TEN YEARS OF CADE'S RESOLUTION NO. 12/2015: HOW CAN BOTH THE ANTITRUST AUTHORITY AND CIVIL SOCIETY MAKE BETTER USE OF THE QUERY PROCEEDING?

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Abstract: Pursuant to Article 9, § 4 e § 5, of Law No. 12,529/2011 – regulated by CADE's Resolution No. 12/2015 – market agents may submit voluntary "queries" with the purpose of obtaining clarifications and guidance regarding the lawfulness of commercial agreements and conducts. Despite its relevance – already acknowledged by the Brazilian competition agency in many instances, for promoting transparency, legal certainty, and celerity, Resolution No. 12/2015 – has been largely underused. Against this backdrop, this article explores the reasons behind such underutilization by conducting a comprehensive analysis of (i) the historical developments and changes of the applicable legal framework; and (ii) all query cases assessed by CADE under Resolution No. 12/2015. This article also examines how CADE could incorporate useful tools deployed by other governmental bodies in Brazil and foreign competition authorities. This article concludes with the proposal of concrete recommendations that can help unlock the full potential of the query proceeding, thereby strengthening Brazil's antitrust enforcement and fostering a more competitive market environment.

Keywords: CADE; Competition Policy; Queries; Guidance; Normative and Procedural Recommendations.

Resumo: Nos termos do artigo 9, § 4º e § 5º da Lei nº 12.529/2011 – regulamentado pela Resolução CADE nº 12/2015 –, agentes de mercado podem submeter voluntariamente consultas visando a obter esclarecimentos e, em última instância, imunidade do órgão antitruste acerca da licitude de contratos ou condutas comerciais, incluindo fusões e aquisições. A despeito de sua relevância – já ressaltada pela autarquia em diversas oportunidades, para promover transparência, imunidade e celeridade – referida Resolução tem sido pouco utilizada. Diante desse contexto, este artigo explora os motivos para tal subutilização por meio de uma análise detalhada (i) da evolução das normas aplicáveis; (ii) e de todos os casos de consultas desde o início da vigência da Resolução CADE nº 12/2015. Este artigo também examina como ferramentas úteis utilizadas por outros órgãos públicos no Brasil e autoridades antitruste no exterior podem ser incorporadas pelo CADE. Este artigo conclui propondo recomendações

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concretas para que as consultas sejam mais bem aproveitadas no Brasil, de modo a aprimorar a política de defesa da concorrência no país.

Palavras-chave: CADE; Defesa da Concorrência; Consultas; Imunidade Antitruste; Alterações Normativas e Procedimentais.

Summary: 1 Introduction; 2 Development of the legal framework on queries; 3 Cade´s Case Law On Queries; 3.1 Key statistics; 3.2 Insights form landmark cases; 4 Conclusions and Recommendations for enhancing the query proceeding; 5 Bibliographic References.

1 Introduction

The Administrative Council for Economic Defense (*Conselho Administrativo de Defesa Econômica* – herein "CADE" or "Authority"), is the entity in charge of conducting competition policy in Brazil. To fulfill its legal mandate, CADE relies mainly on Law No. 12,529/2011, its internal statutes, and regulations, to prevent competitive harm through merger control, repress anticompetitive practices by means of conduct investigations, and promote competition policy through its advocacy role.

Among the tools established by the Brazilian antitrust legal framework, there is the query proceeding, established under Article 9, § 4 and § 5 of Law No. 12,529/2011, and further regulated by CADE's Resolution No. 12/2015.[2] This mechanism allows market agents to voluntarily submit queries seeking clarifications and guidance concerning the legality of their commercial practices and agreements (e.g., mergers). Despite its theoretical benefits,[3] including enhanced transparency, legal certainty, and procedural efficiency, the query proceeding has been notably underutilized since Resolution No. 12/2015 came into effect a decade ago.[4]

The importance of the query proceeding lies in its preventative and collaborative nature, offering companies means to ensure their business practices align with antitrust laws,

[2] This article will use the term "query" as an English translation of the term "*consulta*", used in the original (Portuguese) version of Law No. 12,529/2011. "Query" is the term CADE adopts at the English version of its website. See https://cdn.cade.gov.br/portal-ingles/topics/legislation/laws/LAW%20N%C2%BA%2012529%202011%20%28English%20version%20from%2018%2005%202012%29.pdf. Similarly, whenever referencing to provisions of Law No. 12,529/2011, this article will adopt the translation that CADE uses in the English version of Law No. 12,529/2011.

[3] CADE has already acknowledged the benefits of query in many occasions. See, for instance: President Vinícius de Carvalho's opinion in Query No. 08700.009476/2014-34 (applicant: ABB Ltda.); and Commissioner Gustavo Augusto's opinion in Query No. 08700.007327/2023-21 (applicant: Buser Brasil Tecnologia Ltda.).

[4] Congress admitted that the query proceeding was not being used often when drafting the Brazilian Competition Act. See Brazil. House of Representatives. Report by the Rapporteur, Congressman Ciro Gomes (PSB-Ceará), on Bill No. 3,937/2004. Available at: https://www.camara.leg.br/proposicoesWeb/prop_mostrarintegra?codteor=518696&filename=Tramitacao-PL%203937/2004. About the underutilization of queries, see also Commissioner Diogo Thomson's opinion in Query No. 08700.007327/2023-21 (applicant: Buser Brasil Tecnologia Ltda.).

generally before implementing them. This proactive approach not only mitigates the risk of legal infractions and subsequent penalties, but also promotes a culture of compliance and transparency within the marketplace. However, the practical application of this mechanism has not met expectations, as evidenced by the limited number of queries submitted to CADE over the past ten years. [5]

This article explores the reasons behind this underutilization by conducting a comprehensive analysis of all query cases assessed by CADE under Resolution No. 12/2015. By examining the historical development of the relevant legal framework, alongside similar mechanisms employed by other governmental bodies in Brazil and antitrust authorities abroad, such as in the United States and Australia, this study aims to identify the barriers to effective utilization.[6] Additionally, the article will provide concrete recommendations to enhance the effectiveness and uptake of the query proceeding within Brazil's competition policy system.

The subsequent sections of the article will delve into the evolution of the norms governing queries (Section 2), provide a detailed analysis of CADE's case law on the subject, and extract key insights from landmark cases (Section 3). Finally, the ultimate goal is to offer actionable recommendations (Section 4) that can help unlock the full potential of the query proceeding, thereby strengthening Brazil's antitrust enforcement and fostering a more competitive market environment.

2 Developments of the legal framework on queries

The first reference to the query procedure in Brazil's antitrust laws came with Law No. 8,158/1991.[7] This statute partially changed Law No. 4,137/1962 (the law that created CADE)

[5] In addition to the limited number of query cases examined by CADE, it is worth noting that the literature about the topic in Brazil is also scarce. Paulo Furquim and Marcos Veríssimo are one of the few commentators that conducted a thorough research about the topic, having also endorsed in 2012 the opinion that the query proceeding had been neglected in Brazil at the time. See VERÍSSIMO, Marcos Paulo; AZEVEDO, Paulo Furquim de. **O Estatuto das Consultas no CADE: Proposta de regulamentação do art. 9º, § 4º, da Lei n. 12.529/2011**. São Paulo: Centro de Estudos de Direito Econômico e Social (CEDES), 2012. In 2015, Commissioner Paulo Burnier analyzed the evolution of the legal framework involving the query proceeding in its opinion in *MasterCard (2015)* (Query No. 08700.007817/2015-18; applicant: MasterCard Brasil Soluções de Pagamento Ltda.).

[6] Differently from what happens in Brazil, there has been more discussion in the literature about the use of similar tools by foreign competition authorities. About the Federal Trade Commission's ("FTC") Advisory Opinions, and the Antitrust Division of the United States Department of Justice ("DOJ"), see, for instance: WILLIAM D. DIXON. Federal Trade Commission Advisory Opinions. Administrative Law Review, Vol. 18, (1965), pp. 65-79; and GLOBAL COMPETITION REVIEW. FTC and DOJ promise quick turnaround on advisory opinions. March 25, 2020. Accessed on September 10, 2024. Available at: https://globalcompetitionreview.com/gcr-usa/article/ftc-and-doj-promise-quick-turnaround-advisory-opinions.

[7] Therefore, one should note that neither Decree No. 7,666/1945 – considered as the first antitrust act of Brazil –, nor Law No. 4,137/1962 mentioned anything about queries.

and added a number of provisions, including on the query mechanism. Law No. 8,158/1991 established that all interested parties could consult CADE (and the then existent National Secretariat of Economic Law) regarding the lawfulness of "acts that may lead to restrictions to competition or that may lead to economic concentration" (Article 10).[8] According to the statute, CADE should review such queries within 60 days, otherwise the applicant could not receive sanctions for any action related to the object of the conduct in the period between the end of such 60-day period and the day that CADE issued its ruling (Article 10, § 1º). In case of mergers, companies were allowed to implement the transaction in case CADE did not render its decision within such 60-day timeframe (Article 13, § 3º and § 4º).[9]

Law No. 8,884/1994 had a specific but shorter chapter about the query procedure (Title VII, Chapter III, Article 59), whereby it maintained similar provisions in comparison with Law No. 8,158/1991 (e.g., 60-day deadline for review). It also established that CADE's Internal Statutes would further regulate the query procedure.

CADE's Resolution No. 10/1997 approved the Authority's first Internal Statutes after Law No. 8,884/1994 entered into force. It was the first norm that shed light to civil society on the requirements for submitting queries to the Authority. According to Article 26 of such Internal Statutes, the query request should contain (i) a clear indication of its object, in addition to a thesis with legal foundation; and (ii) proof of the applicant's legitimate interest on the matter. If these requirements were not met, the query would be promptly rejected (Article 26, single paragraph). Once a Rapporteur – one of the Commissioners of the Tribunal – was designated to the case, the Rapporteur could, if necessary, suggest CADE's President to request additional evidence and adopt further discovery initiatives, including requesting the opinion of other economic agents, provided that a deadline was given for all of these measures (Article 27). As it will be further detailed, this contrasts with the current rules that limit CADE's powers to gather additional evidence in queries. *CADE's lack of ability to conduct discovery in queries is a topic of great controversy and has led CADE to reject a considerable number of cases*, given the limitations imposed by Articles 3 and 4 of Resolution No. 12/2015.

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[8] BRASIL. **Lei n.º 8.158, de 8 janeiro de 1991**. Institui normas para a defesa da concorrência e dá outras providências. Brasília-DF: Presidência da República. Disponível em: https://www.planalto.gov.br/ccivil03/leis/l8158.htm. Acesso em: 15 jul. 2024.

[9] Article 11, of Law No. 8,158/1991, stated that CADE's Internal Statutes would regulate further the query procedure. However, the first Internal Statutes available at CADE's website are the ones approved by Resolution No. 10/1997, which entered in force after Law No. 8,884/1994 was already in force (instead of Law 8,158/1991). See https://www.gov.br/cade/pt-br/centrais-de-conteudo/regimento-interno/historico-de-modificacoes (access in 12 jun. 2024) and https://www.gov.br/cade/pt-br/acesso-a-informacao/normas-e-legislacao/resolucoes-1 (access in 12 jun. 2024).

CADE's Resolution No. 18/1998[10] was the first Resolution entirely devoted to the query procedure. It established that "any interested party, including governmental bodies from federal, states and cities' administration can submit queries to CADE" (Article 1). In practice, by answering to queries formulated by public bodies, CADE is executing its advocacy role, whereby it promotes competition policy by issuing opinions on law bills, sector regulation, among other initiatives.

An innovation that Resolution No. 18/1998 brought was an explicit mention that queries could relate to "hypothetical practices or to an ongoing conduct" (Article 3). The term "hypothetical practices" was troublesome because it invited applicants to submit broad queries, about conducts not clearly delineated or that the applicant has no concrete plans in implementing in the near future. Fortunately, Resolution No. 12/2015 solved this issue by changing the wording to "commercial practice, agreement or business conduct that have been already designed and planned but are yet to be put into place."[11]

Perhaps the most notable aspect of Resolution No. 18/1998 was the requirement that the applicant should fill out a form (Article 7) presenting specific information about its request. Through such form (introduced as an attachment to the resolution), parties had to provide a large volume of information,[12] making it resemble a merger filing form (akin to a shorter version of Resolution No. 33/2024's form). It should be noted that at the time Resolution No. 18/1998 was enacted, the *ex ante* merger control regime was not in force yet, so parties could implement transactions prior to requesting CADE's approval.

Articles 9 and 10 provided explicit delineation on the scope of CADE's decisions on queries. The Authority could rule that the conduct (i) was lawful; (ii) was unlawful; or (iii) had indicia of unlawfulness, triggering the launch of an investigation. With respect to mergers, CADE could determine (i) that the transaction met the mandatory notification thresholds; or,

[10] CADE. Resolution No. 18/1998, of November 25, 1998. Available: https://cdn.cade.gov.br/Portal/centrais-de-conteudo/publicacoes/normas-e-legislacao/resolucoes/Resolu%C3%A7%C3%A3o%20n%C2%BA%2018%2C%20de%2025%20de%20novembro%20de%201998.pdf.

[11] CADE. Resolution No. 12/2015, of March 11, 2015. Available at: https://cdn.cade.gov.br/Portal/centrais-de-conteudo/publicacoes/normas-e-legislacao/resolucoes/RESOLU%C3%87%C3%83O%20N%C2%BA%2012.pdf.

[12] Including (i) the group of companies to which they belong; (ii) their groups' turnover in the previous year, in Brazil and worldwide; (iii) mergers that they took part in and new companies they created in Brazil or in Mercosur in the previous 3 years; (iv) the reasons why they were engaging in such practice or agreement, including potential efficiencies; (v) horizontal overlaps and vertical integrations between the parties' activities; (vi) parties' sales (in R$) related to these activities, including an estimate of the markets' total size (in R$); (vii) estimates of the parties and main competitors' market shares; among others.

(ii) vaguely, that other measures were required to complete the assessment. In any stage of the procedure, CADE's President, if requested by the Rapporteur, could ask the applicant to submit further clarifications (Article 13). Like Article 27 of Resolution No. 10/1997, *this provision opened the door for CADE to collect further information throughout the proceeding, which is not allowed by the current rules*.

CADE's Resolution No. 45/2007 brought new Internal Statutes, altering some of the provisions of Resolution No. 18/1998, including increasing from 60 days to 90 days the deadline that CADE had for reviewing queries, and the need for paying a filing fee (Title IV, Section II).[13] *The most controversial aspect of these Statutes was Article 103*, which claimed that CADE's answers to queries did not represent, under any circumstance, the Authority's permission for the applicant to put in practice the object of the query. Seeking clarification whether a practice, agreement or conduct violates or not the antitrust laws, and, in case of compliance, obtaining antitrust authorization, is queries' main objective. Thus, this provision emptied the very nature of the proceeding. Moreover, the wording of Article 103 seemed to contradict Article 107, which covers what kind of decision CADE could issue, being one of them concluding that conduct is not an anticompetitive infringement. Fortunately, Article 8 of Resolution No. 12/2015 solved this problem by reaffirming the binding effect of CADE's ruling.

Finally, moving to the legislation currently in force, the discussions in Congress within Bill No. 3,937/2004, which resulted in the enactment of the Law No. 12,529/2011 (the "Brazilian Competition Act"), emphasized the need to promote changes in queries brought before CADE:

> Law 8.884/94 provides for the possibility of consultations with CADE on matters within its competence. *This tool has definitely not been successful*, not least because the consultations submitted tend to be about conducts in theory. Naturally, the assessment of any conduct depends on a series of particularities of the underlying rules which will only be known when the conduct is already taking place. Therefore, we have defined that the Court will be able to answer queries about conducts in progress, in order to avoid CADE having to give

[13] CADE. Resolution No. 45/2007, of March 28, 2007. Available at: https://cdn.cade.gov.br/Portal/centrais-de-conteudo/publicacoes/normas-e-legislacao/resolucoes/Resolu%C3%A7%C3%A3o%20n%C2%BA%2045%2C%20de%2028%20de%20mar%C3%A7o%20de%202007.pdf.

> opinions on conducts that are still very vague, with little detail about their modus operandi.[14] (emphasis added)

Nonetheless, despite the contributions of the Brazilian Competition Act, which, among other measures, established the *ex ante* merger control regime, it did not bring meaningful changes to the query proceeding.

CADE's Resolution No. 12/2015[15] is the current normative document entirely devoted to queries. The Resolution establishes that firms, entities and sector associations are allowed to submit queries to obtain guidance on three specific situations (Articles 1 and 2), namely: (i) interpretation of the antitrust laws regarding merger control; (ii) whether a business conduct already in place infringes the antitrust laws or not (least recurrent type); or (iii) whether a practice yet to be put into place infringes the antitrust laws (majority of cases from 2015 to 2024).

Other relevant provisions of the Resolution include Articles 3[16] and 4[17] - which pertain to the requirements for queries to be processed and, if accepted, to entail a ruling on its merits by CADE's Tribunal. Article 6 establishes the 120-day deadline for reviewing queries (an increase comparing with previous norms). Article 7 dictates that queries will be answered according to the information that the applicant supplied in addition to public information. To this author's view, this provision limits the usage and effectiveness of queries in Brazil, and should be reviewed. Articles 8 and 9, on the other hand, brought important contributions, by determining queries' binding effects, including the limitations of such effects (e.g., *inter partes*; no more than five years; CADE can revisit ruling in case new facts arise). In fact, the powers that Article 9 grants to CADE are noteworthy, given that they allow the Authority to reconsider its decision also due to "new motives," which is arguably a broad justification.

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[14] BRASIL. Comissão Especial de Defesa da Concorrência. **Projeto de Lei n.º 3.937, de 2004 (Apenso: 5.877/05)**. Altera a Lei nº 8.884, de 11 de junho de 1994, que "transforma o Conselho Administrativo de Defesa Econômica (CADE) em Autarquia, dispõe sobre a prevenção e a repressão às infrações contra a ordem econômica e dá outras providências". Autor: Deputado Carlos Eduardo Cadoca. Relator: Deputado Ciro Gomes. Disponível em: https://www.camara.leg.br/proposicoesWeb/prop_mostrarintegra?codteor=518696&filename=Tramitacao-PL%203937/2004. Acesso em: 15 jul. 2024.

[15] CADE's Resolution No. 12/2015 entered in force on March 17, 2015.

[16] Requirements include identification of the parties, relevant case law, and documents, description of the facts, among others.

[17] CADE shall not accept queries presented by non-interested third parties not involved in the matter, involving objects of previous investigations or regulation, or that fall outside CADE's jurisdiction, among other circumstances.

3 **Cade's Case Law On Queries**

3.1. Key statistics

According to *CADE em Números*, from January 2015 to June 2024, CADE's Tribunal reviewed a total of 35 queries (an average of roughly three queries per year).[18][19] After a peak of nine cases in its first year, Resolution No. 12/2015 shied away. The number of queries decreased significantly throughout the years, reaching no more than three cases per year from 2015 to 2023 (except in 2018, when CADE reviewed seven queries). There were only two queries last year (2023).

From these 35 cases, one case was ruled on before Resolution No. 12/2015 entered into force,[20] while in other four cases such Resolution was enacted between the query's filing date and its ruling date.[21] Twenty-two cases (62,9%) passed the admissibility test, fulfilling the requirements of Articles 3 and 4 of Resolution No. 12/2015. With respect to the other 13 cases (37,1%), CADE partially admitted one[22] (CADE rejected one of the objects of the query) and dismissed two[23] (given that the applicant itself withdrew the query). One case lost its object[24] (query about a merger that was notified by the applicant to the Authority later via the merger control procedure). Nine cases (25,7%) were fully rejected for not meeting Resolution No. 12/2015's criteria. Therefore, the data demonstrates that *a significant number of queries (37,1%) did not receive an analysis of their merits*.

Among the reasons for rejection, Article 4, III ("need for considering additional facts") and Article 4, V ("information supplied by the applicant does not allow CADE to give an informed ruling"), were the motives most often pointed out by CADE to reject queries from 2015 to 2024. These two motives (either alone or combined with others) were used to reject

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[18] Such database is available at: https://cadenumeros.cade.gov.br/QvAJAXZfc/opendoc.htm?document=Painel%2FCADE%20em%20N%C3%BAmeros.qvw&host=QVS%40srv004q6774&anonymous=true.

[19] Considering that (i) Law No. 12,529/2011 revoked Law No. 8,884/1994 entirely and brought significant changes to competition law in Brazil; and (ii) *CADE em Números*' contains data on queries from 2015 onwards only; this paper will limit its analysis on the queries that CADE reviewed from 2015 to June 2024.

[20] Query No. 08700.009432/2014-04 (applicant: SAAB Participações e Novos Negócios S.A.).

[21] Queries No. 08700.009476/2014-34 (applicant: ABB Ltda.); 08700.010488/2014-01 (applicant: International Finance Corporation – IFC); 08700.006564/2014-85 (applicant: Castrolanda – Cooperativa Agroindustrial Ltda.); and 08700.004459/2012-49 (applicant: José Ronaldo Kulb).

[22] Query No. 08700.006858/2016-78 (applicant: Hamburg Südamerikanische Dampfschifffahrts-Gesellschaft KG).

[23] Query No. 08700.007124/2015-25 (applicant: Center Norte S.A. - Construção, Empreendimentos, Administração e Participação).

[24] Query No. 08700.009432/2014-04 (applicant: SAAB Participações e Novos Negócios S.A.).

five cases. The requirements of Article 4, I ("applicant not directly involved in the matter")[25], Article 4, II ("lack of objective indication of the query's object")[26], Article 4, IV ("purely hypothetical situation")[27], Article 4, VI ("matter falls outside of CADE's jurisdiction")[28], and Article, VII ("matter already addressed by a rule or *súmula*")[29], standalone led to the rejection of one case each.

The analysis of CADE's case law sheds light into the reasons parties filed queries to CADE in the first place. Of the 35 queries, 22 of them related to conducts: 19 (50%) pertaining to non-initiated conducts, and three regarding conducts that had already initiated.[30] Thirteen queries related to mergers and one of them[31] consisted of a query to obtain clarification whether the then recently enacted Law No. 12,529/2011 was applicable to the case at hand or whether Law No. 8,884/1994 should be applied.

3.2. Insights from landmark cases

In multiple instances, CADE has already stressed the importance that queries have in competition policy in Brazil. Although the number of queries has been historically shy, as detailed in the previous chapter, query cases have been the stage of many important decisions issued by CADE.

The relevance of queries is also highlighted by its ability to influence how CADE will rule on future cases. In fact, the conclusions that CADE adopted in queries served as jurisprudence for CADE ruling not only other queries, but also deciding on mergers and conduct investigations.

For instance, referring to *Hamburg Süd/CMA CGM (2017)*[32], CADE concluded in *CMA CGM/Cosco/Evergreen (2021)*, *Hapag-Loyd/Nile Dutch (2021)* and *CMA CGM/Maersk*

[25] Query No. 08700.006520/2021-83 (applicant: ICTSI Americas B.V. e ABTRA - Associação Brasileira de Terminais e Recintos Alfandegados).

[26] Query No. 08700.007817/2015-18 (MasterCard Brasil Soluções de Pagamento Ltda.).

[27] Query No. 08700.006858/2016-78 (applicant: Hamburg Südamerikanische Dampfschifffahrts-Gesellschaft KG). This case was partially admitted and partially rejected, as mentioned previously.

[28] Query No. 08700.003762/2019-09 (applicant: Cooperativa dos Médicos Anestesiologistas do Ceará - COOPANEST/CE).

[29] Query No. 08700.004474/2020-05 (applicant: Dupatri Hospitalar Comércio, Importação e Exportação Ltda.).

[30] Queries No. 08700.007817/2015-18 (applicant: MasterCard Brasil Soluções de Pagamento Ltda.); 08700.006520/2021-83 (applicant: ICTSI Americas B.V. e ABTRA - Associação Brasileira de Terminais e Recintos Alfandegados); and 08700.007327/2023-21 (applicant: Buser Brasil Tecnologia Ltda.).

[31] Query No. 08700.004459/2012-49 (applicant: José Ronaldo Kulb).

[32] Query No. 08700.008081/2016-86 (applicants: Hamburg Südamerikanische Dampfschifffahrts-Gesellschaft KG; and CMA CGM S.A.).

(2021)[33] that Vessel Sharing Agreements ("VSAs") between maritime freight companies could raise antitrust concerns and should be notified as associative contracts, differently than Slot Charter Agreements ("SCAs"). Moreover, the reasoning adopted in *Hamburg Süd/Hapag-Loyd (2016)*[34] guided the assessment of criteria for mandatory notification of associative agreements in *Ford/Volkswagen (2021)*[35], especially for discussing situations where companies lacked joint-risk and profit-sharing efforts. For similar purposes, Commissioner Mauricio Bandeira Maia's vote in *BRF/Upfield (2020)*[36] cited *Warner Bros/EA (2016)*.[37]

Another example is *SINTRACON/SEVEICULOS (2018)*[38], which led to the initiation of a subsequent conduct investigation.[39] In *SINTRACON/SEVEICULOS (2018)*, two unions filed a query whereby they questioned CADE on the lawfulness of price tables used for hiring land freight workers. Commissioner Paula Azevedo, who acted as the case Rapporteur, provided a comprehensive analysis of CADE's case law concerning price tables adopted by unions and trade associations – stating that CADE considers such practice as an anticompetitive infringement under the auspices of Law No. 12,529/2011. Similarly to *APRO (2016),*[40] CADE posited that influencing uniform commercial practices hindered agents' ability to freely negotiate commercial variables (e.g., prices), causing harm to consumers (e.g., prices set artificially above the competitive level). *SINTRACON/SEVEICULOS (2018)* was also cited in the investigation against *Augustinho Stang/Portal São Francisco/Pandolfi Combustíveis* to emphasize CADE's concerns with price tables.[41]

Queries have also helped CADE to obtain a better understanding of a sector and to deploy the knowledge acquired in previous cases. The queries on vehicle's electronic tags and

[33] Merger No. 08700.002610/2021-03 (applicants: CMA CGM S.A.; Cosco Shipping Lines Co., Ltd.; Evergreen Marine Corp. Ltd.; and Pacific International Lines PTE Ltd.); Merger No. 08700.001515/2021-84 (applicants: Hapag-Lloyd Aktiengesellschaft; and Nile Dutch Investments B.V); and Merger No. 08700.007341/2021-63 (applicants: CMA CGM S.A.; and Maersk A.S.).
[34] Query No. 08700.006858/2016-78 (applicant: Hamburg Südamerikanische Dampfschifffahrts-Gesellschaft KG; and Hapag-Lloyd Aktiengesellschaft).
[35] See SG's Opinion No. 374/2021 in Merger No. 08700.004247/2021-52 (applicants: Ford Motor Company; and Volkswagen AG).
[36] See Commissioner Mauricio Bandeira Maia's vote in Merger No. 08700.003855/2020-69 (applicants: BRF S.A.; and Upfield Brasil Holding Ltda.).
[37] Query No. 08700.008419/2016-08 (applicants: Warner Bros Home Entertainment Inc.; and EA Swiss Sàrl).
[38] Query No. 08700.001540/2018-62 (applicants: Sindicato dos Transportadores Autônomos de Contêineres e Cargas em Geral de Itajaí e Região – "SINTRACON"; and Sindicato das Empresas de Veículos de Transporte de Carga e Logística de Itajaí e Região – "SEVEICULOS").
[39] Administrative Proceeding No. 08700.002160/2018-45 (claimant: CADE *ex officio*; defendant: SINTRACON).
[40] Query No. 08700.004483/2016-10 (applicant: Associação Brasileira da Produção de Obras Audiovisuais).
[41] Administrative Proceeding No. 08700.005636/2020-14 (defendants: Augustinho Stang, Posto de Combustíveis Portal São Francisco Ltda., Stang & Stang Ltda. e Pandolfi Combustíveis Ltda.).

on conducts by credit card companies are great illustrations of that. CADE's General-Superintendence's ("SG") decision in the merger *Alelo/Conectcar (2021)*[42] referred to the query *CGMP/Conectcar (2015)*[43] to incorporate CADE's analysis on the market for vehicle electronic identification tags used in parking lots. In *CGMP/Conectcar (2015)*, CADE assessed whether an agreement between competitors would trigger competition concerns, as well as whether it would be a notifiable associative contract. This case reinforces the fact that questions related to associative contracts are often the object of queries. The Rapporteur, Commissioner João Paulo Resende, issued a detailed vote, in which he emphasized "the importance of the query instrument as a way of resolving market agents' doubts about operations of this nature," having "strongly recommended that similar contracts, even if they do not fall within the definition of associative contracts, be submitted to this Court by means of a query."[44]

Visa (2017)[45] and *Redecard (2018)*[46] cases were mentioned in SG's technical opinion in the administrative inquiry against *Elo/American Express/Visa/Mastercard (2018)*[47] to highlight that CADE had already examined similar conducts in the past. Similarly to *Mastercard (2015),*[48] Visa wanted to adopt changes in its agreements with facilitators so that they would be obliged to supply certain information to Visa about the stores where transactions using Visa's card took place. The Rapporteur, Commissioner Alexandre Cordeiro, however, understood that, unlike in *Mastercard (2015)*, the applicant in this case successfully presented all of the required documents for admitting the query. Proceeding with the analysis, Cordeiro reasoned that discrimination between competitors is a conduct that asks for a rule of reason analysis, which can only be undertaken with an in-depth discovery. His vote indicates that queries involving conducts analyzed under the rule of reason face additional obstacles for admission. The Rapporteur also flagged that analyzing what Visa would do after it had possession of the sensitive information fell outside the scope of the query. If necessary, he

[42] See SG's Opinion No. 1/2022 in Merger No. 08700.005296/2021-11 (applicants: Alelo S.A.; and Conectcar Soluções de Mobilidade Eletrônica S.A.).
[43] Query No. 08700.007192/2015-94 (applicants: Centro de Gestão de Meios de Pagamentos S.A.; and Conectcar Soluções de Mobilidade Eletrônica S.A.).
[44] See João Paulo Resende's opinion in Query No. 08700.007192/2015-94 (applicants: Centro de Gestão de Meios de Pagamentos S.A.; and Conectcar Soluções de Mobilidade Eletrônica S.A.).
[45] Query No. 08700.000468/2017-75 (applicant: Visa do Brasil Empreendimentos Ltda.).
[46] Queries No. 08700.004009/2018-41, 08700.004010/2018-76, 08700.004011/2018-11 and 08700.004012/2018-65 (applicant: Redecard S.A.).
[47] See SG's Technical Opinion No. 7/2019 in Administrative Inquiry No. 8700.005986/2018-66 (claimant: CADE *ex officio*; defendants: Elo Serviços S.A; American Express Brasil Assessoria Empresarial Ltda.; Visa do Brasil Empreendimentos Ltda.; and Mastercard Brasil Soluções de Pagamento Ltda.)
[48] Query No. 08700.007817/2015-18 (applicant: MasterCard Brasil Soluções de Pagamento Ltda.).

claimed that CADE could open an investigation in case indicia of anticompetitive behavior was found in the future.

In *Redecard (2018)*, the Rapporteur, Commissioner Paula Azevedo, pondered on *what kind of decision could the Authority issue on a query procedure*, notably whether CADE could issue a broad ruling saying the conduct "could pose anticompetitive concerns," rather than categorically affirming that the conduct was lawful or unlawful. CADE issued such generic ruling in *ABB (2014)* and *APRO (2016)*, but not without controversy. So, it is foolhardy to say that there is undisputed case law supporting such generic rulings. On the one hand, the fact that the object of a query entails a rule of reason analysis should not be a motive to reject the conduct, but rather it could result in a generic ruling on the merits. On the other hand, the dissenting opinions of Commissioner Frazão in *ABB (2014)* and *Castrolanda (2014)* opens the door for CADE potentially rejecting queries because its object are conducts that triggers the rule of reason analysis, similar to the discussion held in *Visa (2017)*.

The queries involving resale price maintenance ("RPM") and related practices have established groundbreaking understandings on how CADE perceives and analyzes such conducts. *Continental (2018)*[49] was a landmark case where CADE authorized the automobile tire manufacturer to implement a RPM policy, considering the (i) lack of unilateral or coordinated market power; (ii) prices unilaterally imposed by the manufacturer (without coordination with and/or between resellers); and (iii) lack of discrimination among resellers (all of them were equally subject to the policy). Commissioner Cristiane Alkmin issued a dissenting opinion arguing that every minimum price policy should be considered unlawful *per se* by CADE.

In *Michelin (2021),*[50] Commissioners dissented on whether a study by CADE's Department of Economic Studies (*Departamento de Estudos Econômicos* - herein "DEE") could be undertaken or not, given the normative limitations of queries. Following Commissioner Azevedo's decision in this incidental matter, the majority of the Tribunal understood that *further evidence gathering, including obtaining a technical opinion by the DEE, is not possible in queries*. In his vote, President Cordeiro lamented such decision taken by the Tribunal, emphasizing that "PROCADE [CADE's Attorney General] and DEE are part of CADE. They are CADE's technical bodies."[51] In his view, not allowing DEE to subsidize the

[49] Query No. 08700.004594/2018-80 (applicant: Continental do Brasil Produtos Automotivos Ltda.).
[50] Query No. 08700.004460/2021-64 (applicant: Sociedade Michelin de Participações Indústria e Comércio Ltda.).
[51] See President Cordeiro's opinion in Query No. 08700.004460/2021-64 (applicant: Sociedade Michelin de Participações Indústria e Comércio Ltda.).

Tribunal's decisions on queries would prevent CADE from enhancing the quality of its own decisions in queries. He urged the Tribunal to reflect on this matter in future cases.

In *Grid Pneus v. Bellenzier Pneus and others (2024)*[52], the Rapporteur's vote cited *Continental (2018)*[53] and *Michelin (2021)*[54] to argue that CADE's case law treats RPM-like conducts involving intrabrand competition as a conduct subject to the rule of reason, considering that both anticompetitive and procompetitive effects can arise. Such queries were also mentioned in *Technos (2023).*[55] Discussions about *Continental (2018)*[56] also took place in the merger *SBT/Record/RedeTV/Simba (2023),*[57] notably with respect compensatory power issues. Commissioner Alkmin's vote in *Continental* elaborated on such power to distinguish RPM from price tables, given the possibility of price tables offering compensatory power.

Adding to the list of queries involving RPM-like conducts, CADE also examined *Ipiranga (2021),*[58] where it enlisted assessment criteria for such practices, including whether: (i) there is a mere suggestion (less concerning), rather than an imposition (more concerning) of prices; (ii) there are retaliation mechanisms (if present, conduct is more concerning) for those players that do not comply with the suggested price; (iii) they involve maximum (less concerning) or minimum (more concerning) prices; and (iv) prices are suggested or imposed unilaterally (less concerning) by the supplier, rather than via coordination (more concerning) between suppliers and resellers. Differently than *Continental (2018)* and *Michelin (2021)*, the lack of discriminatory treatment was not ranked here as factor that mitigates concerns.

In addition, *queries have provided insights on the definition of economic groups for the purposes of notifying and assessing mergers*, notably with respect to calculating groups' turnover and market shares. In this sense, references to the *Unimed Campinas/Americana (2023)*[59] query were made in the *Gerdau/Unimed (2023)*[60] merger and in the investigation *São*

[52] Administrative Proceeding No. 08700.003266/2022-42 (claimant: Grid Pneus e Serviços Automotivos Ltda.; defendant: Bellenzier Pneus, Campneus Comercial e Importadora de Pneus Ltda.; among others).
[53] Query No. 08700.004594/2018-80 (applicant: Continental do Brasil Produtos Automotivos Ltda.).
[54] Query No. 08700.004460/2021-64 (applicant: Sociedade Michelin de Participações Indústria e Comércio Ltda.).
[55] Administrative Proceeding No. 08700.004563/2017-48 (defendant: Technos da Amazônia Indústria e Comércio S.A.).
[56] Query No. 08700.004594/2018-80 (applicant: Continental do Brasil Produtos Automotivos Ltda.).
[57] Merger No. 08700.009574/2022-81 (applicants: TV SBT Canal 4 de São Paulo S.A.; Rádio e Televisão Record S.A.; TV Ômega Ltda.; Simba Content – Intermediação e Agenciamento de Conteúdos Ltda.).
[58] Query No. 08700.002055/2021-10 (applicant: Ipiranga Produtos de Petróleo S.A.).
[59] Query No. 08700.000931/2023-27 (applicants: Unimed Campinas Cooperativa de Trabalho Médico; Unimed de Santa Barbara D'Oeste e Americana Cooperativa de Trabalho Médico).
[60] See SG's Technical Opinion No. 8/2024 in Merger No. 08700.007656/2023-72 (applicants: Gerdau Açominas S.A.; Fundação Ouro Branco; Unimed Conselheiro Lafaiete Cooperativa de Trabalho Médico Ltda.; Unimed São João Del Rei Cooperativa de Trabalho Médico; and Unimed Inconfidentes Cooperativa de Trabalho Médico Ltda.).

Francisco v. Unimed (2024)[61] to conclude that all cooperatives belonging to the Unimed system should be considered as belonging to the same economic group. Merging parties in merger *Eni/QatarEnergy (2022)*[62] mentioned CADE's ruling in *CEMIG (2020)*[63] to argue that a state-owned Italian company did not belong to the same economic group of other firms controlled by the Italian Government that were not related to the merger. Similar understanding was adopted by SG's opinion in the merger *Shelf/Companhia Docas do Espírito Santo (2022)*.[64]

Another interesting – and less recurring – topic where queries provided meaningful insights is the effects that tax benefits may cause in market competition. In this regard, the merger investigation *Petróleo Sabba v. Atem (2019)*[65] referred to the query *Philips/Panasonic/Sony/Semp Toshiba (2006)*[66] to state that CADE does not consider tax benefits as an infringement to antitrust laws *per se*.

Therefore, the analysis of CADE's case law indicates that queries were important to inform CADE's decisions on a number of aspects in subsequent cases, including both *preliminary issues (e.g., requirements for notifying associative agreements; criteria for forming economic groups) and merit analysis (e.g., lawfulness of price tables and RPM-like conducts; legality of tax benefits; and further understanding of the competitive dynamics of given sector)*.

The recent cases that CADE ruled this year – i.e., *Buser (2024)*[67] and *Cassol/Todimo (2024)*[68] – involved insightful debates which certainly will also affect competition policy in Brazil in the future. In *Buser (2024)*, the applicant questioned whether compliance with a new regulation of the National Agency of Land Transportation (*Agência Nacional de Transportes Terrestres* – herein "ANTT") that puts obstacles for entrants could lead to an antitrust infringement. Following Commissioner Victor Fernandes' vote, CADE reaffirmed that compliance with sector regulations does not guarantee antitrust immunity. The Tribunal –

[61] See SG's Technical Opinion No. 6/2024 in Administrative Proceeding No. 08700.007522/2017-11 (claimant: São Francisco Sistemas de Saúde Ltda. - Hapvida Assistência Médica S.A.; defendants: Unimed de Assis Cooperativa de Trabalho Médico; Elyseu Palma Boutros; Hospital e Maternidade de Assis Ltda.; and Santa Casa de Misericórdia de Assis.).

[62] SG's Opinion No. 499/2022 in Merger Control No. 08700.006889/2022-77 (applicants: Eni S.P.A.; and QatarEnergy Oil and Gas).

[63] Query No. 08700.003594/2019-43 (applicant: Companhia Energética de Minas Gerais – "CEMIG").

[64] SG's Opinion No. 266/2022 in Merger No. 08700.003467/2022-40 (applicants: Fundo de Investimento em Participações Shelf 119 – Multiestratégia; and Companhia Docas do Espiríto Santo).

[65] Administrative Inquiry No. 08700.004019/2019-68 (claimant: Petróleo Sabbá S.A.; defendant: Atem's Distribuidora de Petróleo S.A.).

[66] Query No. 08700.002380/2006-3 (applicants: Philips do Brasil Ltda.; Panasonic do Brasil Ltda.; Sony Brasil Ltda.; Semp Toshiba S.A.).

[67] Query No. 08700.007327/2023-21 (applicant: Buser Brasil Tecnologia Ltda.).

[68] Query No. 08700.001177/2024-23 (applicants: Cassol Materiais de Construção Ltda e Todimo Materiais para Construção S.A.).

following the Rapporteur's vote, which cited *ICTSI (2022)*[69] – decided to reject the query, given that discussing whether certain sector regulations are anticompetitive or not did not fall under the three hypotheses of Article 2, of Resolution No. 12/2015. CADE claimed that deciding on the lawfulness of a specific sectoral regulation from an antitrust perspective would make CADE's decision binding to other parties not involved in the query (infringing the *inter partes* nature of queries). Yet, CADE used the opportunity to flag antitrust concerns deriving from ANTT's proposed regulation. It is also worth noting that Commissioner Diogo Thomson pondered that CADE should reflect on how to make better use of the query proceeding in general, which, in his view, has been underutilized for a long time. *While this very recent case reveals additional circumstances where queries will not be admitted, it also shows how CADE can make better use of them to empower competition policy in Brazil through its advocacy role*.

In *Cassol/Todimo (2024)*, CADE authorized a partnership between firms to negotiate jointly with suppliers in order to obtain better purchasing conditions, having differentiated joint procurement agreements from purchasing cartels. CADE found that the partnership should not be deemed a notifiable associative agreement, pursuant to Resolution No. 17/2016. Commissioner Gustavo Augusto stated that requiring a separate filing of the transaction as a merger filing would only consume more public resources, which was not in the public administration's best interests. President Alexandre Cordeiro, in turn, stated there is no guidance in Brazilian competition law to differentiate legitimate collaborations from illegal collusions. Citing the Australian Competition and Consumer Commission's ("ACCC") collaboration exemption mechanism, Cordeiro said providing such guidance and orientation to civil society would be welcome.

4 Conclusions and Recommendations for Enhancing the Query Proceeding

Queries face the challenge of balancing two important pillars of law enforcement. The first is ensuring legal certainty for companies to do business. The other is requiring enforcers to rule only when there is sufficient evidence at their disposal, including granting them flexibility for reconsideration in case new legal or factual circumstances arise.

To solve this equation, the query proceeding will only be effective when there are binding effects for the Authority. Otherwise, there are no benefits, and, thus, no incentives for

[69] Query No. 08700.006520/2021-83 (applicant: ICTSI Americas B.V. e ABTRA - Associação Brasileira de Terminais e Recintos Alfandegados).

market agents to file queries in the first place. That is why Article 103 of Resolution No. 45/2007 was doomed to failure, and why Article 9 of Resolution No. 12/2015 represents an important cornerstone of the query proceeding. Similar instruments at disposal of other public bodies in Brazil establish binding effects on the enforcer, as it is the case of the Federal Court of Accounts ("TCU")[70] and the Brazilian Federal Revenues Office ("RFB").[71] Likewise, the Federal Trade Commission ("FTC") in the United States has at its disposal similar tools for examining consultations made by firms beforehand, including *Industry Guidance*[72] and *Competition Advisory Opinions.*[73]

Recommendation No. 1: Departing from a strict prohibition on the Authority's evidence-gathering powers.

Like the case law discussed earlier demonstrates, CADE's lack of power to obtain additional evidence is arguably one the most controversial aspects for admitting queries in Brazil. In contrast, the Australian counterpart, ACCC, *not only has powers to request more information from applicants and third parties* in its authorization proceedings*, but it also welcomes written submissions on the draft determination from them*. While acknowledging the importance of CADE delivering timely responses to market agents so that query's goals are met, not allowing any type of evidence-gathering in the proceeding seems to be an approach not only overly restrictive on the applicants, but also harmful to CADE. Parties should have the ability to submit as much evidence as possible, and CADE should have at least some flexibility to ask applicants or even third parties to submit additional information, in line with what Article 27 of Resolution No. 10/1997 and Article 13 of Resolution No. 18/1998 used to enable.

Recommendation No. 2: Providing greater clarity on the information that applicants should submit.

The query proceeding could benefit from having more transparent and concrete guidance on what type of information and which documents applicants should submit to CADE. This would mitigate the concerns regarding "hypothetical" or broad queries, as well as those pertaining queries without sufficient evidence. Additionally, greater guidance would foster the utilization of queries in Brazil, because if businesses have a better understanding on what they

[70] TCU's Internal Statutes (Articles 264 and 265) establish that TCU's answers to queries will have the nature of a norm, constituting a prejudgment of a thesis, but not of the specific fact or case at hand.
[71] Interested parties can submit consultations to the RFB to obtain clarifications on the interpretation of tax law.
[72] FTC. Industry Guidance. Available at: https://www.ftc.gov/advice-guidance/competition-guidance/industry-guidance. Access in: 3 sep. 2024.
[73] FTC. Advisory Opinions. Available at: https://www.ftc.gov/advice-guidance/competition-guidance/competition-advisory-opinions. Access in: 3 sep. 2024.

need to submit to the Authority, CADE would receive more evidence from the outset. Thus, CADE would need to deploy evidence-gathering powers less often (Recommendation No. 1). CADE should issue a specific version of its – very successful – Guidelines entirely dedicated to queries to solve this issue, enabling both civil society and the Authority itself to save resources.

Recommendation No. 3: Allowing time extension upon agreement.

The purpose of queries is to provide clarifications to companies within an expedite timeframe. Therefore, the implications of the time set by the law for review are twofold. On the one hand, if too long, firms will not feel encouraged to submit queries and authorities will fail to provide timely guidance to companies. On the other hand, time must be long enough to allow the agency to issue a founded and appropriate ruling.

In this sense, allowing more flexibility for CADE to review queries should be welcomed. Brazil could follow Australia's example in this regard. In Australia, parties can seek ACCC's "authorization" to engage in a commercial practice, obtaining an "exemption from competition law."[74] Although such authorization proceeding must be concluded within six months as the general rule, additional six-month extensions are allowed as long as (i) the ACCC has made a draft decision by the initial review period; and (ii) the *extension is agreed on with the applicant*. Allowing this type of flexibility to accommodate both the Authority's and the applicant's needs could help making the query proceeding more attractive in Brazil.

Recommendation No. 4: Limiting postponements for review.

CADE took, on average, 79 days to review queries between 2015 to 2024, according to *CADE em Números*. This data demonstrates that CADE has been able to decide on a timely manner, using significantly less time than its 120-day legal deadline. However, in some cases CADE took more than 120 days to decide. This happened (i) when CADE's Administrative Tribunal remained with less than 4 (four) members, which Law No. 12,529/2011 establishes as the minimum quorum that allows the agency's Tribunal to render decisions on cases; and (ii) when a member of the Tribunal requested access of the case files and postponed the conclusion of the ruling for significant period of time. While the former falls outside CADE's accountability, the latter is a reason of delay attributable to CADE itself. When used in excess, Commissioners' request for case files can lead to rulings taking a long time to be concluded,

[74] AUSTRALIAN COMPETITION AND CONSUMER COMMISSION. **About Exemptions**. Available at: https://www.accc.gov.au/business/competition-and-exemptions/exemptions-from-competition-law/about-exemptions. Access in: 15 jul. 2024.

impairing the very nature that the query procedure is driven by. Normative alterations in this regard would be welcome, such as limiting one request for postponement per Commissioner or shortening the time a Commissioner may remain reviewing the case after requesting the access to the case files (e.g., 60 days, pursuant to Article 95, § 2º, of CADE's Internal Statutes).

Recommendation No. 5: Using queries for detecting anticompetitive conducts.

Article 11 enables CADE to convert queries about ongoing practices into conduct investigations. Not surprisingly, queries of such kind have been the least recurring type of queries. While CADE must act whenever it becomes acquainted of potential illegal conduct and queries should not work as a shield for infringing companies, allowing certain benefits to firms that are submitting this type of queries might encourage them to do so, making the Authority aware about conducts it would not immediately know otherwise. Advantages could include lesser fines in case of a condemnation in the administrative proceeding deriving from the conduct, for instance. Companies would have the incentive to bring forward queries on ongoing conducts without the fear of receiving the same type of retaliation that companies that remain silent and non-cooperative receive. This would increase CADE's detection techniques and bolster the repression of anticompetitive conducts.

As this article advocates, the recommendations herein provided relate closely to the need for increasing flexibility and transparency towards achieving more effectiveness in CADE's query proceeding. By embracing the proposed changes, the query proceeding should escape from ostracism and would have the ability to deliver a number of benefits to competition policy in Brazil.

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