

Collaboration among competitors: limits and best practices



There is no antitrust exemption for any kind of interaction among competitors. This is the clear signal from CADE (Acronym in Portuguese for Administrative Council for Economic Defense), the Brazilian Antitrust Authority.

INTERACTIONS AMONG COMPETITORS:

- Trade associations, professional groups, standard-setting organizations.
- Formation of consortia, joint ventures, associative agreements and other collaboration agreements among competitors.
 - Collaboration agreements among competitors may include infrastructure sharing agreements, joint measures promoting sustainability, collaborative designs for the development of new technologies and/or new medications, joint purchasing agreements, licensing agreements, strategic alliances, joint loyalty programs, those to address major economic crises, among others.

APPLICABLE SANCTIONS:

- Failure to notify CADE whenever mandatory: gun jumping practice [fines of up to BRL 60 million]
- Sharing of competitively sensitive information [fines of up to 20% of the group's revenue]
- Cartel [fines of up to 20% of the group's revenue and prison sentence for individuals]
- Influence on the adoption of uniform commercial conduct [fines ranging from BRL 50 thousand to BRL 2 billion for associations]

Note: Everyone is subject to the Brazilian Antitrust Law: individuals and legal entities (government-owned or private ones); association of entities or individuals (temporary or not) which have been legally incorporated (de jure) or not (de facto).

- + Reputational damages
- + Market value decline for companies
- + Legal expenses

Among others

The topic is complex, as such interactions can be legitimate and bring benefits to businesses although also exposing companies and entrepreneurs to illicit practices. Examples of such include: (i) lack of submission of such agreements to CADE whenever mandatory (**gun jumping**), (ii) the **exchange of competitively sensitive information**, (iii) **cartel** practices, among others. Such interactions require a specialized legal preventive analysis from both the merger filing and anticompetitive conducts perspectives.

Recently, CADE hired a specialized technical consultancy in competition law matters to develop a [Guide for Collaboration among Competitors](#) which includes a [Study on the Exchange of Competitively Sensitive Information](#).

Examples of situations where collaboration among competitors is considered a merger case of mandatory submission:

- *Joint ventures* and consortia among competitors (or even among non-competitors) are deemed as a merger case of mandatory submission from the perspective of the Brazilian competition law.
- Contracts deemed as "associative," lasting \geq two years:
 - constituting a common enterprise for the exploitation of economic activity;
 - resulting in the sharing of risks and results of the economic activity which is the scope of the agreement; and
 - in which the contracting parties are competitors in the relevant market under the contract.

REQUIREMENTS FOR MERGER FILLINGS

Those resulting or that may result in effects in Brazil.

Those in which economic groups involved on opposite sides of the transaction exceed the gross turnover criteria locally (in Brazil): BRL 75 and BRL 750 million.

Beware of the [definition of economic groups](#) according to specific regulations and CADE guidelines.

[SEE OUR NEWSLETTER ON THE SUBJECT](#)

Except for agreements aimed at enabling participation in public tenders.

Examples of agreements of mandatory submission



Logistics Sector: Vessel Sharing Agreements (VSA)



Telecommunications Sector: Ran Sharing Agreements (RSA)



Aviation Sector: Joint Business Agreements (JBA)

COLLABORATIONS IN THE AVIATION SECTOR ON CADE'S RADAR

- Announcement of a codeshare agreement between Azul and Gol recently caught CADE's attention
- Although codeshare agreements are not subject to mandatory notification - as a rule, they do not involve any degree of coordination and interference between the parties - the concern arose at a time when the companies are negotiating a potential merger

Competition merit analysis of collaborations among competitors submitted to CADE

- **ESG Collaboration:** [[CHECK OUR NEWSLETTER ON THE SUBJECT](#)]

- Led by TozziniFreire Advogados, it involved a joint investment by four agricultural trading companies in a startup with the purpose of developing and operating a platform to facilitate (securely) access and visualization of sustainability data from agricultural and food supply chains.
- Unanimously, CADE's Tribunal unconditionally cleared the transaction. The decision is relevant and innovative for cases involving platforms among competitors, as in addition to CADE considering the antitrust safeguards outlined in the transaction documents as sufficient, the decision made it clear that the submission of an Antitrust Protocol is a necessary aspect for CADE's assessment.

- **Technological and Innovation Collaboration:**

- Joint venture among certain German companies for the creation of a platform in the automotive sector, notified and approved in several countries.
- In late 2022, CADE conditioned its approval on the companies adhering to unilaterally imposed obligations.
- The companies abandoned the transaction, claiming that obligations imposed by CADE were not feasible. However, after news that they had created another similar company (called "Cofinity-X"), CADE's Tribunal determined (i) the initiation of investigations due to gun jumping and anti-competitive practices, (ii) the evaluation of whether it was necessary to draft misleading and false penalty notices, (iii) and recommendation to inform the authorities of other involved jurisdictions.

- **Countervailing Power:**

- In September 2023, CADE's Tribunal conditionally cleared the extension of the activities of the JV Simba Content (formed by SBT, Record, and RedeTV), whose main objective would be the intermediation and representation for distribution and sale of free-to-air and/or pay TV signals to pay-TV service providers.
- The Tribunal conditioned clearance on various obligations, including the free assignment of channels to small operators and price obligations for medium operators (at a level compatible with that offered to major operators).

I. COLLABORATION AMONG COMPETITORS

Examples of important safeguards to mitigate competition risks

- Prior assessment of competition risks.
- Precise delimitation of the scope, duration, and territory to which the collaboration applies.
- Limitation of the individuals involved and signing of confidentiality agreements.
- Some collaborations may require an **Antitrust Protocol with Governance Rules**.



The specificities of the types of collaboration should be considered

II. INTERACTION AMONG COMPETITORS (AND OTHER MARKET PLAYERS) IN INDUSTRY ASSOCIATIONS

Examples of important safeguards to mitigate competition risks

- Periodic competition compliance training; and
- Risk management before, during, and after meetings.

New risk areas (labor market, sustainability).



Attention: Competition safeguards are equally required in advocacy efforts before government agencies

Example of Exchange of Competitively Sensitive Information.

'Specific information that directly relates to the performance of the core activities of economic agents, which include, but are not limited to, (...): (a) costs; (b) capacity level and expansion plans; (c) marketing strategies; (d) pricing products (prices and discounts); (e) key customers and guaranteed discounts; (f) employees' salaries; (g) key suppliers and terms of contracts entered into with them; (h) non-public information on brands and patents and Research and Development (R&D); (i) plans concerning future acquisitions; (j) competitive strategies, as well as any business secrets, know-how, commercial information or any [confidential] information or data which is not public available.' CADE - ACC (Acronym in Portuguese for Merger Control Agreements) in Merger Case No. 08700.002488/2022-48/2023-37, dated as of October 19, 2023.



Recently, CADE initiated an investigation against automakers to investigate an alleged conduct of exchanging sensitive information potentially affecting competition in the international market of light motor vehicles for passenger transportation. As reported by CADE, this is the first case in Brazil where competing companies are being investigated for seeking to mitigate competition through innovation.

CADE's Institutional Actions

- **Hiring consultancy services from UNDP Brazil to propose a draft guide on collaboration among competitors**
 - The document is expected to be made available for public consultation by the end of the year to receive feedback from the antitrust community.
- **Temporary Information Note on Collaboration among Companies to Address the Covid-19 Crisis, published in July 2020, during the pandemic**

The general guidelines for collaboration among companies involve considerations regarding scope, duration, territorial scope, governance, transparency, and good faith.

Progress on the Subject in Other Jurisdictions

Given the trend of cooperation among competitors, Competition Authorities around the world are adopting certain initiatives, such as the (i) creation of specific rules on the subject and (ii) the development of guidelines to assist players on situations of higher and lower risk.



COLLABORATION AMONG COMPETITORS AND SUSTAINABILITY

In addition to the European Union (Horizontal Cooperation Guidelines), the United Kingdom (Guidance on Horizontal Agreements), Japan (Antitrust guidelines on environmental sustainability, including business cooperation), and the Netherlands (Guidelines for Collaborations among Competitors) have updated specific guidelines for collaboration with competitors over the last few years, in response to calls from the private sector to more clearly articulate which forms of sustainability-related collaboration would be allowed. The United States is also expected to revise its 2020 document on the subject, the Antitrust Guidelines for Collaborations Among Competitors.

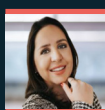
What to expect?

- Increase in the submission of collaboration agreements through CADE's consultation proceeding: analysis with a binding opinion to CADE's Tribunal and the parties;
- Greater scrutiny by the authority regarding collaborations among competitors, either through the investigation of anticompetitive conducts or through the initiation of APACs (acronym in Portuguese for the administrative procedures for the investigation of merger cases);
- Compliance by-design: seeking the implementation of specific mechanisms to mitigate competition risks, with emphasis on Corporate Governance mechanisms; and
- Publication by CADE in 2024 and/or 2025 of a Guide on Collaboration among Competitors, including a Study on the Exchange of Competitively Sensitive Information.

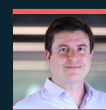
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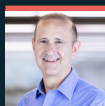
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