

A Helpful Antitrust Exception In Brazil During Pandemic

By **David Andrew Taylor** (July 17, 2020)

On May 28, the tribunal of Brazil's antitrust agency, the Administrative Council for Economic Defense, or CADE, unanimously decided that there is plausible economic justification for the Small Trade Activity Recover, or STAR, program.

This collaboration between the traditionally competing companies Ambev SA, BRF SA, Coca-Cola Indústrias Ltda., Mondelēz Brasil Ltda., Nestlé Brasil Ltda. and PepsiCo do Brasil Ltda., through a May 11 memorandum of understanding, intends to assist small and medium-sized point-of-sale consumer retail businesses as a means of minimizing the effects of the COVID-19 pandemic in the beverage industry.



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As stated in the memorandum, because of the fact that during the course of the COVID-19 pandemic Brazilian state and municipal governments had implemented extensive restrictive measures including the temporary shutdown of such businesses, causing them considerable financial distress, the intent of the parties is to establish the STAR program initiative of "special financing and simplified inventory and ordering mechanisms, among other actions, to be independently adopted by each company and in the context of the program." The parties understand such consent is consistent with Brazilian federal COVID-19 policy and Senate Bill 1.179/2020.[1] Also, the memorandum notes that the European Union had established a likewise temporary framework for urgent situation business cooperation assessment stemming from the COVID-19 pandemic.[2]

The petition presenting the memorandum to CADE[3] contextualized that, according to a Bain & Company consultancy study, 58% of the point-of-sale businesses surveyed had more than 50% lost income, 24% believed that they would not be able to stay in business should they not resume activity within the following two months, 49% had stopped paying on at least one outstanding bill, and 66% did not receive any form of institutional/corporate support.

The businesses understood their biggest necessities in terms of support to be in the areas of health protection, promoting business demand, and business-to-business supply and bill payment, and were "anxious" for business-to-business and business-to-customer condition betterment, as well as for financial assistance and health equipment delivery so as to resume business activity.

According to the petition, under the STAR program the "Momento Nós" project already being organized by the parties to the memorandum[4] would invest R\$370 million (about \$68.6 million) in reopening assistance, focusing on the needs of "a significant number" of small points of sale,[5] which would be defined on a case-by-case basis.[6] Such assistance would be comprised of special conditions for stock replenishment, including purchase discounts for at least a three-month time period, distribution of health kits,[7] health protocol training as well as a website informing of available small retailer governmental incentives and benefits. The project would be effective until Oct. 31, 2020, and possibly extended thereafter.

The companies successfully argued to CADE that such small point-of-sale retailers comprise a significant portion of consumer goods[8] distribution in Brazil and that should the health crisis become protracted isolated assistance actions would not have sufficient scale to

positively impact on their resuming their activity. This would impact the whole industry, ergo their corporate collaborative effort to assist.

The General Superintendence Ruling No. 529/2020, acknowledging[9] the International Competition Network Steering Group[10] recommendation[11] and also that of the Organization for Economic Cooperation and Development,[12] was ratified by the CADE tribunal, which, based on the facts presented and its preliminary analysis of the terms of the memorandum, concluded that the memorandum:

- 1) Is not a horizontal conduct associative contract for which notification to CADE is necessary, as defined by Article 88 of the Brazilian Antitrust Law (Law No. 12.529/2011) and CADE Internal Resolution No. 17 (of Oct. 18, 2016);[13]
- 2) Is not an attempt at achieving anti-competitive wielding of market power;
- 3) Has plausible economic justification in that its intended measures seek to preserve the capital and workforce investment of small and medium-sized businesses for the reopening of the economy;
- 4) Indicates the effective adoption of antitrust risk prevention protocols by the parties; and
- 5) The petition that was filed by the parties demonstrates the good faith of the parties and their [genuine] preoccupation with restoring competitiveness and normality to the sector.

The June 6 certificate of the CADE decision further detailed that, in accordance with Article 36 of the Antitrust Law, CADE reserves its "prerogative to revisit its positioning at a future point in time should there be indication of any acts requiring investigation of economic order infraction." It also noted that the CADE tribunal determined that the parties to the memorandum provide to CADE upon request all information regarding the cooperation outlined in the memorandum as well as, at the time of its expiration, a report describing "all the measures that were adopted, the information that was exchanged and the results obtained."

As mentioned above, the content of Senate Bill 1.179/2020 (signed into law as Law No. 14.010, effective as of June 12) was referenced within the memorandum and relied upon by the parties as providing possible basis for their intention. In its Chapter 10, with respect to the competition regime, the law establishes that the antitrust rules typically prohibiting the infractions of the economic order of selling goods and services below cost and unjustified total or partial termination of company activity cannot apply for the time period of (1) March 20 to Oct. 30, 2020, or (2) for the duration of the state of public calamity relative to the COVID-19 pandemic,[14] and that relative to associative agreements, as well as consortia and joint ventures between two or more company entities, the same need not be notified to CADE for approval during the stated time period.

Also, taking into consideration "the extraordinary circumstances resulting from the pandemic" (similar to the language of the decision certificate), CADE can thereafter review the implementation of such arrangements should there be indication of any acts requiring investigation of economic order infraction.

According to the projection of the March 9 United Nations Conference on Trade and Development press release on the economic impact of COVID-19, a "preliminary downside

scenario sees a USD 2 trillion shortfall in global income with a USD 220 billion hit to developing countries (excluding China)" as a result of the "so-called 'Covid-19 shock.'"[15] And, as stated in a March 18 International Labor Organization COVID-19 notification, sustaining business operations "will be particularly difficult for Small and Medium Enterprises." [16]

Just like elsewhere in the world, the Brazilian federal government has implemented financial support assistance for businesses economically impacted by the COVID-19 pandemic. On March 16, a R\$30 billion (about \$5.57 billion) emergency package was announced that included measures regarding small and medium-sized businesses.[17] A certain level of fraud, abuse and waste of government resource assistance can almost be assumed, however, with government programs involving taxpayer money.[18] Major private Brazilian and multinational companies are thus also engaged in COVID-19 pandemic response initiatives in Brazil on an individual basis.[19] There is the point of view as well that Brazilian small and medium-sized business support oversight controlled by the business parties themselves in some collaborative and legally organized manner, ergo the STAR program initiative.

Competition Law enforcement in Brazil, as elsewhere in the world, is well developed and serious, and has been mature in its application reacting to the COVID-19 pandemic. The current state of the law (and illustrated by the case study presented above) shows a deferential treatment by CADE of competitor cooperative agreements in Brazil at the present time as a result of the COVID-19 pandemic and its consequences on the Brazilian economy. Relaxing of regulation now permits collaboration among competitors toward assisting distribution capacity in post-crisis recovery.

The STAR program, involving aspects that may justifiably be enthusiastically received by many financially capable corporate altruists, does not however imply pure altruism on the part of the STAR program corporate participants.

From the corporate point of view in the beverage industry, the COVID-19 pandemic has the very obvious potential of completely destroying the extensive supply and distribution networks that have been built up over many years and that are essential to their businesses. From the business sector point of view there must be an injection of properly directed financial and other support to maintain the business structure overall, and in this situation competitive gain is of secondary importance. This applies down to self-funding the action within the industry, rather than needing and relying on governmental support with associated uncertainty.

The legal conditions imposed by CADE on the STAR program qualify that the working agreement is of limited duration and that any anti-competitive behavior will be investigated, sanctioned and remedied.

These legal conditions being established, it is apparent that the STAR program can be equally replicated in other business sectors, and can therefore become an important and effective catalyst in rejuvenating the Brazilian economy following this terrible COVID-19 pandemic.

The STAR program initiative should be applauded.

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[1] Now Law No. 14.010, dated June 10, 2020, published on June 12, 2020, establishing an Emergency and Transitional Regime - RJET calling for, inter alia, CADE`s recognition of the extraordinary circumstances of the COVID-19 pandemic in its enforcement of the Brazilian Antitrust Law (Law No. 12.529/2011). See text below for further discussion on this requirement.

[2] Citing the April 8, 2020 European Commission Communication from the Commission entitled "Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current COVID-19 outbreak," available at https://ec.europa.eu/info/sites/info/files/framework_communication_antitrust_issues_related_to_cooperation_between_competitors_in_covid-19.pdf.

[3] Filed on May 19, 2020.

[4] The project would also include other companies adhering to the same intentions in the future. From the Movimento Nós website – <https://movimentonos.com.br/> – Brazilian poultry processor Cooperativa Central Aurora Alimentos and Cervejaria Heineken Ltda. are also participating companies, and there are a number of supporting partners as well.

[5] Bars, restaurants, mini-markets and bakeries.

[6] The "Movimento Nós powerpoint accompanying the Petition identifies that the intention is to "reach" 300,000 points of sale and that the "premises of the project" are that there will be 1) no commercial activity performed between the coalition and the points of sale, 2) no counterparty fidelity rebating or exclusive dealing that would otherwise incentivize dominance and exclude competition, 3) availability for other partner companies to participate in the project and 4) no focus on the particular products of the companies participating in the project.

[7] Containing alcohol-based hand gel and COVID-19 health protocol letter and pamphlet literature, which the businesses would in turn direct to their clients.

[8] Beverages, food, personal and domestic care product, etc.

[9] To cite from the Ruling, the challenge presented to CADE is to:

analyze such situations of possible collaboration between competitors and verify the existence of certain prerequisites that would permit such cooperation without, on the other hand, allowing for breaches that could result in coordinated conduct or abuse of dominant position to the detriment of society. Within said prerequisites can be highlighted the exceptionality of the situation being faced, the necessary urgency for the adoption of measures, causal relation between the crisis and the intended cooperation, the limited temporal universe for the coordination, the efficiencies generated and their passing on to consumers and others that present themselves in the concrete situation.

[10] Of which Brazil is a member.

[11] Citing the language of the April 2020 ICN Steering Group Statement: "Competition during and after the COVID-19 Pandemic" as follows:

This extraordinary situation may trigger the need for competitors to cooperate temporarily in order to ensure the supply and distribution of scarce products and services that protect the health and safety of all consumers. Such joint efforts, if limited in scope and duration necessary to assist those affected by COVID-19, and in line with applicable laws or specific guidance from authorities, may be a necessary response to protect consumers and provide products or services that might not be available otherwise. It can be appropriate for competition agencies to accommodate collaboration between competitors necessary to address the circumstances of the crisis to the extent that their laws permit.

Available at <https://www.internationalcompetitionnetwork.org/wp-content/uploads/2020/04/SG-Covid19Statement-April2020.pdf>.

[12] The Ruling referenced the following language of the OECD Policy Response "Tackling Coronavirus (COVID-19) – Contributing to a Global Effort, COVID-19: Competition policy actions for governments and competition authority" relative to competition authority action:

This may include both general guidance to deal with the current crisis as well as speedy case-by-case guidance to business (e.g. open fast-track channels to provide advice on specific cases of co-operation). It is important to consider efficiencies in arrangements between competitors, more specifically for the development of key health products (e.g., vaccines or essential drugs). Authorities should ensure that the arrangements are limited in time and do not include hardcore restrictions such as price fixing. "Crisis cartels" have achieved limited benefits in stabilising businesses and resulted in significant detriment for consumers. Authorities should therefore remain vigilant.

Available at <https://www.oecd.org/daf/competition/COVID-19-competition-policy-actions-for-governments-and-competition-authorities.pdf>.

The CADE website-published May 26, 2020 OECD Note "Tackling Coronavirus (COVID-19) – Contributing to a Global Effort, Co-operation between competitors in the time of COVID-19," which "examines some typical situations where co-operation between competitors may be lawful or pro-competitive" and "discusses the main challenges that competition authorities face in analyzing or dealing with such situations," prefaces in its "Common criteria of lawful co-operation agreements during COVID-19" section with more specificity that:

The analysis of co-operation between competitors in the current pandemic crisis requires an assessment of the scope of the agreement, including its geographic scope, together with the need for the co-operation to overcome the market disruptions created by the crisis, its duration in time as well as the objective or purpose that the parties had with the agreement.

Available at <http://www.cade.gov.br/mais-noticias/divisao-de-concorrencia-da-ocde-divulga-nota-sobre-cooperacao-entre-concorrentes/co-operation-between-competitors-in-the-time-of-covid-19-1.pdf>.

[13] According to the Brazilian Antitrust Law and CADE Internal Resolution No. 17, to paraphrase, any contractual arrangement establishing horizontal or vertical joint enterprise between competitors in a certain market involving their risk and result sharing shall be considered an "associative contract" subject to evaluation by CADE for pre-implementation approval.

[14] Declared by Legislative Degree No. 6 of March 20, 2020.

[15] Available at <https://unctad.org/en/pages/PressRelease.aspx?OriginalVersionID=548>.

[16] Further:

Preparedness at all levels is essential to mitigate impacts and increase resilience, protecting jobs, enterprises and livelihoods. Drawing on previous epidemics, business continuity planning has proved to help navigate the uncertain future and promote business sustainability by identifying and managing risks; understanding business priorities, key products and services; establishing response plans; and taking action to minimize disruption and ensure that the workplace and workers are protected and prepared.

Available at https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/briefingnote/wcms_738753.pdf.

[17] Relative to small businesses, in addition to other measures on May 18, 2020, Law No. 13.999 was enacted, creating the Micro and Small Business National Support Program - Pronampe, which program is intended to provide these businesses COVID-19 pandemic financial impact relief to protect jobs, help them recover and thus support the economy. The program extends BRL 15.9 billion in credit to cover operating business expenses such as rent and payroll, via Brazilian Central Bank-authorized private financial institutions, which financing is partially Operations Guarantee Fund - FGO guaranteed. The line of credit is extended as 30% of the company`s 2019 financial year gross revenue (or, alternatively, 50% of the company`s paid up share capital in the case that the company has operated for only a year or less), payable over 36 months at the annual Brazilian benchmark interest rate Selic plus 1.25%, conditional on the company not being able to layoff employees until 60 days following receipt of the last line of credit loan installment, and that there be no payment of dividends to shareholders.

[18] One can cite the highly-publicized incidences of fraudulent use of the COVID-19 Emergency Small Business Assistance in the U.S.A., for example. Although intended by the U.S. Congress to provide very substantial assistance to small and medium and family-owned local businesses, there was totally inadequate oversight established for the actual program, the Paycheck Protection Program (PPP). The considerable taxpayer funding ended up being administered through some of the major banking institutions – such as JPMorgan Chase, and Bank of America. Such banks naturally refer to their listed business clients, and small local and family-owned businesses are generally not clients of large commercial banks. The funding ended up in many cases in the hands of bigger established businesses (and even Harvard University) and there is still no full accountability of how the taxpayer funding was actually disbursed. This led to public denunciation (See, for example, CNN Business, "Big banks accused of favoring more lucrative small business loans in coronavirus program" (April 21, 2020), available at <https://edition.cnn.com/2020/04/21/business/small-business-loans-ppp-lawsuit/index.html>. Relatedly, small and mid-size business borrowers across the U.S. have filed class action lawsuits. See ClassAction.org, "COVID-19 Lawsuits: PPP Loan Denials, Delays," (May 6, 2020), available

at <https://www.classaction.org/coronavirus-paycheck-protection-program-lawsuits>) and actual return of the funding in many instances.

[19] Google is but one example of the companies that have been providing grants to nonprofits supporting Brazilian small and medium-sized businesses during the COVID-19 pandemic. To quote from the U.K. independent daily newspaper The Guardian on the concept of such business altruism:

For decades executives have been encouraged to view the world beyond their corporation as a field of competitors to be battled with, or consumers to be lured. If the 'outside' world of neighbourhoods, supply chains, or regions was to be considered, it was kept in the periphery of a corporate social responsibility function rather than seen as central to the strategy of the business.

This passive view is changing fast. If corporations are to be sufficiently robust and successful over the coming decades, they need to ensure the resilience of the neighbourhoods in which they reside and in the extended supply chains that serve them. There are a number of different organisations that have successfully balanced the need for their business to be robust and profitable with a desire to improve conditions in the communities around them.

The Guardian, "Can altruism be good for business? - If corporations are to be successful over the coming decades, they need to ensure the resilience of their local communities," (June 6, 2014), available at <https://www.theguardian.com/sustainable-business/altruism-good-business-community>.