

# **Broadcasting of Sports Content in Brazil: Relevant Discussions from a Competition Law Perspective**

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Competition in the market for the broadcasting of sports content has been a matter of concern for the Brazilian antitrust authority (Administrative Council for Economic Defense (Conselho Administrativo de Defesa Econômica or CADE)) for the past two decades. Overall, during this period, CADE has undertaken investigations into negotiations between football leagues, content producers, channel programmers and pay-TV operators for the licensing of the transmission rights of major sports events, as well as reviewed relevant merger cases affecting these negotiations and other aspects of the market. Furthermore, CADE has more recently started to discuss to what extent – if any – over-the-top (OTT) platforms are able to compete with traditional players in the pay-TV industry, such as programmers of sports channels and pay-TV operators. As the authors argue in this article, these discussions put into perspective CADE's primary concerns related to the broadcasting of sports content – namely, access to sports content and how this content is delivered to end consumers.

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## Introduction

In Brazil, the pay-TV market is subject to intense public scrutiny, as seen in recent discussions held before the national competition authority, the Administrative Council for Economic Defense (Conselho Administrativo de Defesa Econômica or CADE).<sup>1</sup> Indeed, recent cases brought before CADE have clearly shown the importance of understanding how this market works, given that it involves negotiations between players across the value chain with potentially different interests, and, perhaps more importantly, how consumers have been accessing audio-visual content more recently.

This discussion applies, in particular, to sports channels. In Brazil, sports broadcasting is one of the most successful segments in the pay-TV market. In December 2018, according to official data released by Ancine,<sup>2</sup> the Brazilian audio-visual regulator, sports-dedicated pay-TV channels accounted for 13.2 per cent of total subscriptions in Brazil, meaning it was the third-most-representative category of pay-TV channels in terms of numbers of channels and subscribers.<sup>3</sup> In addition, according to data compiled by Kantar Ibope Media, a local rating company, five of the 30 most-watched channels in pay-TV in September 2019 were exclusively dedicated to sports content.<sup>4</sup>

Under Law No 12,485/2011 (the ‘SeAC Law’), agents in the audio-visual industry are separated into four categories, according to their activities in this market: content producers, programmers, packagers and operators (or distributors) (see Figure 1). Also, according to this legislation, while producers, programmers and packagers are subject to regulation and inspection by Ancine, pay-TV distributors are regarded as telecommunications

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1 CADE has three departments, the Administrative Tribunal (the ‘Tribunal’), the General Superintendence (GS) and the Department of Economic Studies (DEE). The GS is responsible for investigating anti-competitive conduct. On the conclusion of such investigations, the GS issues an opinion recommending that the Tribunal either dismisses the investigation or imposes fines and other applicable sanctions on the defendants. The GS is also responsible for investigating merger cases and at the end of such investigations may recommend the approval of these mergers or challenge the mergers before the Tribunal for the blocking or imposition of conditions for the approval of these mergers. The Tribunal is composed of seven commissioners and is responsible for issuing final decisions on antitrust investigations and merger cases challenged to the Tribunal. Finally, the DEE provides economic support to both the GS and the Tribunal.

2 Agência Nacional do Cinema or Ancine (National Film Agency).

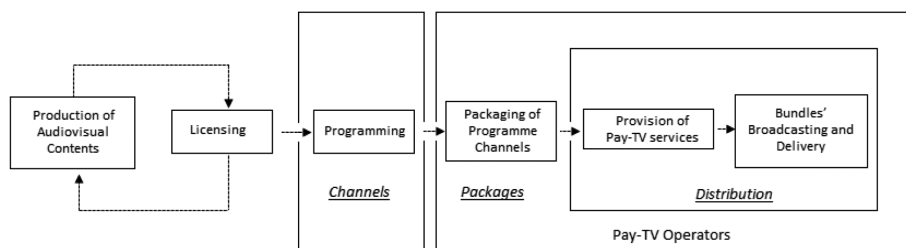
3 Ancine, ‘Assinantes no Mercado de Programação na TV por Assinatura 2019’ (Ancine 2019), 15, available at [https://oca.ancine.gov.br/sites/default/files/repositorio/pdf/informe\\_assinantes\\_no\\_mercado\\_de\\_programacao\\_-\\_versao\\_diagramada.pdf](https://oca.ancine.gov.br/sites/default/files/repositorio/pdf/informe_assinantes_no_mercado_de_programacao_-_versao_diagramada.pdf) accessed 16 September 2019.

4 Ricardo Feltrin, ‘Exclusivo: 30 canais mais vistos por quem assina TV paga no Brasil’ *Uol* (São Paulo, 21 September 2019) <https://tvefamosos.uol.com.br/noticias/ooops/2019/09/21/exclusivo-30-canais-mais-vistos-por-quem-assina-tv-paga-no-brasil.htm> accessed 28 October 2019.

services providers and, as such, are subject to the jurisdiction of Anatel<sup>5</sup> – the Brazilian telecommunications regulator.

Finally, under Law No 12,529/2011 (the ‘Competition Law’), CADE has the authority to control mergers taking place in this industry (provided that certain legal thresholds are met), as well as to investigate and punish any conduct found to be in breach of competition rules.

**Figure 1: Pay-TV value chain in Brazil**



Adapted from AT&T Inc, Time Warner Inc Merger Control no 08700.001390/2017-14 (2017), GS Opinion 5, p 13.

Overall, from an antitrust standpoint, two main discussions can currently be identified concerning sports broadcasting in Brazil.

The first relates to access to sports content. Historically, the more pay-TV sports channels can broadcast significant events – notably, local events, such as the Brasileirão, the most relevant professional football league in Brazil – the more they are popular with consumers and advertisers. As a result, content producers and programmers often compete between themselves and with other market players (notably, public networks) for the transmission rights of major events. In contrast, pay-TV operators frequently engage in negotiations with programmers to license sports channels and to have a competitive line-up in the market. In recent years, CADE has investigated commercial negotiations between the owners of transmission rights (football clubs and their associations), programmers and pay-TV operators to determine whether there is any indication of anti-competitive behaviour in this respect.

Another discussion relates to how pay-TV content – and, therefore, sports content – is delivered to end consumers in Brazil. As in other jurisdictions, Brazilian regulators have increasingly been dealing with the provision of audio-visual content through the internet by over-the-top (OTT) platforms. In particular, they have been keen to understand to what extent these agents may – or will – affect competition in the pay-TV market.

5 Agência Nacional de Telecomunicações or Anatel (National Telecommunications Agency).

### **Access to sports content: negotiations between owners of broadcasting rights, programmers and pay-TV operators**

As noted, the current regulation of the pay-TV market in Brazil rests on the view that the value chain of this market is composed of content producers, programmers, packagers and operators (or distributors). Since these players perform activities that are vertically related across the value chain, they often have to negotiate access to content and other assets with other companies to carry out their activities.<sup>6</sup> In the sports channels segment, two types of negotiation stand out in this respect: (1) negotiations between owners of transmission rights for sports events (such as football clubs and associations)<sup>7</sup> and content producers or programmers, related to the granting of such rights; and (2) negotiations between programmers and packagers or pay-TV operators, related to the licensing of pay-TV channels.

Over the past 20 years, CADE has assessed the relationship between the rights holders of transmission rights, programmers and pay-TV operators and its likely effects on competition through antitrust probes or merger reviews. To date, CADE has not unilaterally imposed fines or any other penalties or blocked a transaction altogether based on a finding of potential or actual anti-competitive effects in the market. However, CADE has negotiated settlements or merger remedies in relevant cases that are further discussed in this article.

Overall, CADE's concerns regarding negotiations between the owners of broadcasting rights, programmers and pay-TV operators have involved potential or actual horizontal or vertical anti-competitive effects in the pay-TV sports channels segment. The proceeding subsections briefly summarise the main concerns raised by CADE from both a horizontal and a vertical standpoint, as well as the remedies adopted to address such concerns, in the past two decades.

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6 Also, it is noteworthy that the SeAC Law limits cross-ownership between content producers/programmers and pay-TV operators. Under this legislation, content producers and/or programmers cannot hold 50 per cent or more of a pay-TV operator's total and voting capital. Conversely, pay-TV operators cannot hold 30 per cent or more of a content producer and/or programmer's total and voting capital. These restrictions are subject to intense discussions before Anatel, the telecommunications regulator, which is still to decide whether the AT&T/Time Warner merger would violate these restrictions. The Brazilian Congress is also considering a bill (Senate Bill No 3832/2019) intended to lift this cross-ownership ban.

7 Under Law No 9,615/1998 (also known as the 'Pelé Law'), sports associations own the so-called right of arena, which consists in the exclusive prerogative of negotiating, authorising or prohibiting the capture, fixation, emission, broadcasting, rebroadcasting or reproduction of images, by any means or process, of sports events in which they take part. These entities may license their right of arena to public networks, pay-TV distributors and agents of any other medium interested in transmitting sports events to consumers. The applicable legislation does not provide for any specific process of negotiation for these rights.

*Horizontal effects*

From a horizontal perspective, the most relevant case in the sports segment is the *Disney-Fox* case, which concerned the acquisition by The Walt Disney Company (Disney) of certain assets from 21st Century Fox (21CF).<sup>8</sup> In this case, the main concern raised by CADE was that the transaction could lead to a significant concentration in the market for the programming and licensing of sports channels to pay-TV operators, since: (1) it would reduce the number of programmers active in the segment from four to three (ie, Disney/Fox, Globosat and Bandeirantes); and (2) Disney and Fox owned six of the ten main channels in this segment (ie, the ESPN and Fox Sports channels, respectively).

In essence, CADE's concerns were mainly related to rivalry in the pay-TV sports channels segment. In its view, while owning transmission rights is necessary for programmers to differentiate their offerings and compete in this segment, live sports content is not born equal because Brazilian consumers tend to prefer sports channels with local content over channels with international content. From this angle, Disney and 21CF were considered close competitors<sup>9</sup> by CADE as compared to Globosat (SporTV) or Bandeirantes (Band Sports) because they owned (and competed for) transmission rights for major international events related to Latin American, North American and European leagues, while the latter are mainly focused on major local sports events or less popular international events.

In CADE's view, this meant, in the post-transaction scenario, that Disney would hold a significant portfolio of sports channels that would be attractive to Brazilian viewers without facing any significant competitive pressure from its competitors, thereby having the capacity and incentives to abuse this portfolio power by imposing bundles or other vertical restraints against pay-TV operators, especially smaller operators. Besides, and perhaps more importantly, Disney would have the ability to charge pay-TV operators higher prices for licensing these channels and reduce the diversity of content, with potentially adverse effects on consumer welfare. Finally, CADE disagreed with the merging parties' claims that the transaction would enable the creation of a new player in a better position to compete

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8 [2019] CADE Merger Control Case No 08700.004494/2018-53.

9 It should be noted that, according to CADE, Fox Sports itself is a relatively new sports channel in the Brazilian market and was a successful entrant that was able to compete with ESPN and bring more diversity of content to the Brazilian sports channels market.

with Globosat. Instead, it noted that it could create a ‘virtual duopoly’ in the sports channels segment.<sup>10</sup>

Another topic of discussion in the case concerned broadcasting rights. As Commissioner Paulo Burnier noted, those rights are necessary for a programmer to create a competitive sports channel but are sold by football clubs and associations only through auctions that are not entirely transparent and occur only periodically. Also, property over those rights rarely changes from one programmer to another: 21CF, for example, won the rights to broadcast two major events, the Copa Sulamericana and the Copa Libertadores football leagues, several times over the past 15 years. In the Commissioner’s view, which was ultimately the prevailing view in the CADE Administrative Tribunal (the ‘Tribunal’), this pattern of periodical, non-transparent auctions with no rotation of transmission rights creates difficulties for new entrants in competing effectively with incumbents in the market for the programming and licensing of sports channels to pay-TV operators in Brazil, especially so in the post-transaction scenario of the *Disney-Fox* case.

Given these concerns, the Tribunal cleared the *Disney-Fox* case under the condition that the merging parties divested certain assets necessary for the production and licensing of the Fox Sports channels in Brazil,<sup>11</sup> in order to enable a new player to enter the Brazilian market for pay-TV sports channels. Apart from that, the Tribunal determined that Disney should:

- license to the buyer of the assets package all the broadcasting rights negotiated on a regional or supranational basis, in case the buyer does not wish to purchase such rights;
- abstain, for an undisclosed period of time, from participating in auctions for broadcasting rights of the same events owned by the divested business;
- refrain from rehiring employees or reacquiring rights or assets for an undisclosed period of time; and
- sublicense the Fox Sports brand on a royalty-free basis for a determined period of time.

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10 According to CADE, the transaction could lead to a virtual duopoly because one of the three remaining players in the market (ie, Bandeirantes) has a very low market share and Disney and Globosat could not be considered close competitors given that they did not actually compete for the same type of sports events (eg, Globosat is focused on major Brazilian football events and Disney is focused on major international sports events).

11 Under the commitment negotiated between CADE and the parties, Disney and 21CF were obligated to sell assets such as real estate, licences, contracts and personnel. This divestment package did not cover intangible assets such as brands, trademarks, registrations or trade names with the ‘Fox’ name. In addition, the buyer would have the right to decide whether or not to purchase broadcasting rights associated with the divested assets.

CADE designed this remedy package after consulting with potentially interested buyers and cooperating with other Latin American authorities.<sup>12</sup> Under the agreement, a divestiture trustee was to be named to oversee the divestment of all assets. Also, a ‘hold separate’ clause in the agreement provided that these assets would be managed separately by a third party until a buyer was found.

In November 2019, after the merging parties declared that they were not able to comply with the remedies agreed with CADE (ie, they were not able to divest the Fox Sports channels in Brazil), CADE’s Tribunal decided to re-examine the transaction including the divestiture remedy originally agreed with the merging parties. CADE’s Tribunal was not clear, however, about which options it would be considering in its re-examination of the case.<sup>13</sup> In any case, according to media reports and other publicly available information, negotiations for the sale of the assets with potential buyers were still ongoing at the time of writing, meaning that the sale of the assets in the original remedies package could still be an outcome of the case.

Regarding these negotiations, an important aspect will likely be the extent to which those assets would still be effective in enabling the entry of a new player in the Brazilian market for pay-TV sports channels. As CADE’s Tribunal takes this new opportunity to reassess the Disney-Fox deal, it is possible that Fox Sports will have to, at some point, renegotiate its licensing agreements with professional football clubs and pay-TV operators. The terms of this renegotiation, however, are still unclear in a context where the Covid-19 pandemic negatively affects transmission of live sporting events and reduces the viewership of sports channels in Brazil. In addition, it is worth noting that some key employees have already left the Fox Sports channels after CADE’s original decision.

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12 CADE cooperated with authorities in the United States (Department of Justice), Chile (National Economic Prosecutor’s Office) and Mexico (Federal Telecomunicaciones Institute and Federal Economic Competition Commission). This cooperation was intended to avoid any contradictory decisions between these authorities, especially given the pan-regional aspects of the market for pay-TV sports channels.

13 In the original discussion of the Disney-Fox case before the Tribunal, Reporting Commissioner Polyanna Vilanova and Commissioner Maurício Bandeira Maia issued dissenting opinions disagreeing with the majority opinion of the Tribunal’s on the type of remedies that were best-suited for the case. While the majority of the Tribunal followed Commissioner Burnier’s opinion that structural remedies were sufficient to preserve the competitive structure of the market, Commissioners Vilanova and Bandeira Maia favoured the imposition of unilateral behavioural remedies as a condition to approving the deal. This discussion may be revisited during the Tribunal’s re-examination of the case.

*Vertical effects*

CADE's case law indicates that it is mostly concerned with anti-competitive effects resulting from the vertical relationship between: (1) the owners of transmission rights for sports events and content producers/programmers; and (2) programmers of sports channels and pay-TV operators.

RELATIONSHIP BETWEEN RIGHTS OWNERS AND PAY-TV CHANNELS: ACCESS TO TRANSMISSION RIGHTS

Regarding the relationship between the owners of transmission rights and content producers and programmers, one of the most relevant cases initiated by CADE was the *Thirteen Club* case, in which it investigated potential anti-competitive conduct consisting in the joint negotiation and sale of transmission rights of the Brasileirão by a group of 13 of the most relevant Brazilian professional football clubs.<sup>14</sup> CADE opened this investigation in 1997 based on a complaint filed by individuals according to which the so-called Thirteen Club had been negotiating their transmission rights of the Brasileirão with Globo and Bandeirantes, two major local media groups. According to the complainants, under these negotiations, the Thirteen Club was offering 'arena rights' in a single package bundling all the media then existent (that is, public networks, pay-TV and pay-per-view) on an exclusive basis. Also, the Thirteen Club offered buyers a right of preference to cover any offer made by third parties during renewal periods (ie, an English clause).

After reviewing the case, the now-extinct Secretariat of Economic Law (Secretaria de Direito Econômico or SDE), the investigative unit within CADE that preceded the General Superintendence (GS), issued its opinion recommending that the Thirteen Club and Globo be sanctioned for breaching competition rules. In the SDE's opinion, by offering transmission rights in a bundle covering all media, the Thirteen Club automatically prevented other potential interested parties that were active in a single medium (such as small and medium-sized public networks) from bidding for those rights, thereby raising barriers to entry for other potential competitors and reducing competition in this particular market for transmission rights. Besides, the SDE found that other commercial conditions followed by the Thirteen Club – exclusivity and preference clauses – also had the potential to harm competition by perpetuating Globo's position as the licensee of the transmission rights and reducing incentives for other players to compete for such rights and create new sports channels.

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14 [1997] CADE Administrative Proceeding No 08012.006504/1997-11.

Despite the SDE's recommendation, however, in 2010 the Tribunal agreed to settle the case with the Thirteen Club and Globo on the condition that the Thirteen Club:

- offered transmission rights for each medium on a standalone basis (including internet and mobile);
- ceased to offer preference clauses for the buyers of such rights;
- applied transparent and objective criteria in its bidding processes; and
- allowed licensees of such rights, in the specific case of public networks, to sublicense those rights to third parties.

As for Globo, it agreed with CADE to renounce the preference rights granted by the Thirteen Club for the 2009–11 seasons of the Brasileirão.

The *Thirteen Club* case was arguably a landmark case as regards the relationship between owners of transmission rights for sports events, content producers and programmers. It also indicated that CADE would monitor, from that moment on, negotiations between these agents more carefully, given their relevance from a competition standpoint.

Indeed, in 2016, the GS opened a new investigation<sup>15</sup> into whether Globo was abusing its dominant position in the transmission of the Brasileirão in broadcast TV (public network), pay-TV and pay-per-view by threatening, retaliating or discriminating professional football clubs that negotiated their arena rights with Esporte Interativo, a Brazilian pay-TV channel owned by Turner, from WarnerMedia Group, by then a new entrant in the sports channel market.<sup>16</sup> Until then, Globo enjoyed a virtually monopolist position as the owner of transmission rights of the Brasileirão in the pay-TV market, but this scenario began to change after Esporte Interativo won rights from some specific professional clubs for the 2019 edition of the event. The GS also investigated whether Globo was trying to raise rivals' costs by demanding exclusivity in all three media from professional football clubs. After an extensive investigation, however, in March last year the GS dropped the case after failing to find any evidence of anti-competitive behaviour from Globo.

Eventually, the Thirteen Club, as well as other similar organisations, became extinct, and professional football clubs began negotiating their arena rights on a standalone basis. Nevertheless, there has been some discussion on whether the existence of a joint negotiation model could be necessary to raise the bargaining power of small-sized professional clubs towards programmers. In 2014, for example, the Federal Attorney's Office

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15 [2019] CADE Preparatory Proceeding No 08700.000721/2016-18, Opinion No 09/2019/CGAA4/SGA1/SG.

16 By the end of 2018, Turner announced that it would deactivate the Esporte Interativo channel and broadcast sports events through its general content channels (TNT and Space) and digital platforms only.

(Ministério Público Federal) made a formal request for CADE to intervene in the negotiations between football clubs and communications vehicles (ie, public networks and pay-TV programmers, among others). In its response, CADE said that a joint negotiation model may harm competition and can only be implemented through legislation.<sup>17</sup>

Despite CADE's position, however, recent reports in the Brazilian press indicate that professional football clubs are increasingly willing to establish a national league for the joint negotiation of their arena rights. Moreover, efforts for the creation of a league may become more intense as Brazilian professional football clubs struggle with the negative impacts of the Covid-19 pandemic.

In Brazil as well as elsewhere, these clubs' revenues are mostly dependent on the transmission of matches and other live events at national and state level that attract a significant number of advertisers and sports enthusiasts. Since the start of the Covid-19 pandemic in Brazil, however, most if not all of these events have been cancelled and, as a result, professional football clubs (as well as other professional sports clubs) have suffered a significant decrease in their revenues from arena rights and from advertising, and have been compelled to renegotiate or extend employment contracts with athletes and declare a force majeure to avoid fulfilling contractual obligations with business partners. In addition, there may be situations where advertisers could refuse to pay for advertisements as long as professional football clubs (or other professional sports clubs) do not perform their own contractual obligations under the *exceptio non adimpleti contractus* principle.<sup>18</sup>

Under such circumstances, it is possible that the Covid-19 pandemic could place additional pressure on Brazilian professional football clubs to establish a national league as mentioned above. This would also present additional challenges for CADE in monitoring and curbing potential antitrust conducts deriving from measures taken by football clubs and sports channels to protect their businesses during the Covid-19 pandemic.

#### RELATIONSHIP BETWEEN PAY-TV CHANNELS AND OPERATORS: ACCESS TO PAY-TV SPORTS CHANNELS

As for the relationship between programmers and pay-TV operators, CADE has mostly focused on commercial practices and mergers that

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17 [2015] CADE Administrative Inquiry No 08700.009863/2014-70, Opinion No 47/2015/CGAA2/SGA1/SG/CADE.

18 The *exceptio non adimpleti contractus* principle is commonly used in civil law systems and consists in the right entitled to the party of a reciprocal contract to refuse to carry out its obligations as long as its co-contractor has not performed its own obligations or offered to do so. This principle rests on the idea that mutual obligations are dependent on each other and must, therefore, be carried out at the same time.

could have any potential foreclosure or portfolio effects in the market for pay-TV distribution. In some of these cases, CADE worked closely with Anatel and Ancine.

In the *SporTV* case,<sup>19</sup> opened in 2001, CADE investigated whether Globo (owner of Globosat, a programmer of pay-TV sports channels known as SporTV, and by then a shareholder of NET, a major pay-TV operator) would have engaged, through Globosat, in an anti-competitive practice of refusing to license the SporTV channels to independent, non-integrated pay-TV operators. According to NeoTV, an association of smaller pay-TV operators, Globosat was supposedly licensing its pay-TV (SporTV 1 and 2) and pay-per-view (Premiere Esportes) channels exclusively to NET.

After an extensive investigation, the SDE found that Globosat's conduct amounted to an abuse of its dominant position with the potential to foreclose the downstream market for pay-TV distribution as well as limit competition in the market for pay-TV sports channels. According to the authority, since SporTV and Premiere Esportes held transmission rights for virtually all relevant national sports events, both channels were substantially important for independent pay-TV operators to offer a competitive mix of channels in the market. In addition, the SDE identified that by holding exclusive rights to broadcast virtually all relevant sports events, Globosat prevented competitors from offering alternative channels able to compete with SporTV in the future.

Despite these conclusions from the SDE, Globosat eventually settled the case with the Tribunal, committing to license the SporTV and Premiere Esportes channels to independent pay-TV operators on a non-discriminatory basis, for three years, as well as to limit the use of exclusive rights to broadcast national football events. It is also worth noting that these premises in Globosat's settlement with CADE (ie, restrictions to the control of sports events rights and commercialisation on a non-discriminatory basis) were also present in the remedies imposed by CADE on different occasions as a

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19 [2006] CADE Administrative Proceeding No 08700.003048/2001-13.

condition to approving merger cases reviewed by the authority, such as the *DirecTV-SKY* case<sup>20</sup> and the *AT&T-Time Warner* case.<sup>21</sup>

Finally, CADE has recently opened a new investigation – which is broader in scope and does not focus only in sports content – of possible anti-competitive vertical restrictions imposed by programmers (Globo, Turner (WarnerMedia), Disney and 21CF) on pay-TV operators through the tying of channels, penetration targets and most-favoured-nation (MFN) clauses.<sup>22</sup> This investigation was opened based on market studies developed by Ancine and was ongoing at the time of writing.

### **Competition between programmers and OTT platforms concerning sports broadcasting**

From an antitrust standpoint, another relevant discussion in the pay-TV sports segment relates to the emergence of OTT platforms and to what extent these platforms exert competitive pressure over pay-TV programmers. The CADE briefly discussed this topic in its recent decisions in the *AT&T-Time Warner* and *Disney-Fox* cases.

In the *AT&T-Time Warner* case, CADE focused its analysis on a specific segment of OTT platforms, video-on-demand (VOD) platforms, which, as noted by CADE, cover several business models based on the provision of non-linear content.<sup>23</sup>

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20 The *DirecTV-Sky* case involved two transactions: (1) acquisition by The News Corporation Limited ('News Corp') of indirect corporate control of DirecTV's Brazilian subsidiary ('DirecTV Brazil'), then a major pay-TV operator; and (2) a merger between DirecTV Brazil and Sky Brasil Serviços Ltda. ('Sky'), another relevant operator, with the surviving entity still using the 'Sky' brand. In its final decision, CADE cleared transaction (1) under the condition that News Corp and its affiliates avoid exercising, for the next five years, exclusivity rights for the transmission of the five major football leagues in Brazil at that time. The Tribunal imposed this restriction on the basis that it was necessary to avoid any conduct by News Corp that could raise Sky's competitors' costs and, further, to ensure that CADE's decision in the *SporTV* case were not rendered ineffective. See [2006] CADE Merger Control Cases No 53500.002423/2003 and No 53500.029160/2004.

21 In its review of the *AT&T-Time Warner* case, CADE raised the concern that the creation of a single economic entity active in all markets of the pay-TV value chain (ie, content production and programming, through WarnerMedia, and packaging and distribution, through Sky, a local subsidiary of AT&T and the second-largest pay-TV operator in Brazil) could lead to foreclosure effects in the market for distribution of pay-TV content. To avoid the anti-competitive effects identified, CADE and the merging parties agreed to behavioural remedies under which the parties should, among other actions, license their channels on a non-discriminatory basis to pay-TV operators and/or extend non-discriminatory conditions to programmers in their negotiations with Sky. See [2017] CADE Merger Control Case No 08700.001390/2017-14.

22 [2019] CADE Administrative Proceeding No 08700.001323/2019-53.

23 As CADE noted, VOD may be segmented into the following business models: subscription VOD, transactional VOD, advertising VOD, catch-up TV and TV everywhere.

Regarding these platforms, CADE found that these had no significant impact on competition, despite their growing attractiveness to consumers. This perspective, however, was not unanimous among its commissioners, considering that the minority of the Tribunal found VOD platforms to be a sufficient counterbalance to the merging parties' market power.

By its turn, in the *Disney-Fox* case, CADE assessed the merging parties' claim that OTT applications in general – that is, not only VOD platforms but also streaming platforms – have been increasingly exerting competitive pressure over pay-TV sports channels. According to Disney and 21CF, this would be demonstrated by the fact that players such as Amazon, Twitter and Facebook have recently purchased broadcasting rights for local and international sports events (such as the National Football League and the National Basketball Association) and started to stream such events through the internet.

In this respect, CADE's understanding was that, even though access to high-speed internet has increased in Brazil and more digital platforms have been providing audio-visual content through the internet, these platforms exert limited competitive pressure over pay-TV programmers. First, there is a difference in the content provided by these two groups of players, as OTT platforms merely broadcast specific sports events, while pay-TV channels not only broadcast events but also produce editorial content for their subscribers (such as documentaries and roundtable discussions). This, in CADE's view, means that OTT platforms still provide an inferior experience to consumers in terms of content variety as compared to pay-TV sports channels.

Furthermore, based on input from Ancine, CADE noted that some technical elements make it more difficult for OTT platforms to compete directly with pay-TV channels. Among these factors, it highlighted:

- frequent delays in the transmission;
- loss of image and audio quality during transmission; and
- dispersion of sports events across different platforms, making it necessary for users to hire these providers collectively to follow these events.

It is worth noting, in any case, that Ancine has explicitly stated that this understanding applies to a short-term scenario only.<sup>24</sup>

Finally, CADE dismissed the merging parties' claim on the basis that there is no factual evidence that OTT platforms directly compete with pay-TV channels. In CADE's view, recent market data indicates that the audience for Disney and 21CF sports channels has been growing steadily, even after OTT platforms

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24 Ancine, Response to Request for Information No 4416/2018, filed on 22 January 2019, CADE Merger Control Case No 08700.004494/2018-53. In Ancine's words, '[o]ne of the main disadvantages of live streaming transmissions, especially for sports, in relation to Pay-TV, is the delay that occurs in live streaming, when compared to cable transmission' (p 70, translated by the authors).

started to stream live events in Brazil. As Commissioner Burnier noted, it seems more reasonable to expect that OTT platforms exert competitive pressure over pay-TV operators directly rather than pay-TV programmers as a result of ‘cord-cutting’ and other changes in consumer habits.

The latter seems to be supported by recent events in the Brazilian pay-TV market, as subscriptions for this service have been facing a steady decline over the last months. In addition, there is an ongoing debate on whether the provision of pay-TV content through the internet should be treated as a pay-TV distribution service within the meaning of the Brazilian legislation (eg, a telecom service regulated by Anatel). This discussion was raised by Claro, a leading telecommunications group, which controls the largest pay-TV operator (NET) in Brazil, after 21CF and Turner started to stream their audio-visual content through streaming platforms on the internet. The discussion was brought to Anatel, the Brazilian courts<sup>25</sup> and the Brazilian Congress,<sup>26</sup> and was still ongoing at the time of writing.

## Conclusion

This article aimed to indicate the main competition discussions on the broadcasting of sports events in Brazil.

As noted, CADE’s experience regarding this segment in the past 20 years indicates that, first and foremost, it is concerned with access to sports content in general, such as transmission rights and pay-TV sports channels. Regarding transmission rights, CADE’s investigations have mostly focused on understanding to what extent negotiations of such rights between football leagues, content producers and programmers involve any kind of vertical restraints and, therefore, are consistent with Brazilian legislation. As for sports channels, CADE has been focusing on commercial practices and mergers that may foreclose the market for pay-TV operators, especially non-vertically integrated operators. These practices include potential refusal to deal, tying, penetration targets and MFN clauses involving the licensing of such channels.

In addition, CADE has intervened in the market whenever it found necessary to ensure access to transmission rights (see the *Thirteen Club* case) and pay-TV channels (see the *SporTV* case), as well as to determine divestments and avoid any potential abuse of a dominant position in this segment (see the *Disney-Fox* case). It also has taken a firm stand against a joint negotiation model between football clubs and communications vehicles (that is, public networks and pay-TV programmers, among others), a matter

25 [2019] Federal Tribunal of the 1st Region, Lawsuit No 1017111-33.2019.4.01.3400.

26 See n 6 above.

that has been frequently discussed. Even so, it is unclear whether these interventions will be able to withstand as the Covid-19 pandemic negatively affects transmission of live sporting events, reduces viewership of sports channels and creates additional pressure for professional football clubs to recreate joint negotiation schemes for their arena rights.

Finally, CADE's most recent experience also shows that it is increasingly interested in understanding how sports content is provided to end consumers. In its review of relevant merger cases taking place in the pay-TV market, it concluded that, while OTT platforms may compete with pay-TV operators to a certain extent, the same cannot be said in relation to pay-TV programmers, given differences between these players in terms of user experience (content variety) and quality of service. This discussion, however, is ongoing and CADE may adopt a different understanding in future cases involving this matter.

