

## Na Mídia

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### Brazil rejects prosecutor's appeal against Boeing-Embraer merger

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Brazil's competition tribunal has unconditionally cleared Boeing's deal with Embraer, having found that the country's public prosecutor lacks legal standing to appeal against deal decisions.

The tribunal for the Administrative Council for Economic Defence (CADE) last Wednesday rejected an appeal brought by the Federal Public Prosecutor's Office (MPF) the week prior. The MPF called on the enforcer to re-examine whether to allow US aerospace company Boeing to buy an 80% stake in the commercial airline division of Brazilian rival Embraer.

Brazil's competition law states that every decision by CADE's General Superintendence that unconditionally approves a deal may be reconsidered by the tribunal or reanalysed through an appeal by interested third parties within 15 days.

However, CADE commissioner Luiz Hoffmann said despite the relevance of MPF to Brazil's legal system, section 9, article 129 of the Federal Constitution of Brazil states the public prosecutor's office does not have the authority to intervene and appeal against the enforcer's decision in merger matters.

CADE's general superintendent recommended last month that the enforcer clear the deal without remedies. The tie-up does not pose any harm to competition because Boeing and Embraer face strong competition from Airbus; the companies are not close competitors in Brazil; and they do not compete in the same markets, the general superintendent said.

CADE said it analysed the deal by separating it into two markets: one for manufacturing regional airliners and large commercial aircraft, and the other for manufacturing military aircraft.

Boeing would take over Embraer's global commercial aircraft business, including product development, production, marketing and services operations. The combined entity, in which Embraer retains a 20% stake, would be renamed Boeing Brasil-Commercial.

The enforcer investigated the Brazilian market for commercial aircraft with capacity ranging from 100 to 150 seats, and found the joint venture will not negatively affect the existing level of competition.

In the market for military aircraft, CADE said the combined entity has no opportunity to exercise market power because the deal does not involve merging the companies' portfolios of military aircraft.

Despite observing some unfavourable entry conditions in the commercial aircrafts market, the expansion of Boeing's operation will likely increase its ability to impose competitive pressure against frontrunner Airbus, the enforcer claimed. CADE added that the Brazilian aerospace company's partnership with Boeing will provide Embraer with greater technological and commercial advancements.

However, the public prosecutor's office argued in its appeal against the clearance that the general superintendent failed to analyse the deal's impact on regional flight operations that use aircraft with fewer than 100 seats.

To better understand the tie-up's potential impact on competition as a whole, the commercial aviation market for aircraft with fewer than 100 seats needs to be analysed, the MPF said. It added that CADE's finding also dismissed the possibility of the deal restricting potential competition considering Boeing's strong market power in the aerospace sector.

Ricardo Pastore, a partner at Pereira Neto Macedo, said he believes the enforcer's investigation was deep. "None of the replies in the market test indicated that the deal would harm competition in Brazil."

However, Pastore noted that given Embraer is a state-controlled company, the deal was clouded with political pressure from the outset. Part of the reason for the MPF to appeal against CADE's approval may have been linked to political pressure, he said.

Eduardo Frade, a partner at Vinícius Marques de Carvalho Advogados and a former CADE general superintendent, said the merger was thoroughly analysed.

Even though the tribunal decided not to process MPF's appeal, "it became clear that the commissioners also didn't believe it was the case to advocate the matter for revision," he said. "So in the end, there was a sound institutional message that the Brazilian competition authority was comfortable with the approval of the transaction."

**Bruno Drago, a partner at Demarest Advogados, said once a decision has been taken by CADE – providing due process of law has been observed – it should not be revised absent any proof that a breach of possible commitments occurred.**

Brazil's competition laws are very specific in limiting the role the prosecutor's office can play in merger control, including limiting its ability to intervene in administrative investigations launched by the general superintendent, Drago said.

Now that the Boeing/Embraer deal has cleared antitrust hurdles in most jurisdictions – including the US, China, Japan and South Africa – the European Commission is the final major competition authority whose approval is needed.

The commission last October initiated a Phase 2 investigation into the proposed deal over concerns that it may reduce competition in the commercial aircraft market. The proposed joint venture "may remove Embraer as the third-largest global competitor in the already highly concentrated" market and result in higher prices and less choice, the commission said.

Last month, the European enforcer reportedly halted its review, demanding additional information from the parties.

According to news reports, the commission said in an e-mail statement that this procedural delay in merger investigations "is activated if the parties fail to provide, in a timely fashion, important information that the commission has requested from them."

"Once the missing information is supplied by the parties, the clock is restarted and the deadline for the commission's decision is then adjusted accordingly," the authority added.

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