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JUDICIALIZATION OF CADE DECISIONS: CHARACTERISTICS AND CONTROVERSIES OF SUPERMERGERS IN BRAZIL

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ABSTRACT

This research is based on the ongoing need to discuss the judicialization of CADE decisions, given the constant mergers and acquisitions of large companies in the most diverse sectors and society's concern with maintaining competition through clear criteria. Despite the exercise of the constitutional principle of access to the judiciary, the problem is based on the possibility of discussing these decisions in light of their legal nature. In this sense, a deductive method, qualitative research, scientific articles, and national doctrine were used, in addition to legislation related to the subject, to contextualize the judicialization of the decisions of the Administrative Council for Economic Defense - CADE, a national agency that has been widely used by companies that in some way are dissatisfied with its administrative decisions. The context of the agglomerations carried out in Brazil is analyzed, which continually tend to form and cause imbalances in the market, requiring government modulation.

Keywords: Administrative Council for Economic Defense - CADE. Decisions. Judicialization. Supermergers.

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Revista ARACÊ
ISSN: 2358-2472

INTRODUCTION

The caput of art. 170 of the Federal Constitution states that the Brazilian economic order is based on the valorization of human labor and free initiative, in addition to providing for compliance with the following clauses, especially for this research, free competition. It was through this line of ideas that CADE - Administrative Council for Economic Defense - was created, an agency responsible for ensuring free competition in the market, with jurisdiction to monitor and judge antitrust issues. In addition, it judges requests for corporate agglomeration, having the nature of a judicial body.

However, the decisions issued by CADE are usually subject to judicial review, demonstrating dissatisfaction on the part of the litigants. Most of the decisions are brought to the attention of the Judiciary, which in turn usually follows the opinions of these administrative decisions. The issue, in truth, is not mere nonconformity. It is possible to see an intention beyond mere judicialization. Companies usually carry out the agglomeration stages and only then bring them to the attention of CADE. While the situation is being analyzed, the companies are already in advanced stages of sedimentation.

On the one hand, we see the judicialization of the board's decisions, on the other, we have the slowness with which they occur. Some take years to be issued, and in the meantime, the conglomerate companies operate in the market at full steam. These actions influence the market dynamics, especially the competition between them and the smaller companies. When a decision is made by CADE, the case is still brought to the attention of the Judiciary, causing even more delay in resolving the dispute. In the meantime, the companies act pungently.

Although it is not coherent to determine that these companies cautiously await the slow decision of both CADE and the Judiciary, it is also not coherent to let them act at their discretion. The economic activity of the then cluster of companies will certainly cease, ceasing their negotiations, and it is also extremely dangerous for these companies to direct the course of the market, which in just one year could lead other smaller companies to bankruptcy due to the absolute impossibility of competition. This is what happens in Brazil.

Using the deductive method, this study will be conducted in stages: initially, the main characteristics of CADE will be outlined, in its powers and activities in Brazil will be pointed out. Next, the extent to which administrative decisions are brought to the attention of the Judiciary will be addressed, and the controversies surrounding the possibility of this action will be addressed. Finally, the super mergers in Brazil and the position of national courts on

Revista ARACÊ
ISSN: 2358-2472

the subject will be analyzed, as well as the reasonable procedural duration of these lawsuits.

CADE: COMPETENCIES AND CHARACTERISTICS OF DECISIONS

Created by Law No. 4,137/62 and later revoked by Laws No. 8,884/94 and Law 12,529/2011, CADE is a special-regime agency with jurisdictional activity throughout the national territory. The agency has a complex decision-making system, not only in terms of legal-administrative issues but also with their economic implications, with direct interference in private and public interests. The constant binomial of what is legality vs. morality means that the actions of this agency go beyond mere administrative issues.

It was through Law No. 8,884/94 that CADE began to appear at one of the poles of the procedural relationship, “in legal actions, being represented by its attorneys and, only in the absence of these, [...] may the Federal Public Prosecutor's Office promote the execution of its judgments [...].” (Pais, 2007, p. 87).

It is also worth noting that this attribution also arose from the fact that CADE became a federal agency, integrating the indirect administration of the Government, and, from then on, it began to focus more closely on the prevention and repression of infractions against the economic order, and whose attributions will be better addressed below.

It is interesting to note that, according to Maria Sylvia Zanella di Pietro (2024, p. 428), “the first legal concept of an agency was given by Decree-Law No. 6,016, of 11/22/43, which defined it as a ‘decentralized state service, with public legal personality, explicitly or implicitly recognized by law.’”. Since then, in addition to the creation of several agencies, some have been elevated to the category of special agencies, which concentrate, in addition to their characteristics, specific privileges about other agencies. As indicated in the Executive Summary of the results of the research on lawsuits filed against CADE decisions, summarizing the historical process of the legal composition of the aforementioned council:

> The institutional consolidation of a competition protection agency has been a long road, dating back to the enactment of Decree-Law No. 7,666/45 (the “Malay Law”), and also includes the creation of CADE in 1962 as a committee with incipient activities for almost three decades, the enactment of the Federal Constitution of 1988, with the insertion of principles in articles 170 et seq., as well as the implementation of a market economy, finally arriving at Law No. 8,884/94 and the last 16 years of consolidation of activities to control anticompetitive conduct and structures through an independent agency.

Revista ARACÊ
ISSN: 2358-2472

Thus, CADE is an important technical administrative body that "[...] has the objective of preventing and repressing anti-competitive practices, [...], whose purpose is to preserve the national economy and the well-being of all [...]. (Atiê; Medeiros Júnior, 2010, p. 51). The well-being of all is based on the rights of the end consumer, who needs competition to obtain competitive prices and the right to choose products on the market. Likewise, the book celebrating the 50th anniversary of CADE in Brazil (2013, p. 31) points out:

> When companies compete with each other, they seek to offer higher quality goods and services at lower prices. The result of this competition is that the consumer pays less to have access to a greater variety of products and services. Competitiveness stimulates innovation and increases efficiency and productivity, in addition to generating opportunities for companies to enter a market and develop their businesses. These elements contribute to a healthy economic environment, generating growth for the country and well-being for society.

With the advent of the Competition Defense Law, Law No. 12,529/2011, the Brazilian Consumer Defense System (SBDC) underwent restructuring and the competition defense policy in Brazil underwent significant changes, among them the one that determined that CADE would be responsible for instructing the administrative processes for investigating violations of the economic order and analyzing acts of concentration. Previously, these responsibilities were the responsibility of the Secretariat of Economic Law.

CADE's activities are currently based on three main functional axes: preventive, repressive, and educational. Prevention occurs by analyzing and then deciding on mergers and other acts of economic concentration. It represses and judges the formation of cartels, also investigating other conducts that are harmful to free competition.

Finally, in the educational modality, the council exercises the power to "instruct the general public on the various conducts that may harm free competition; encourage and stimulate academic studies and research on the subject, establishing partnerships, in addition to "holding or supporting courses, lectures, seminars and events related to the subject; publishing publications, such as the Competition Law Journal and booklets.

The regulatory activity of the State was responsible for the intensification of CADE's activities. After the 1990s, the council began to play a more influential role in the prevention and repression of antitrust, a fact that, according to Atiê and Medeiros Júnior (2010, p. 46):

Revista ARACÊ
ISSN: 2358-2472

> Given the new economic reality, Law No. 8,884 of June 11, 1994, was enacted, creating conditions to ensure the defense of competition in our country. Primarily, it sought to prevent companies from abusing and overusing their positions of economic dominance, inflicting restrictions on free competition in the markets in which they operated, as well as increasing their market power through alliances or mergers with companies of the same caliber, and competitors..

In Brazil, this State intervention in the economy followed a global trend, while in other parts of the world, driven by globalization and the need to protect its economic market, both internally and externally, it did so. As Atiê and Medeiros Júnior (2010, p. 48-49) state, “It is also interesting to note that the market serves as a real tool, in a way that is indispensable for meeting the material demands of human beings, since it acts as a storehouse of resources and time [...]”. Note that the authors point out the systematization of the market, which is inevitably built by people and a whole complex of interconnections, but which requires social rules according to the dynamic order in which they coexist.

CADE's actions with projected effects at an international level include the repression of dumping practices, unfair internal and external trade practices that can occur in various parts of the world, and harm-free competition. However, according to Fernandes (2000, p. 34), “the imposition of Antidumping and Compensatory Duties is not immediate.

To be permitted, the damage or threat of damage to the local industry must be proven, as a result of the practice of dumping and subsidies in the market.” CADE’s actions are carried out through the assessment of administrative actions, “[...] and Compensatory measures that have their procedures, with specific deadlines, hearings for the parties and finally with the decision on whether or not to impose a measure.” (Fernandes, 2000, p. 34).

These duties are applied to imports, being added to the existing Import Tax, which results in a higher purchase price of the foreign goods by the importer. It is carried out through an administrative action, called Antidumping Action, and measures.

Therefore, for the market to have a healthy continuity, it is necessary to ensure freedom of competition and broad autonomy of consumer choice, and, for this, the action of CADE is fundamental in preserving the areas of defense against competition. Thus, in 2003 there was an intensification of CADE's actions in the repression of cartels, which, according to data compiled in commemoration of CADE's 50th anniversary (BRAZIL, 2013):

Revista ARACÊ
ISSN: 2358-2472

> The fines for administrative convictions, which are provided for in Law 12,529 of November 30, 2011, range from 0.1% to 20% of the gross revenue of the company, group, or conglomerate obtained in the year before the initiation of the administrative proceeding, in the field of activity in which the infraction occurred. When these convictions are applied to individuals or associative entities, the fines can range from R$50,000 to R$2 billion (art. 37, II), in addition to additional fines, both for individuals and legal entities.
> Even if the lawsuits are brought to court, it does not seem reasonable that they should not be filed with the judiciary simply because the latter does not have the technical expertise that CADE has. Furthermore, as noted by Atiê and Medeiros Júnior (2010, p. 64)

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Even if the lawsuits are brought to court, it does not seem reasonable that they should not be filed with the judiciary simply because the latter does not have the technical expertise that CADE has. Furthermore, as noted by Atiê and Medeiros Júnior (2010, p. 64)):

> […] It does not seem wrong for the Judiciary to verify the application of the Principle of Proportionality and Reasonableness, provided for in our Federal Constitution, of the fine applied or the obligation to do or not to do, imposed by CADE, as a condition for admitting the legal transaction that is intended to be carried out by economic agents.

In this way, in addition to verifying the application of legal criteria, the judiciary will also be able to verify the application of the aforementioned principles, to prevent companies from being punished excessively. As soon as they feel dissatisfied, companies have all the legal support to take their demands to court, even with the controversies that will be pointed out in the following topic.

DOCTRINAL CONTROVERSIES OF THE JUDICIALIZATION OF ADMINISTRATIVE DECISIONS

CADE has among its three axes those competencies that directly refer to the knowledge and judgment of administrative processes, whose decisions can be brought to

Revista ARACÊ
ISSN: 2358-2472

the attention of the Judiciary, which can analyze the facts in light of legality and, as will be seen below, usually confirms CADE's administrative decisions.

The council also acts so that certain demands that may have antitrust connotations are studied and rejected. In the field of prevention and repression of anti-competitive conduct, according to the compilation of information relating to the council's 50 years of activity (BRASIL, 2013), it points out that:

> Law 8.884/94 was fundamental for the development of competition defense policy. When this law came into force, Brazilian business culture was still strongly marked by price control mechanisms, and the presence of the State as a main actor was requested by several sectors.

The proposed approach in this research concerns the first two axes, preventive and repressive. The legal nature of CADE's decisions is administrative since it does not have jurisdictional powers.

Within the broad administrative area, another necessary approach is taken to analyze the council's decisions: their delimitation and classification as discretionary and binding, according to the administrative act that led to them. At this stage, it is undeniable that these decisions have the necessary attributes to be recognized as administrative since they are endowed with legitimacy and veracity, imperativeness, self-executing, and typicality.

Likewise, they have the indispensable elements for the composition of the administrative act, subject, object, form, purpose, and motive. The controversy lies in the classification between binding and discretionary acts, which will be the subject of the following analysis.

Discretionary and binding acts have characteristics that inevitably compose them: legality. Therefore, the act performed must inexorably be provided for by law, under penalty of being irremediably tainted with the vice of illegality, which endorses the annulment of the act and its expunging from the legal world. However, some other characteristics can be pointed out to differentiate them, even if the regulation does not reach all aspects of administrative action. In this sense, Di Pietro (2024, p. 212) asserts:):

Revista ARACÊ
ISSN: 2358-2472

> […] The law leaves a certain margin of freedom of decision in the face of the specific case, so that the authority may opt for one among several possible solutions, all valid before the law. In these cases, the power of the Administration is discretionary. The adoption of one or another solution is made according to criteria of opportunity, convenience, justice, and equity, specific to the authority because they are not defined by the law. Even in this case, however, the power of administrative action […] is not free, because, in some aspects, especially competence, form, and purpose, the law imposes limitations. (author's emphasis))

The author also points out that discretion only finds space where there is legality, and for this reason, it can be concluded that "the actions of the Public Administration in the exercise of the administrative function are binding when the law establishes a single possible solution in the face of a given factual situation [...]" (Di Pietro, 2024, p. 212). Regarding the decisions issued by CADE, since their characteristics are much closer to binding than to discretion, it is understood that they are primarily binding. One of the reasons is the fact that the aforementioned council is a technical body, and therefore issues decisions of a technical and non-discretionary nature.

The decisions issued by CADE are legally binding, and what is decided is based on what the law allows or prohibits. The recommendations given in most judgments also express the same idea, that of maintaining the legal order. These CADE decisions, therefore, have a binding administrative nature and therefore appear in the legal system through acts arising from the law.

Given that the law is unable to regulate all everyday acts, it is inevitable that there will be a modulation of facts, the subsumption of which does not exceed the limits between the binding and the discretionary act, in light of the constitutional principles of access to justice and the inalienability of jurisdiction.

In this same sense, Atiê; Medeiros Júnior (2010, p. 51) points out):

> CADE's decisions are characterized as binding acts, linked to the complexity of the scientific criteria that must be examined in light of the specific case and are not linked to the law itself. Thus, there is no room for discussion regarding the likelihood of the Judiciary, when prompted, interfering to assess the legitimacy of the judgments issued administratively by the agency in question.

Once the nature of the decisions has been defined, the problem now lies in the possibility of judicializing the decisions. Thus, since there is no independent administrative litigation model in Brazil, even though CADE has a type of decision-making court, such decisions are subject to judicial review. The Brazilian legal system has a single jurisdiction, according to Art. 5, XXXV of the Constitution.

Revista ARACÊ
ISSN: 2358-2472

However, as Hely Lopes Meirelles (2008, p. 211) teaches, judicial review of administrative acts “is solely of legality, but in this field, the review is broad, given the constitutional precepts that the law will not exclude from the assessment of the Judiciary the injury or threat to a right (art. 5, XXXV)”, among other guarantees indicated in the constitutional text.

The same author adds that “given these mandates of the Constitution, no Public Power may be exempted from judicial review, regardless of its category (discretionary or linked) and originating from any agent, agency or Power.” This implies that “the only restriction is regarding the object of the trial (examination of legality or harm to public assets), and not regarding the origin or nature of the contested act.” (Meirelles, 2008, p. 211). The Judiciary may not assume the jurisdiction of the public administration, but it may say whether it acted by the law, within its jurisdiction, and may indicate where the violation of individual or collective rights is verified. In this sense, given the possibility of judicialization of CADE’s administrative decisions, it is clear that the controversy, doctrinal and jurisprudential, is subsumed within the scope of this review. This non-interference also maintains the logic of the primacy of the separation of powers, as a determinant for the independent action of each of the spheres. In this regard, Binenbojm (2005, p. 28) comments:):

> Within the logic of the separation of powers, Parliament, as a vehicle for expressing the general will, would have primacy in the elaboration of legal norms, which would not only limit but also pre-order the actions of administrative bodies. The Administration would thus be left with a merely executive function, of mechanically fulfilling the will already expressed by the legislator. Thus, the idea of legality as a positive link to the law arises: if individuals, in prestige and appreciation of their public and private autonomy, are allowed to do everything that is not prohibited by law, the Public Administration is only required to act by what the law prescribes or allows.

Within its jurisdiction, the Judiciary may analyze formal aspects restricted to the control of legality and compliance with the legal norms of the system, as well as the guarantees of procedural order. Under the analysis of material aspects, the Judiciary may analyze the decision-making process only when the legality of the acts is verified, since it is understood that a broad review of the component elements would lead to the emptying of CADE's jurisdiction.

What would be the point of maintaining this council, if its decisions and motivations can be reviewed by another power? It is alleged that such an action would be an invasion

Revista ARACÊ
ISSN: 2358-2472

of jurisdiction, according to the understanding of some jurists and courts. The most emphatic (and most disturbing) positions refer to the emptying of CADE's functions to the detriment of a more expansive action by the Judiciary and the technicality/complexity of the matter in question. However, the technical nature of the council's decisions, although it can be justified by the complexity of the matter, cannot be used as an argument to exclude the action of the judiciary, whose jurisdiction is constitutional. The level of technical expertise of CADE is undeniable, and there are no specialized courts in Brazil to judge antitrust matters. When these lawsuits reach the judiciary, probably in a court with civil jurisdiction, depending on the level of expertise of the matter, the judge will not be prepared to understand them immediately. This lack of technical expertise makes the processes slow, even more so because complex lawsuits are already, by their nature, slow. Within this dynamic that surrounds the judicialization of CADE decisions, an interesting phenomenon occurs, as noted by Atiê and Medeiros Júnior (2010, p. 64): [...] given this possibility of seeking protection of rights by the interested party, a phenomenon has occurred today called the “judicialization of competition”, due to the gradual frequency of filing lawsuits in the Judiciary, to question CADE's technical-administrative decisions. This is because the idea that the specialization of the subject matter discussed in these lawsuits is so dense that the Judiciary should not submit to it should not be taken into consideration. To examine these lawsuits, it is necessary to know anticompetitive behavior and economic phenomena, but, although indispensable, it is not necessary to have very dense knowledge, because, in addition to everything, the Judiciary also has experts to remove any doubts about what is raised in these lawsuits.

By analyzing the facts from the perspective of legality, dismissing, a priori, considerations about the discretionary nature of the decision, the Judiciary delimits its sphere of action, because even issues judged by CADE taking into account strict legality, have edges with a discretionary bias, of modulation and adaptation to reality. However, as with everything in the legal field, the principles of proportionality and reasonableness must be applied to avoid excesses of all kinds. Balance, when so many interests are involved, is essential for there to be an approximation of justice. In this regard, Oliveira (2000, p. 62) understands):

Revista ARACÊ
ISSN: 2358-2472

> While traditional doctrine, to consider an act as linked, prohibits the Administration from any intellectual participation, it is possible to verify opinions today that, even when it is necessary, freedom of assessment on the part of the administrator does not exist. Thus, in the face of a case regulated by law in a relatively broad manner, the administrator is not given the right to choose any of the possible decisions, but he is committed to choosing the best one. This reasoning leads to the conclusion that certain situations, previously considered as discretionary power of the Administration, are now recognized as linked activities.

It cannot be denied that it is in the Judiciary that discussions about corporate agglomeration efforts are being held, while it is also the sphere responsible for the final interpretation of antitrust legislation. And so as not to seem too incisive, it is also in the Judiciary that the most varied discussions take place in the most varied spheres, and the Judiciary has ended up becoming the official interpreter of the most diverse disputes. However, it must exercise self-restraint to prevent the Judiciary from adopting an overly active and invasive stance, culminating in the emptying of the body's functions, although it is believed that this will not occur for two reasons. First, because the Judiciary's activist stance is accompanied by another stance by the State, however, contrary to that of the judicial body. The Judiciary acts actively when the State acts negatively, failing to fulfill its constitutional function or to manage the repercussions of these powers. Secondly, because the judiciary is not interested in actively participating in antitrust policy, as it is not an expert in the matter, and, mainly, due to the current demand for issues that are as important or more important than the agglomeration of companies, although this is an issue that, despite being complex, takes time to be felt by the population, which is also unaware of its effects and, in most cases, even applauds the agglomerations of companies. As pointed out by (CUEVA, 2009, p. 134)):

> […] CADE's case law concerning the effects of patent licensing on the competitive environment is significant, due to its adherence to the rule of reason, and consistent, as it seeks to avoid harm to competition through the use of remedies based on the principle of proportionality, with the minimum intensity necessary to achieve the intended ends.

Based on the points discussed so far, it does not seem to attribute exclusive jurisdiction to CADE, since it ends up placing on it an obligation that needs to be decentralized to be democratic. Thus, in the following topic, some of the main mergers that have occurred in Brazil will be analyzed, as well as how the courts have acted when prompted by demands arising from CADE decisions.

Revista ARACÊ
ISSN: 2358-2472

JUDICIAL CONTROL OF ADMINISTRATIVE DECISIONS

In force since 2012, Law 12,519/2011, which regulated the structure of the Brazilian Competition Defense System and provided for the prevention and repression of violations against the economic order, in addition to other measures, brought a series of provisions on “the prevention and repression of violations against the economic order, guided by the constitutional dictates of freedom of initiative, free competition, the social function of property, consumer protection and repression of the abuse of economic power.” (BRASIL, 2011).

In chapter II, art. 36, the aforementioned law (BRAZIL, 2011) provides for the infractions of the economic order:

> The following acts constitute an infraction of the economic order, regardless of fault, in any form manifested, which have as their object or may produce the following effects, even if they are not achieved: I - limiting, distorting, or in any way harming free competition or free enterprise; II - dominating a relevant market for goods or services; III - arbitrarily increasing profits; and IV - abusively exercising a dominant position.

Further, the same law states, in § 1, that “the conquest of a market resulting from a natural process based on the greater efficiency of an economic agent about its competitors does not constitute the illicit act provided for in item II of the caput of this article.” (BRAZIL, 2011). Given these legal provisions, the judiciary will act according to these legal guidelines, in addition to verifying the principles of proportionality and reasonableness.

According to Pais (2007, p. 93), “the national legal system adopted the monopoly regime of judicial decisions, which is exercised by the Judiciary, except for some exceptions constitutionally provided for.” For this reason, CADE’s administrative decisions may be reviewed, at any time, by the Judiciary, and the defendant may question the administrative acts of the competitive agents, “using annulment actions, preceded or not by precautionary measures.” (PAIS, 2007, p. 93).

There is a strong tendency for acts of corporate agglomeration to be carried out first and then brought to the attention of CADE, although this is not the policy of the aforementioned council.

Some authors argue that this practice is, in a way, misleading. The information provided by companies when they carry out acts of concentration is essential for the exercise of the agency's police power. According to Araújo (2015, p. 117), “the expression ‘deceitfulness’ is not exclusive in the law to information provided to CADE”.

Revista ARACÊ
ISSN: 2358-2472

The author points out that “in the illustrative list of conducts, [...], it is characterized as an infraction of the economic order to use ‘deceitful’ means to cause price fluctuations [...]”, considering that “the main aspect of deceitfulness [..] is the relationship between the information of the parties and third parties with the antitrust authority” (Araújo, 2015, p. 117). The more reliable this information is, the faster the deliberation will be. Furthermore, when such information is provided in a non-compliant manner, Article 43 of Law 8,884/94 provides for the application of a fine of five thousand to five million reais, depending on the severity of the facts and the economic situation of the offender. In addition, misleading information may also lead to the revocation of administrative authority, “resulting in harmful consequences for companies and third parties related to the concentrated corporate structure.” (Araújo, 2015, p. 118).

CADE has a policy to combat cartels, and several companies have been severely monitored for their attempts at super-mergers. First of all, it is important to note that, for a better understanding of the Brazilian Competition Defense System (SBDC), it has two instrumental aspects of protection for the maintenance of economic order.

One, is structural, and the other, is behavioral, with the structural one being preventive, acting to prevent the formation and excessive concentration of market power through control of the structure of companies; Behavioral control refers to the way they behave in the market, to prevent adjustments and combinations to participate in bids.

According to the same source, these convictions are still subject to appeal to the CADE court, composed of seven judges, who can ultimately impose a fine of up to 20% on the value of the transactions. The deals were made by adjusting proposals and withdrawing them, to defraud bids. These companies maintained constant contact to dominate the market and prevent other companies from participating in the bidding process. In this regard, the following data is available from the CADE website::

> The bidding processes were carried out in several states and municipalities, such as São Paulo, Rio de Janeiro, Santa Catarina, and Goiás, between 2007 and 2012. According to the Superintendence's opinion, the evidence gathered during the investigation shows that the defendants maintained permanent contact to fix prices and negotiate advantages in bidding processes, to divide the market – including through subcontracting – and to pre-designate the winners of the bidding processes. The implementation of the strategies included, for example, the presentation of cover bids and the suppression of bids.

Revista ARACÊ
ISSN: 2358-2472

It is interesting to note that CADE operates in line with an anti-cartel policy, and this type of violation does not only occur as a result of super mergers. The data presented above serve to give an idea of the importance of the board in the market. However, given the chosen context, the main super mergers that have occurred in Brazil will be discussed below. In this sense, it is important to understand how the board operates until the final decision is made.

CADE's administrative decisions, when submitted to the Judiciary, are generally reviewed in their material aspect so that adopting a certain theoretical approach represents a political choice on the part of the competition defense authority.

Thus, the CADE court's advisors carry out procedural analyses whose purpose and objectives are based on competition law. When submitted to the Judiciary, the analysis will be conducted to determine whether the grounds outlined in CADE's administrative decision are by competition law, and therefore, as exhaustively stated throughout this study, it refers to the assessment of binding administrative decisions.

The freedom to choose one way of acting or another will depend solely on the specific case, and not on the will of the advisor, which gives the decision the essence of a discretionary act. The objectives of competition law, in this context, guide CADE's decisions, guiding the choice of theoretical and doctrinal grounds for the judgments.

According to Atiê and Medeiros Júnior (2010, p. 64), "[...] given this possibility of seeking protection of rights by the interested party, a phenomenon has occurred today called "judicialization of competition", which would be the judicialization of cases by the companies involved, to question CADE's administrative decisions.

The authors add that the judiciary, "to examine these actions, must know anticompetitive behavior and economic phenomena, but, although indispensable, it is not necessary to have very in-depth knowledge [...]". This means that the judge, to understand matters that he does not master, must rely on experts, who can still be consulted if there is any doubt about the reports.

In this regard, according to the Executive Summary – Disclosure of Results (2010, p. 24), the largest number of administrative proceedings (PAs)):

> [...] whose decisions were the subject of legal proceedings concern convictions for the practice of uni militancy, identified by CADE as a specific form of cartel practice (10/19), as well as convictions for fee fixing (5/19). It was also found that the administrative decisions in PAs that gave rise to the most legal proceedings were issued in the context of general medical services (15/21).

Revista ARACÊ
ISSN: 2358-2472

> The research also revealed that the Judiciary has not shown itself to be innovative, neither more nor less, about these legal demands, as can be seen in the following excerpt (FIESP, 2010, p. 25):
>
> This reveals the current lack of, in Brazil, a general trend of success or failure in the outcome of the demands brought by economic agents to the Judiciary regarding CADE decisions. This also means, at least from a quantitative perspective, that the Brazilian Judiciary has not necessarily shown itself to be more or less interventionist.

This concern, however, does not contradict the understanding of the Superior Court of Justice, which states that it is the CADE's responsibility to monitor concentration or deconcentration operations. In competition matters, lawsuits are even more frequent in the judiciary, most of the time because they involve large economic transactions, which is why most of the more in-depth questions regarding judicial action in this area are based on the economic analysis of law. Thus, as Oliveira (2000, p. 101) observes, “the great legacy that the AED offers to judicial activity, […] alerting judges to the fact that decisions influence not only the reality of the parties to the litigation and third parties involved with them but also other individuals […]”. This social reach goes beyond the simple economic transaction between the parties involved. The judge needs to be sensitive enough to understand that a decision may affect thousands of people and that the decisions will be final. Cases such as Nestlé-Garoto, in which the transaction was carried out through the subscription and payment by Nestlé of new shares issued by Garoto, in addition to other transactions, so that in 2002, “Nestlé S/A came to hold full control of Garoto S/A, raising several concerns regarding the impact that the concentration of competitors until then would generate in the chocolate market (Mansoldo, 2010, p. 05)”. To make the merger possible, and comply with legal requirements, according to the same, “both parties submitted the act to CADE for consideration. Defending the transaction, they argued that the relevant market to be considered in the agency's analysis should be geographically delimited by the Mercosur area.” Due to the social relationship, the main concern of the defense of competition law was the analysis of the scenario that would be presented if the operations were approved, which, was proven through simulations, that “the economic benefits of the act were outweighed by the potential losses inflicted on chocolate consumers.

The only scenario favorable to approval was an estimate made by the applicants themselves.” (Mansoldo, 2010, p. 06). CADE then considered the possibility of Garoto's activities being terminated and generating mass unemployment, and, according to Mansoldo (2010, p. 10)):

Revista ARACÊ
ISSN: 2358-2472

> Thus, the total annulment of the act and the sale of the assets of Garoto S/A to another company in the sector, which held less than 20% of the relevant market share, was determined. It is worth noting here that the intervention of the Council in setting the maximum level of market share admitted, in theory, a new competitor that held a 44.47% share in the sector. The applicants then developed a divestment plan, which was submitted to CADE together with a request for reconsideration of the case. However, during the request, a public hearing was held in Vila Velha/ES, promoted by Nestlé, and the presence of one of the Councilors who had participated in the trial (Luiz Alberto Esteves Scaloppe) paved the way for the claim that new facts and documents had been produced and should be taken into consideration by the agency.

This decision led to the claimant being taken to court, claiming that the board members had unduly exceeded the 60-day deadline for assessing the transaction. Thus, the judge reinstated the effects of the transaction and ordered the approval of the act after the deadline had expired. (Mansoldo, 2010). At this point, it is interesting to note that the possibility was raised that the board's actions were technically discretionary, but there is no technical discretion.

The outcome was that the claimant appealed and, after a long process, it was understood that CADE should issue a new decision, annulling the first one, as they considered that there were nullities to be remedied, in addition to the assessment of documents that should be analyzed because they were attached after the board's judgment. In this regard, CADE's decisions, such as the Nestlé-Garoto case, involve not only the comparison of an economic analysis of the law from the perspective of protecting competition law but are also accompanied by social issues related to the defense of the consumer market. It does not seem reasonable that companies, especially foreign ones, carry out operations without concern for maintaining the economic structure in operation in the country where they wish to continue operating.

In this way, CADE plays a leading role in defending the Brazilian economic order, also protecting other companies that carry out their activities in the country. It is increasingly necessary to demand speed in the processing of legal proceedings, both in the administrative and judicial spheres, to avoid irreversible harmful effects arising from these transactions.

It is worth remembering that anti-competitive practices can slip into situations that also require civil liability, and for this reason, CADE's actions become even more important, since the public interest can be channeled into specific individual rights. According to Lemos (2018, p. 25), “Through this institute, individuals affected by the cartel [...] seek the

Revista ARACÊ
ISSN: 2358-2472

conviction of offenders also in the private sphere.", which demonstrates the need to keep the council's actions effective.

CONCLUSION

Throughout the research, it was seen that the Administrative Council for Economic Defense plays a fundamental role in maintaining the balance of forces that make up the market, and how its actions restrict excesses and guide antitrust action in the economic scenario. In addition, it acts to prevent possible practices that are harmful to consumers and highlights the healthiest conduct for corporations.

Even surrounded by so much controversy, especially regarding the legal nature of its decisions, CADE remains a strong technical body focused on developing best practices within a decentralized government structure. Despite this, over the years, it has suffered harsh attacks regarding its decisions, as the prevention of certain types of formations that are harmful to the market has been viewed with some distrust.

For this and other reasons, most of them are simply nonconformity. The council's decisions have been subject to judicial review, and among the nonconformities highlighted are access to the judiciary and the inalienability of jurisdiction. Under these premises, the judiciary's actions have been aimed at ratifying the council's opinions, where there is rarely a change in the understanding of the administrative decision.

In this sense, it is healthy to recognize the technicality of CADE, which has a specialized team, which is not always the case when these demands reach the judiciary. Although the judicial analysis is largely legal, the technicality that could be required for the knowledge of the case is, in most cases, relativized. The technical grounds themselves included in the administrative demand serve as the basis for convincing the judge. Given the data studied, it was finally seen that mergers in Brazil are brought to the attention of CADE for approval, but due to abusive practices, they end up being subject to some considerations, which lead these companies to take legal action. Some operations, such as that of Nestlé-Garoto, used only to illustrate the situation, arise from situations in which the defense of competition is essential since linked to these facts is an eminently social issue.

With this, it was seen that the defense of competition by CADE prevents companies, despite carrying out some operations before bringing them to the attention of the board, from being forced by law to bring them to the attention of the administrative body. The study, at this point, does not intend to exhaust the discussion; on the contrary, this is just

Revista ARACÊ
ISSN: 2358-2472

one of the biases that can be addressed. Future research will seek to point out other points whose outlines can be complementary.

Revista ARACÊ
ISSN: 2358-2472

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