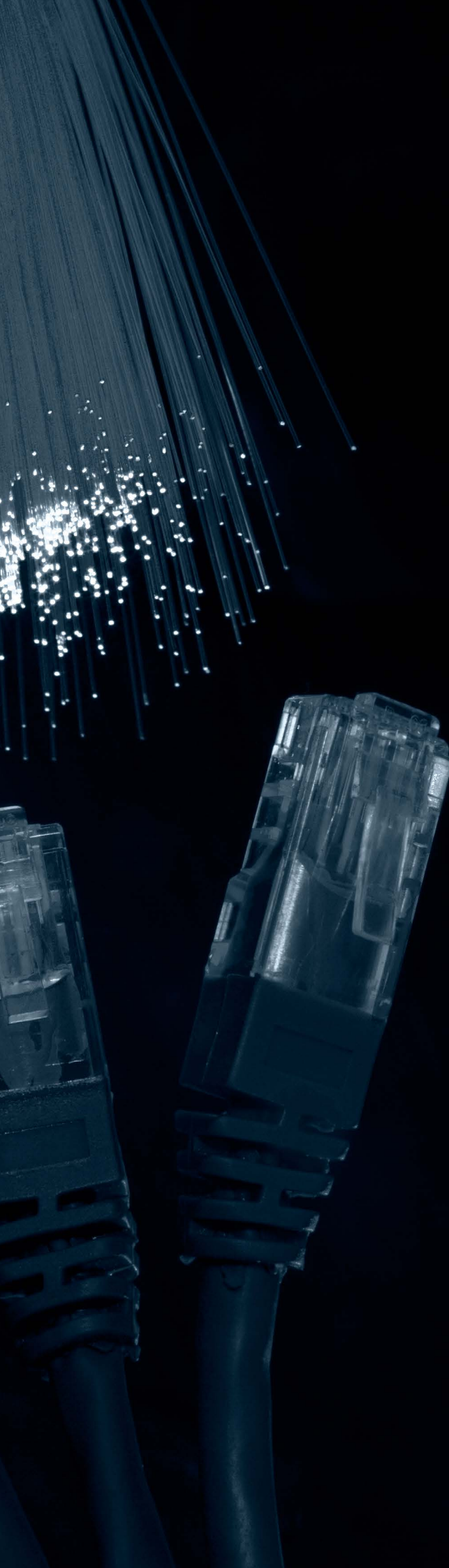
- The General Superintendence understood that, even if no efficiencies had been found as a result of the formation of the consortium by the distributors to participate in the auction, there was no “investigation into the practices of refusal to deal and price differentiation committed by the members of the winning consortium of the Post Office bid, namely Oi, Claro and Telefônica”, nor was there any evidence that the consortium had been “formed to enable, in a coordinated manner, an abuse of a dominant position by the distributors.”

• **Claro, Oi e Telefônica case:** the issue on forming a bidding consortium was also discussed by CADE's Tribunal in the 219th Trial Session held on September 13th, 2023. CADE's Tribunal decided to accept motions for clarification filed by Claro, Oi and Telefônica, recognizing that there was an omission regarding the dosimetry criteria that were adopted to sentence the companies for anti-competitive conduct in 2022.

- The decision resulted in a substantial fine reduction



● Claro ● Oi ● Telefônica



- On May 11th, 2022, the telecom companies were sentenced by CADE after forming a consortium to compete in a bid conducted by the Post Office for the contracting of Multimedia Communication Services (MMCS) and broadband internet services. The companies were accused of acting in a coordinated manner to win the bid and of refusing to contract, refusing access and of discriminatory pricing against British Telecom.

5.

Joint negotiations between competitors are debated in CADE's trial sessions

- In two separate trials by the Tribunal, joint negotiations between competitors were the central theme of CADE's analysis, demonstrating a trend towards greater scrutiny of these type of partnerships.
- One of these cases involved the analysis of continuation of the activities of Simba Content JV, composed of SBT, Record and RedeTV (see Merger Review No. 08700.009574/2022-81), whose main objective is the intermediation and representation for the distribution and sale of free-to-air and/or pay TV signals to pay TV service providers. The Tribunal unanimously cleared the transaction with restrictions.
- This contrasts to some extent with the Tribunal's decision in the second case, in which it upheld a preliminary injunction imposed by the General Superintendence against the Association of High Complexity Hospitals of the State of Goiás (Ahpacég) still at the administrative inquiry stage. The injunction orders the association of hospitals to cease collective price negotiations with health plan operators. This case will now be investigated by the General Superintendence, which may decide to begin administrative proceedings or close the investigation.
- For more information on the Simba JV case, see the tables below:

JV Simba - General Superintendence Analysis:

After analyzing the licensing of pay TV channels (broadcasting of free-to-air channels on pay TV) market in depth, the General Superintendence decided to clear the transaction without restrictions, despite the 30 to 40% combined market shares of the parties, taking into account the following factors:

- **Between 2014 and 2021:**
 - » the combined audience of Simba's channels fell by 1.7 percentage points;
 - » market shares remained between 30% and 40%;
 - » technological changes and the growth of streaming services in the period eliminate any competitive risk;
 - » exercise of market power unlikely;
 - » investments made by SBT, Record, RedeTV and Simba to improve content and jointly develop products and services for pay TV and other media (pursuant to the agreement signed with CADE in 2016).

JV Simba – Tribunal Analysis:

- The Tribunal conditioned the clearance of the transaction on the following main restrictions:
 - » the obligation for prices charged to medium-sized providers to be based on an average of the prices charged to large operators - with these large players, negotiation is free;
 - » the free of charge licensing of channels to small providers must be maintained for a period of 9 months; after this period, prices charged to small providers will be calculated as described above;
 - » no limitations on the direct reception of digital channels by small providers;
 - » no limitations on the technologies or equipment used by small providers to distribute digital channels;
 - » prohibition of tie-in arrangement and obligation to maintain the quality of digital signals made available to small providers;
 - » limiting the term of the joint venture to 14 years.



What's next

(I) If at least one new commissioner is not appointed and confirmed by Senate, as of November 4, 2023, CADE's Tribunal will lack a quorum, preventing sessions from being held and suspending all of its decisions

- With less than a month to go, the new commissioners have not yet been appointed, and they still must go through confirmation and approval proceedings in Congress. As noted in the July 2023 edition of this publication, if at least one new commissioner is not appointed by early November, the lack of quorum will prevent trial sessions from being held and will suspend procedural deadlines and prevent all M&A transactions subject to mandatory merger review by CADE from closing, even those that have been already approved without restrictions by the General Superintendence.

(II) IBRAC's traditional yearly event will discuss how to make leniency agreements more attractive

- In 2023, antitrust authorities have been seeking to recover the attractiveness of leniency agreements, following a steep decline in their adoption in the last decade. Partner Patricia Carvalho will moderate a panel on the subject at the 29th International Seminar on Competition Policy hosted by IBRAC on November 9th and 10th in São Paulo. Panelists include the General-Coordinator of the Antitrust Leniency Program, Felipe Roquete, the Executive Secretary of the Office of the Federal Controller General (CGU), Vânia Vieira, as well as foreign specialists in the field bringing in perspectives from the US and Europe.

- The cause for concerns about this decline stems from the fact that leniency agreements are crucial tools for investigations in cartel cases, which are seen as the most harmful competition violation. There are several reasons for this drop in leniency agreements' attractiveness: financial and reputational costs involved in negotiation proceedings, the challenges in coordinating the case with multiple authorities (CADE, the Public Prosecutor's Office, Controller General Offices, etc.), as well as the recent developments in legislation in Brazil and globally on cartel damage claims.

- In 2023, CADE executed its 109th Leniency Agreement, the second one in 2023. Between 2021 and 2023 to date, CADE executed 8 leniency agreements. Between 2017 and 2019, 37 agreements were executed.

- In 2023, relevant antitrust authorities from several jurisdictions have been attempting to recover the attractiveness of these agreements, investing in the promotion of these programs and discussing how to improve them. Two initiatives stand out:

- » The OECD's paper on "[The Future of Effective Leniency Programmes: Advancing Detection and Deterrence of Cartels](#)," to which many countries contributed and which allowed a debate from different perspectives on how to ensure the continuous improvement of leniency programs around the world; and

» The UK Competition Markets Authority (CMA) [video](#) promoting the program on social media.

- This is a very challenging scenario, but it brings an opportunity for us to rediscuss standards and improve leniency programs, as well as understand their importance to curb cartels. Even if this is not a “silver bullet” to solve the issue, the global movement has placed leniency agreements back to the forefront of international debates and may result in innovations as regards antitrust regulations in the future.

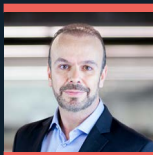
- More information on the panel and the IBRAC annual seminar may be found at: https://ibrac.org.br/inscricao_evento.htm/evento/058055058

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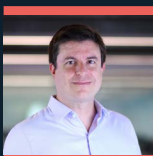
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PARTNERS IN CHARGE OF THE CONTENT:



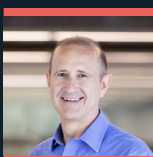
**GUILHERME
RIBAS**

gribas@tozzinifreire.com.br
55 11 5086-5198



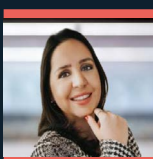
**MARCEL
MEDON SANTOS**

mmsantos@tozzinifreire.com.br
55 11 5086-5144



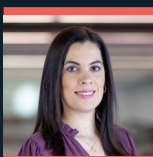
**MARCELO
CALLIARI**

mcalliari@tozzinifreire.com.br
55 11 5086-5313



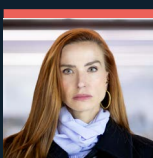
**PATRICIA
BANDOUK CARVALHO**

pcarvalho@tozzinifreire.com.br
55 11 5086-5142



**TATIANA
LINS CRUZ**

tlins@tozzinifreire.com.br
55 11 5086-5239



**VIVIAN
FRAGA**

vfraga@tozzinifreire.com.br
55 11 5086-5397



**Tozzini
Freire.**
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tozzinifreire.com.br