
THE MERGER CONTROL REVIEW

EDITOR
ILENE KNABLE GOTTS

LAW BUSINESS RESEARCH

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THE MERGER CONTROL REVIEW

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EDITOR'S PREFACE

*Ilene Knable Gotts**

Perhaps one of the most successful exports from the United States has been the adoption of mandatory pre-merger competition notification regimes in jurisdictions throughout the world. Although adoption of pre-merger notification requirements was initially slow – with a 13-year gap between the enactment of the United States' Hart-Scott-Rodino Act in 1976 and the adoption of the European Community's merger regulation in 1989 – such laws were implemented at a rapid pace in the 1990s, and many more were adopted and amended in the last decade. China and India have just implemented comprehensive pre-merger review laws, and although their entry into this forum is recent, it is likely that they will become significant constituencies for transaction parties to deal with when trying to close their transactions. This book provides an overview of the process in 32 jurisdictions as well as an indication of recent decisions, strategic considerations and likely upcoming developments in each of these. The intended readership of this book comprises both in-house and outside counsel who may be involved in the competition review of cross-border transactions.

As shown in further detail in the chapters, some common threads in institutional design underlie most of the merger review mandates, although there are some outliers as well as nuances that necessitate careful consideration when advising clients on a particular transaction. Although a few merger notification jurisdictions remain 'voluntary' (e.g., Australia, Singapore, United Kingdom), the vast majority impose mandatory notification requirements. With the exception of a few jurisdictions (e.g., Brazil), most require that the notification process be concluded prior to completion (e.g., pre-merger, suspensory regimes), rather than permitting the transaction to close so long as notification is made prior to closing. Indonesia is at present considering adopting a pre-merger requirement to augment its current ability to investigate and take remedial action post-completion. Some jurisdictions impose strict time frames by which the parties must file their notification.

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For instance, Cyprus requires filing within one week of signing of the relevant documents and agreements; Brazil requires that the notification be made within 15 business days of execution of the agreements; and Hungary and Romania have a 30-calendar-day time limit from entering into the agreement for filing the notification.

The United States was the first jurisdiction to adopt a process for mandatory pre-merger review by federal antitrust authorities. Very little has changed in the US process in the three decades since its implementation. Some aspects of the US process have been adopted by other jurisdictions. For instance, Canada has recently transformed its procedure to resemble the US style of review, with a simplified initial filing, a 30-day period to issue a detailed information request, and the waiting period tolled until the parties comply with the request. Offers to resolve competitive concerns are only considered by the US after the more detailed investigation has been carried out. The US and Canadian authorities must go to court to block a transaction's completion. Both jurisdictions can seek to challenge a completed merger, even if that transaction had already been reviewed pre-merger by the relevant authority; although in Canada, such challenges must be brought within one year of closing, while in the US there is no statute of limitations.

Most jurisdictions more closely conform with the European Union model. In these jurisdictions, pre-filing consultations are more common, parties can offer undertakings during the initial stage to resolve competitive concerns, and there is a set period during the second phase for providing additional information and the agency reaching a decision. Once the authority approves the transaction, it cannot later challenge the transaction's legality. Other jurisdictions, such as Croatia, are still aligning their threshold criteria and process with the EU model. There remain some jurisdictions even within the EU, however, that differ procedurally from the EU model. For instance, in Austria the obligation to file can be triggered if only one of the involved undertakings has sales in Austria so long as both parties satisfy a minimum global turnover and have a sizeable combined turnover in Austria.

It is becoming the norm in large cross-border transactions raising competition concerns for the US, EU and Canadian authorities to work closely with one another during the investigative stages, and even in determining remedies, minimising the potential of arriving at diverging outcomes. Regional cooperation among some of the newer agencies has also become more common, for example, the Argentine authority has worked with Brazil; and Brazil's CADE has worked with Chile and with Portugal. Competition authorities in Bosnia and Herzegovina, Bulgaria, Croatia, Macedonia, Serbia, Montenegro, and Slovenia similarly maintain close ties and cooperate on transactions. In transactions not requiring filings in multiple EU jurisdictions, member states often keep each other informed during the course of an investigation. In contrast, to date, it does not appear that China has worked cooperatively with any other competition authority, although it has 'consulted' with the US and EU on some mergers.

Minority holdings and concern over 'creeping acquisitions', in which an industry may consolidate before the agencies become fully aware, seems to be gaining increased attention in many jurisdictions, such as Australia. Some jurisdictions will consider as reviewable acquisitions in which only 10 per cent interest or less is being acquired (for example, Serbia for certain financial and insurance mergers), although most jurisdictions have somewhat higher thresholds (for example, Korea sets the threshold at 15 per cent of a public company and otherwise 20 per cent of a target; and Russia, at any amount

exceeding 20 per cent of the target). Jurisdictions will often require some measure of negative (e.g., veto) control rights, to the extent that it may give rise to *de jure* or *de facto* control (e.g., Turkey).

Given the ability of most competition agencies with pre-merger notification laws to delay, and even block, a transaction, it is imperative to take each jurisdiction – small or large, new or mature – seriously. China, for instance, in 2009 blocked The Coca-Cola Company's proposed acquisition of China Huiyuan Juice Group Limited and imposed conditions on four mergers involving non-Chinese domiciled firms. In *Phonak/ReSound* (a merger between a Swiss undertaking and a Danish undertaking, each with a German subsidiary), the German Cartel Office blocked the merger worldwide even though less than 10 per cent of each of the undertakings was attributable to Germany. Thus, it is critical from the outset for counsel to develop a comprehensive plan to determine how to navigate the jurisdictions requiring notification, even if the companies operate primarily outside some of the jurisdictions. This book should provide a useful starting point in this important aspect of any cross-border transaction being contemplated in the current enforcement environment.

Chapter 5

BRAZIL

*Bruno L. Peixoto**

I INTRODUCTION

i The Brazilian System for Defence of Competition

The Brazilian System for Defence of Competition (‘the SBDC’) comprises three administrative agencies that review mergers successively:

- a* the Secretariat for Economic Monitoring within the Ministry of Finance (‘the SEAE’), responsible for conducting the economic analysis and issuing an initial opinion;
- b* the Secretariat for Economic Law within the Ministry of Justice (‘the SDE’), responsible for issuing a second opinion as well as initiating administrative proceedings to investigate failure of filing a notification; and
- c* the Administrative Council for Economic Defence (‘the CADE’ or ‘the Commission’), responsible for adjudicating and issuing final decisions.

Although all three agencies may collect evidence and request information from merging and third parties, enforcers have striven to efficiently allocate the work among the agencies, avoiding duplicating costs and extending the analysis. It has been recently determined that the SEAE will lead the review of mergers, issuing a detailed guiding opinion pursuant to the Horizontal Merger Guidelines (‘the HMG’¹) in order to inform CADE’s decision, while the SDE will focus its resources on cartel investigations and analysis of single-firm conduct. Accordingly, since February 2010, the SEAE has replaced the SDE as the agency responsible for initiating and conducting the review process, including (1) reviewing all information, data, and documents provided with the merger notification, (2) requesting further information and (3) analysing requests for

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1 SEAE/SDE Joint Regulation No. 50 of 1 August 2001.

confidentiality presented by parties (although notifications continue to be filed before the SDE).

As set out in the new regulation on the procedural rules concerning the SDE issued in March 2010, in the vast majority of filings the SDE's role has been limited to issuing very brief opinions in general concurring with SEAE's reasoning. A notable exception occurs when the SDE is investigating any of the merging parties for collusion or unilateral conduct, in which case the agency is expected to issue a substantive opinion on the notified transaction and even request the CADE to issue a hold separate order.²

Filings are assigned by draw to one of CADE's six commissioners who will be responsible for analysing the transaction as well as the opinions referred above, preparing a report, and writing an opinion to be presented to the full commission during an open adjudicating session. Commissioners are free to undertake studies and further investigations on any matters and often request clarifications from merging parties and allow them to discuss modifications and required remedies or propose consent orders. Oral arguments from both merging and third parties are heard in adjudicating sessions in which the cases are often discussed by the commissioners before a unanimous or majority decision is issued.

ii Post-merger notification and thresholds

Law No. 8,884 enacted in 1994 ('the Antitrust Act') requires post-merger notification (see Section III, *infra*); however, a bill under consideration in Congress ('the Antitrust Reform Bill') requires mandatory pre-merger notification and if it passes it will substantially change the current merger control regime (see Section V, *infra*).

Pursuant to the Antitrust Act, any transaction by an entity that holds 20 per cent or more of a relevant market, which may increase economic concentration or any transaction that results in an aggregate market share of 20 per cent or more shall be notified (market share threshold). In addition, any transaction by an entity (acquirer, target or party in an agreement) whose gross turnover in Brazil,³ in the last fiscal year, was equivalent to or higher than 400 million reais must be notified (turnover threshold). Equally, a transaction shall be notified when either the acquirer or target belongs to a group whose consolidated gross turnover in the Brazilian market in the last fiscal year was equivalent to or higher than 400 million reais.

iii Potentially covered transactions

Any type of transactions, including joint ventures, change of control and minority interest transactions, which result in de facto concentration or potential restraint of competition by means of possible information sharing and influence on decision-making processes must be notified when the thresholds are met. Corporate control is defined in the case

2 See, for instance, SDE's request concerning the proposed acquisition of the control of the cement producer Cimpor by leading producers in Brazil that have been under investigation for cartelisation. See Concentration Proceedings No. 08012.002018/2010-07 (*Camargo Correa/Cimpor*) and No. 08012.001875/2010-81 (*Votorantim/Cimpor*).

3 CADE Interpretative Rule No. 1/2005.

law as the fact of either holding more than 50 per cent of the voting shares or having the ability to make or veto strategic decisions concerning price, output, sales, investments or R&D policy.

In a recent decision involving the acquisition of an indirect minority equity interest in a company that competed with the acquirer's subsidiary in Brazil, the CADE, after conducting a fact-specific analysis of the causal nexus between the acquisition and increased probability of unilateral and coordinated effects, has adopted a set of behavioural remedies to prevent and monitor possible exchanges of strategic information and coordinated action between the groups with regard to their activities in the country.⁴

However, corporate reorganisations or minority interest transactions in which the acquirer already controls the target are exempted when the following concurrent conditions apply:

- a* the seller does not have the power to appoint officers or members of the board, influence commercial policy or veto any subject; and
- b* the transaction does not include:
 - non-compete provisions for a period longer than five years and/or with scope broader than the relevant company's market; or
 - provisions that result in any form of control over any of the parties or the relevant company.⁵

Consultations can be filed before the CADE only with regard to non-imminent and hypothetical transactions. The CADE's opinion following a consultation is not final and is not a substitute for the agency's decision after proper notification.

iv Regulated industries

Transactions in industries regulated by a particular agency, such as telecommunications, energy, oil & gas and transportation must be reviewed by both the relevant agency and the SBDC. In such cases, the former issues a preliminary opinion on the specific regulatory issues. In the telecommunications industry, though, the National Telecommunications Agency ('Anatel') performs the role of both the SEAE and the SDE, issuing a comprehensive opinion subject only to the CADE's final review.

Until mid-2007, mergers of banks and financial institutions were submitted exclusively to the Brazilian Central Bank. However, the Federal Court of Appeals for the First Region ('the TRF1'), has ruled that transactions in the banking and financial industries are not exempted from antitrust scrutiny and must also be reviewed by the CADE. While an appeal is pending before the Superior Court of Justice (see *BCN/Bradesco v. CADE, infra*), the Antitrust Reform Bill provides for mandatory antitrust review of transactions in such industries.

4 Concentration Proceeding No. 53500.012487/2007 (*Telefonica SA/Telco SpA/Telecom Italia SpA*).

5 CADE Interpretative Rule No. 2/2007.

v Non-compete provisions

In December 2009, the CADE issued two new interpretative rules on ancillary non-compete provisions, which reflected the established case law. Interpretative Rule No. 4 provides that non-compete clauses in joint-venture agreements are lawful if directly related to the scope of the agreement and limited to its relevant markets. Interpretative Rule No. 5 provides that non-compete clauses in M&A agreements are lawful when related to the protection of the acquired business's goodwill and limited to a period of five years from the acquisition.

II YEAR IN REVIEW

i Hold separate agreements, remedies and statistics

Although the number of reported transactions was significant lower than in the previous years,⁶ 2009 was marked by the filing of several high-profile deals between leading players in key relevant markets such as telecommunications, food processing, health insurance, banking, petrochemicals, generic drugs and retailing.

Notwithstanding the pressure for sanctioning industry consolidation as a remedy for distressed companies and the economic slowdown, CADE's President stated, in the beginning of 2009, that the Commission would not relax antitrust enforcement. Referring to how the United States government's incentives to concentration and collusion might have prolonged the Depression of the 1930s, Arthur Badin warned companies not to expect substantial changes in merger analysis.⁷

As a result, the CADE issued a higher number of hold separate orders and executed agreements with the merging parties, halting the implementation of transactions that generated substantial concentration and potential anti-competitive effects *prima facie* ('Agreements for Preserving the Merger Reversibility') while the SEAE and the Commission itself conducted a comprehensive and detailed analysis of the mergers' effects on such markets' dynamics.

In perhaps the most significant case, the CADE required Brazil's leading food processors, Perdigao and Sadia, to enter into a hold separate agreement, freezing the merger to create the world's largest exporter of processed poultry, Brasil Foods.⁸ The agreement restricted integration and information sharing among the firms and assured that irreversible measures, resulting from the transaction would not be implemented before the review was concluded. It allowed, however, for financial restructuring of Sadia, which had been distressed since the beginning of the financial crisis in 2008. Recently, the agreement has been amended to allow the companies to coordinate their buying activities before the final ruling, as well as integrate their operations in relevant

6 Compare 460 filings in 2009 with 631 and 599 filings in 2008 and 2007, respectively (see www.cade.gov.br/Default.aspx?ec4dcf50dc3bfd5cf456).

7 President Arthur Badin's speech at the American Chamber of Commerce, reported by the Valor Economico on 23 March 2009.

8 Concentration Proceeding No. 08012.004423/2009-18 (*Perdigao/Sadia*).

markets in which their combined share is not significant. Competitors, however, have intervened and challenged the merger.

Decisions on all the major cases are expected to be issued in 2010 and might significantly impact the future of merger enforcement in Brazil (see Section V, *infra*).

In 2009, 437 mergers were cleared, six were abandoned and one was blocked.⁹ In addition, the CADE required modifications or imposed behavioural or structural remedies on 19 transactions including, for instance, the acquisition by Coca-Cola of Leao Junior, the leading iced tea producer in the national market.

The CADE has ordered Coca-Cola to cease to produce, distribute, and sell Nestlé's iced teas (Nestea) in order to be allowed to conclude its acquisition of Leao Junior.¹⁰ Coca-Cola and Nestlé had formed a joint-venture to produce and sell Nestea in Brazil, using Coca-Cola's plants and distribution system. The CADE verified that, in such circumstances, the acquisition of Leao Junior by Coca-Cola would create a quasi-duopoly in the country and that the resulting exercise of market power could not be deterred by entry. Entry was found to be unlikely and insufficient due to the high costs of establishing an efficient distribution system, brand loyalty, and incumbents' portfolio power. With the aim of safeguarding competition, but preserving merger-specific efficiencies, the CADE ordered Coca-Cola to cease and transfer all its operations related to the production and distribution of Nestea.

Having espoused a theory of restraint of competition and exclusion through the power resulting from a dominant firm's portfolio of products, as further indicated in recent decisions concerning single-firm conducts, the Commission might continue to consider that enhanced portfolio power might hinder effective entry in concentrated markets. The *Coca-Cola/Leao Junior* case also illustrates the Commission's guiding principle of devising remedies that address particular concerns but do not impede merger-specific efficiencies.

The only merger blocked by the Commission concerned the integration among health insurance providers and hospitals in the city of Santa Maria, State of Rio Grande do Sul, generating a concentration of 98.3 per cent in the local market of insurance for individuals and families as well as a monopoly in hospital services provided by private firms.

Finally, the CADE conditioned the approval of several transactions on the modification of non-compete provisions, requiring parties to limit the scope of ancillary restraints to the seller's geographical markets and to a period not longer than five years.¹¹

ii Court decisions

In the past year, federal courts decisions continued to impact merger control. Mergers in the banking and financial industry remained the subject of a heated judicial controversy

9 See www.cade.gov.br/Default.aspx?ec4dcf50dc3bfd5cf456.

10 Concentration Proceeding No. 08012.001383/2007-91 (*Coca-Cola Group/Leao Junior*).

11 CADE Interpretative Rule No. 5/2009, see Section I, *supra*.

and, for the first time, a CADE decision has been remanded for further analysis, although appeals are still pending.

In *Nestlé/Garoto v. CADE*, the TRF1 remanded the decision blocking the 2004 acquisition of Garoto, the third largest producer of chocolate in the country, by Nestlé, the leading producer.¹² The court ruled that the CADE should have reviewed new facts raised by the appellants in a petition for rehearing the case. The Commission had found that the merger substantially increased horizontal concentration and there was no evidence of offsetting efficiencies, effective rivalry or timely and sufficient entry capable of hindering the enhanced market power.

In *BCN/Bradesco v. CADE*, the Superior Court of Justice started to review a decision by the TRF1 that affirmed a CADE decision ruling that transactions in the banking and financial industry must also be subjected to antitrust scrutiny. Previous interpretation of Brazilian banking law by the Administration indicated that such operations should be submitted solely to the Central Bank. While a panel is still considering the matter, two judges have issued their opinions, siding with appellants and stating that the law does not allow the CADE to review mergers in such industries.

III THE MERGER CONTROL REGIME

i Deadline to file a notification

Pursuant to the current post-merger notification system, parties must file within 15 business days of the execution of the ‘first binding document.’ It is important to notice that in the case law, the first binding document standard has been broadly construed to encompass letters of intent, memoranda of understanding, or any document, whether definitive or not, that causes parties to cease acting as competitors, reduces their incentives to compete or allows them to have access to competitor’s strategic or sensitive commercial information. In some cases, nevertheless, CADE has construed ‘first binding document’ as the main or global agreement executed among the parties. However, such interpretation is not fully consolidated yet and parties are advised, therefore, to follow the traditional case law for guidance in complying with the filing period. Recently, the Superior Court of Justice affirmed that the CADE can construe the Antitrust Act and held that merging parties shall defer to the CADE’s interpretation concerning the filing period.¹³

With regard to tender offers and hostile takeovers, although in a few recent decisions the Commission has considered the acceptance of the offer as the first binding document,¹⁴ in the vast majority of the cases it has considered the issuance of the offer as the triggering event.¹⁵

12 TRF1 Proc. No. 2005.34.00.015042-8 (*Nestlé/Garoto v. CADE*).

13 STJ Appeals No. 984.249/DF and 615.628/DF.

14 See Concentration Proceedings No. 08012.000252/2009-58 (*Panasonic/Sanyo*); and 08012.007391/2008-21 (*Econergy International/SESA Bidco*).

15 See, for instance, Concentration Proceedings No. 08012.008112/2008-47 (*Continental/Schaeffler*); 08012.011356/2007-26 (*Danone/Koninklijke Numico*); 08012.011413/2007-77 (*Akzo Nobel*).

In cases of formation of consortia for procurement and bidding, only the winning consortium shall submit the agreement between the firms and the triggering event is the execution of the public contract.¹⁶

Parties shall jointly submit one filing per transaction. All parties, including the seller, are responsible for filing and may be fined for failure of properly notifying.

Parties are also allowed to file a pre-merger notification prior to the execution of a binding agreement. In such cases, there is no mandatory waiting period and they may close and implement transactions before clearance (assuming the risks of complying with adverse decisions regarding their operations in Brazil).

In any case, the CADE can issue hold separate orders to halt the implementation of transactions in cases of substantial concentration and perceived immediate threat to competition. Requests for hold separate orders can be filed by the SEAE, the SDE or third parties. Recently, for instance, further consolidation in the cement industry has been frozen by the CADE following a request by the SDE and CSN, a major flat steel producer that decided to enter in the cement business but was not successful in a tender offer for the target which ended up under the control of two leading producers. CSN has argued that the resulting concentration will lead to new barriers to entry and coordinated price increases.¹⁷

ii Review period and fast-track

The total review period is 120 days. SEAE and SDE have 30 days each to issue their opinions. CADE has an additional period of 60 days to reach the final decision. However, every time further information is requested from the parties, competitors, clients, and suppliers, the clock stops. In practice, a complex transaction with perceived potential anti-competitive effects may take more than six months to be cleared. Thus, parties are advised to take a proactive role, adding as much information as possible to the notification and requesting meetings with the authorities.

According to the SEAE-SDE Joint-Regulation No. 1, simple transactions may be, at their discretion, submitted to fast-track and expedited analysis in which both authorities issue a very brief joint opinion before submitting the case to the CADE. Normally, transactions are analysed under the fast-track mode when there are no vertical or horizontal relations among the parties, there is no change of control, it results in mere substitution of players in the Brazilian market, entry of a new player into the national markets, or does not lead to significant concentration. Currently, a fast-track review takes 30 to 90 days.

Imperial Chemical Industries); 08012.013153/2007-74 (*Cookson/Foseco*) 08012.009865/2006-16 (*3M/Biotrace International*).

16 Interpretative Rule No. 3/2007.

17 See Concentration Proceedings No. 08012.002018/2010-07 (*Camargo Correa/Cimpor*) and No. 08012.001875/2010-81 (*Votorantim/Cimpor*).

iii Rights of third parties

Third parties, including consumers, competitors and suppliers may formally challenge a transaction, present evidence and argue the case before the agencies. Third parties have full access to the files, except for information deemed as confidential by the SEAE, following parties' requests. In order to notify third parties, summaries of notified transactions are published on the CADE's website (but no longer in the official gazette). Furthermore, third parties may appeal to the Commission or the federal courts, challenging a ruling, pursuant to the rules of administrative and civil procedure.

iv Substantive tests and analysis of efficiencies

The Antitrust Act proscribes transactions that 'limit or restrain competition, or result in dominance of any product or service relevant market'. In practice, the SEAE, SDE and CADE follow the methodology established by the HMG – largely inspired by the 1992 DoJ-FTC Horizontal Merger Guidelines – and analyse the possibility of the lessening of competition through unilateral effects or coordinated interaction. The agencies assess the factual possibility of creating or enhancing unconstrained market power.

Transactions that generate specific efficiencies capable of benefiting consumers, at least to the same extent as the parties,¹⁸ may be cleared even if they create or enhance market power, provided that the operation does not produce 'unnecessary harmful effects' or 'eliminate substantial part of competition.'¹⁹ Authorities have taken productive efficiencies seriously, adopting econometric models for assessing economies of scale and scope as well as reductions in transaction costs. However, assessment of dynamic efficiencies is still incipient.

The ultimate test is whether a merger generates a positive net effect on consumer and aggregate welfare and the benefits resulting from merger specific efficiencies are 'equally distributed among the parties and consumers.'

v Remedies

CADE has adopted both structural (partial or total divestiture) and behavioural remedies, but has held that remedies should address specific threats to competition and, thus, should be limited in scope. Parties are allowed to propose and negotiate modifications or remedies with CADE's commissioners. Final decisions are enforced by federal courts.

vi Appellate rights and judicial review of the CADE's decisions

In cases of adverse decisions, parties may appeal to the Commission during the period of 30 days following the decision when there is a new or previously unknown fact or document which is likely to change substantially the analysis performed.²⁰ Furthermore, pursuant to the Constitution of the Federative Republic of Brazil any administrative decision is subject to judicial review and several of CADE's recent decisions requiring

18 Article 54, Section 1.

19 Article 54, Section 1, items I to V.

20 CADE Regulation No. 45, article 151.

divestitures have been taken to court. Actions challenging decisions by the SBDC are filed before federal judges and parties often appeal to the Federal Court of Appeals for the First Region, and successively to the Superior Court of Justice and the Supreme Court.

In a high-profile case, the Superior Court of Justice and the Supreme Court upheld, in 2007, an administrative ruling ordering Vale, the world's largest iron ore mining company, to divest acquired mining company Ferteoco or alternatively renounce its exclusive right of buying the mining production of CSN, a major steel company. In *Vale/Ferteoco/Caemi/Socoimex/Samitri*,²¹ decided in 2005, the CADE had analysed the acquisition by Vale of four iron ore mining companies and their associated railroads in the southeast region of Brazil. It ruled that the transactions would cause Vale to monopolise the national iron ore mining market. Thus, it ordered Vale either to divest Ferteoco or renounce its exclusive right of buying the mining production of CSN. The Federal Courts of Appeal for the First Region and the Superior Court of Justice upheld the ruling. Nevertheless, Vale asked the Supreme Court to review the procedural rule that allows the Commission's President to break a voting deadlock, since the structural remedy was imposed by a 4-3 majority as a consequence of the President's vote. The Supreme Court ruled that the appellant failed to demonstrate a violation to the Federal Constitution.²²

Normally, courts halt the implementation of imposed remedies until the final ruling. While it is clear that federal courts can control due process as well as review procedural requirements and findings of law (see also *Nestlé/Garoto v. CADE*, *supra*), the scope of judicial review concerning CADE's findings of fact has not been settled yet.

IV OTHER STRATEGIC CONSIDERATIONS

i Negotiating with the CADE

In addition to proposing alternative remedies, after filing parties are advised to negotiate an 'agreement for preserving merger reversibility' with the CADE in cases of high-profile transactions that generate a substantial concentration and possible concerns about unilateral or coordinated effects. Negotiations should be conducted before the issuance of a hold separate order, with the aim of properly limiting the scope of possible restrictions to the relevant markets significantly affected by the integration, allowing the companies to thereby promptly implement other relevant aspects of the transaction in the country.

ii Extraterritoriality

The Antitrust Act explicitly embraces the effects doctrine, which has been broadly applied. Pursuant to the case law, transactions in which any of the parties exports to

21 Concentration Proceedings No. 08012.000640/2000-09; No. 08012.001872/2000-76; 08012.002962/2001-65; 08012.006472/2001-38; 08012.002838/2001-08.

22 AI 682486/DF (*Vale v. CADE*).

Brazil or operates in the country through a branch, subsidiary, office, establishment, or even an agent or representative shall be notified.

iii Multi-jurisdictional filings and cooperation among agencies

Brazilian antitrust agencies have executed cooperation agreements with their counterparts in several countries, including Canada, Chile, Portugal, Russia and the United States, as well as the European Union. Recently, the SDE has cooperated extensively with authorities from Portugal, for example, concerning competing tender offers from Brazilian companies to acquire a Portuguese cement producer, Cimpor.²³ Although coordination with the US agencies and the European Commission has been focused mainly on cartel and single-firm investigations thus far, the trend is of increasing and broad cooperation in all areas of antitrust enforcement.

In 2009, 'The Understanding of Cooperation among Competition Authorities of the Mercosur's Member States for Control of Concentrations in the Regional Market' became effective in Brazil. The agreement provides that each Member State (Argentina, Brazil, Paraguay and Uruguay) shall notify other Member State's competition authorities of any merger notification, within 15 days from the filing, provided that:

- a* the transaction is relevant for competition enforcement in other Member States;
- b* the concentration generates effects in more than one Member State;
- c* any of the parties, its subsidiaries or controlled companies are established in other Member States;
- d* measures are required in more than one Member States; or
- e* information required for the analysis of the merger is located in other Member States.

Member states are expected not only to provide information on such transactions, but also to cooperate in the investigations and consider coordinating the enforcement activities. Enforcers from all Member States are expected to meet periodically to discuss enforcement priorities and joint actions.

V OUTLOOK & CONCLUSIONS

i Substantive analysis

Forthcoming decisions on high-profile mergers concerning consumer goods and services will indicate whether the analysis of market contestability and post-merger industry equilibrium will continue to play a major role in merger review and arguments of entry, imports, and effective rivalry will repeatedly rebut structural presumptions of market power. Considering that economists from the SEAE have further consolidated their role as the main voice in the merger review process issuing an analytical opinion to inform CADE's decision, which in practice often works as the focal point of the analysis (see Section I, *supra*) assessment of contestability is likely to continue to occupy the central stage in merger analysis, at least until new economic theories, such as upward pricing

23 See Section III, note 15, *supra*.

pressure, get traction in the antitrust community. Therefore, presumably compromise solutions are likely to emerge in the pending cases by means of consent orders and divestitures aimed at avoiding possible anti-competitive effects on very specific markets where unconstrained market power might be created or where the concentration exceeds 70 per cent to 80 per cent while approving the deals and preserving merger-specific efficiencies.

ii Economic outlook and merger waves

By the end of 2009, it was clear that Brazil had not only weathered the crisis very well, but had become one of the main destinations for exports and foreign capital flowing from markets still affected by the economic slowdown. Thus, entry, imports, and elasticity of supply are posed to remain strong defences for mergers that generate high concentration.

With the prospect of quickly resuming sustainable economic growth, a new merger wave is expected in 2010-11, which raises the question of when the merger review process will be improved.

iii The Antitrust Reform Bill

The Antitrust Reform Bill approved by the House of Representatives has been debated in the Senate for the last year and might substantially change Brazilian antitrust enforcement by merging the antitrust powers of the SDE and the SEAE into CADE, creating, as a consequence, a single antitrust agency. The bill would also significantly enhance the CADE's capability by allowing the agency to hire more than 100 additional officials.

Importantly, the bill abolishes the market share threshold, establishes mandatory pre-merger filing pursuant to a size of parties test, as well as a fast track for promptly clearing transactions unlikely to produce anti-competitive effects.

Although the Senate has not reached an agreement yet on the size of parties test, according to the bill approved by the House of Representatives, the new threshold would be met when one of the parties gross turnover in the last fiscal year exceeded 400 million reais and at least one other party's gross turnover exceeded 30 million reais.

Under the new system, simple transactions shall be cleared in no more than 20 business days when further information is not necessary. The first phase of the analysis shall not last more than 60 business days. Complex transactions that may produce substantial concentration or potential anti-competitive effects would be subjected to a second phase of investigation for up to 90 business days. After such period, the CADE's superintendence shall either approve or challenge the merger. In the latter case the transaction shall be adjudicated before the full commission.

Last but not least, the bill reinforces the efficiency defence by providing that transactions that generate a positive net effect on aggregate welfare may be cleared provided that a 'relevant part' of the benefits derived from the merger specific efficiencies is passed on to consumers.

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Bruno L Peixoto received his Master of Laws (LLM) degree from the University of Chicago Law School, is a Vice-Chair of the International Antitrust Law Committee of the American Bar Association Section of International Law, and heads the antitrust law practice group of Lanna Peixoto Advogados in São Paulo, Belo Horizonte, and Brasília.

Before founding Lanna Peixoto Advogados, Bruno was an attorney at the Antitrust Department of the Ministry of Justice (‘the SDE’) where he held positions in the Merger Control Division and in the Anti-competitive Practices Division.

Bruno regularly advises global companies on their commercial practices and business strategies and has represented merging companies in complex transactions, performing a comprehensive assessment of specific efficiencies derived from integration as well as their effects on Brazilian and Latin American markets. He has conducted notifications of mergers and acquisitions in industries as diverse as steel, retailing, insurance and food processing.

Bruno has also distinguished experience in complex and multifaceted antitrust litigation, having represented leading Brazilian and global companies in investigations concerning cartelisation and unilateral conducts before the CADE and the SDE. In addition, he has obtained landmark decisions in private actions in federal and state courts, has successfully elaborated and filed the first private actions for damages caused by cartelisation in Brazilian legal history, as well as the first antitrust collective actions.

Bruno is also founder and president of the Brazilian Institute for Economic Analysis of Law, a non-profit organisation to advance economic analysis of Brazilian law. He is also active in the academic community and has lectured extensively and published articles on antitrust law in both Brazilian and American law journals including the *Stanford Journal of Law, Business & Finance*.

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