

**Section of International Law:
International Antitrust Law Committee**

ESSENTIALS OF MERGER REVIEW IN BRAZIL

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| MERGER REVIEW PROCEDURES | |
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| Narrative Description of Merger Review Process | <p>The Brazilian System for Defense of Competition (SBDC) comprises the following administrative authorities:</p> <ol style="list-style-type: none"> 1. CADE: Administrative Council for Economic Defense, federal commission responsible for issuing final and binding decisions on mergers and anticompetitive practices. 2. SDE: Secretariat for Economic Law within the Ministry of Justice, responsible for bringing administrative actions, investigating, collecting evidence, and issuing preliminary opinions. 3. SEAE: Secretariat for Economic Monitoring within the Ministry of Finance, responsible for issuing analytical economic opinions. <p>The review starts in SEAE which is responsible for issuing a non-binding economic opinion based on the analytical framework established by the Horizontal Merger Guidelines. It often requests further information from the parties, competitors, clients, and suppliers. After issuing its opinion, the case is sent to SDE to perform a legal analysis of the transaction pursuant to Act 8.884/94 (Antitrust Act) and also issue a non-binding opinion. Next, CADE's general attorney office and the federal prosecutor's office issue their opinions which, in general, follow SEAE's and SDE's assessments.</p> <p>Subsequently, the case is assigned by draw to one CADE's</p> |

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| | <p>six commissioners who will be responsible for analyzing the transaction as well as the opinions referred above, preparing a report, and writing a vote to be presented to the full commission during an open adjudicating session. Commissioners are free to undertake studies and further investigations on any matters. They often request clarifications from the parties and allow them to discuss required remedies or propose consent orders.</p> <p>Oral arguments from both merging and third parties are heard in adjudicating sessions in which the case is often discussed by commissioners before reaching a unanimous or majority final decision.</p> <p>The total review period is of 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, counting is suspended. In practice, a complex transaction with perceived potential anticompetitive effects may take more than 6 months to be cleared. Thus, parties are advised to take a proactive role, adding as much information as possible to the notification and meeting with the relevant authorities to discuss the case.</p> <p>According to SEAE-SDE Joint-Resolution n. 1, simple transactions may be, at their discretion, submitted to fast track and expedited analysis in which both authorities issue a brief joint opinion before submitting the case to CADE. In general, transactions receive expedited review in the following cases: when there are no vertical or horizontal relations among the parties, there is no change of control, it results in substitution of players, entry of a new player in Brazilian markets, or does not lead to significant concentration. Currently, expedited review takes from 60 to 90 days.</p> |
| <p>Procedural Details Not Included in the ICN Materials, If Any</p> | <p>In industries regulated by a specific agency, such as telecommunications, energy, oil & gas, and transportation, a preliminary opinion on particular regulatory issues is also issued by the relevant agency, as a general rule. In the telecommunications industry, however, ANATEL (National Telecommunications Agency) also assumes the role of both SEAE and SDE and issues a comprehensive opinion before CADE's review.</p> |
| <p>Current Legal Developments</p> | <p>In 2007, CADE issued Interpretative Rules n. 2 and n. 3 consolidating the case law and providing certainty to merging parties about minority interest transactions and formation of consortia for governmental procurement and</p> |

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| | <p>bidding.</p> <p>Interpretative Rule n. 2 exempts corporate reorganizations and minority interest transactions when the following concurrent conditions apply:</p> <ol style="list-style-type: none"> 1. The seller does not have the power to appoint officers or members of the board, influence commercial policy or veto any subject. 2. The transactions do not include: <ol style="list-style-type: none"> 2.1 Non-competition provisions for a period superior to 5 years and/or geographical scope broader than the relevant company's; nor 2.2 Provisions that result in any form of control over any of the parties or the relevant company. <p>Interpretative Rule n. 3 establishes that, in cases of formation of consortia for governmental procurement and bidding, only the winning consortium shall submit the transaction for antitrust scrutiny. The execution of the public contract is considered as the triggering event.</p> |
| <p>Recent Cases or Illustrative Precedents</p> | <p>Please see Substantive Merger Review Law and Merger Remedies below.</p> |
| <p>Frequently Asked Questions</p> | <ol style="list-style-type: none"> 1. Is it possible to fully implement the transaction before clearance? <p>Brazilian current antitrust law establishes mandatory post-merger notification, though Congress is considering an amendment to establish pre-merger notification (see Current Legal Developments in Substantive Law below). Thus, there are no waiting periods or standard suspension effects. In this context, parties may normally close and fully implement transactions worldwide before clearance, assuming the risk of complying with adverse decisions regarding their operations in Brazil.</p> <p>CADE, however, has the power to issue preliminary injunctions to halt implementation of transactions that may lead to substantial concentration and/or perceived anticompetitive effects. In such cases, CADE issues hold separate orders with regard to assets or operations in Brazil. Requests for such preliminary injunctions can be filed by SEAE, SDE or third parties.</p> |

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| | <p>In these cases of substantial concentration and/or potential or prima facie anticompetitive effects, parties are advised to negotiate a specific hold separate agreement with CADE, before issuance of a preliminary injunction freezing the effects of the whole operation in Brazil. Parties may submit a draft agreement (“Agreement for Preserving Operation Reversibility”) assuring that specific irreversible measures resulting from the transaction will not be implemented.</p> <p>2. What are the analytical steps established in the Horizontal Merger Guidelines?</p> <p>The Horizontal Merger Guidelines issued in 2001 by SEAE and SDE were largely inspired by the DOJ-FTC Guidelines and establish that the review shall follow 5 steps:</p> <ol style="list-style-type: none"> (1) defining the relevant markets and estimating the elasticity of demand and supply according to the SSNIP test; (2) determining whether the market share of the merged entity is sufficient to permit the exercise of market power; (3) assessing the probability that unilateral or coordinated market power will be exercised after the merger, i.e. whether the market is contestable and market power constrained by imports, entry, and/or effective rivalry and/or whether there are sufficient conditions for coordinated interaction or collusive behavior; (4) examining the efficiencies generated by the transaction; and, finally, (5) evaluating the net effect of the transaction on consumer and aggregate welfare. |
| <p>SUBSTANTIVE MERGER REVIEW LAW</p> | |
| <p>Description of Substantive Legal Provisions</p> | <p>Articles 54 to 58 of Brazilian Antitrust Law, enacted in 1994 (Act 8.884/94), encompass the substantive merger provisions.</p> <p>Article 54, the fundamental provision, establishes that “any acts, in any format, which may limit or restrain competition, or result in dominance of any product or service relevant market, shall be submitted to CADE [Administrative Council for Economic Defense] for review.”</p> <p>Furthermore, administrative resolutions issued by the</p> |

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| | <p>CADE, the Ministry of Finance's Secretariat for Economic Monitoring (SEAE), and the Ministry of Justice's Secretariat of Economic Law (SDE) establish procedural rules for filing notifications.</p> |
| <p>Current Legal Developments</p> | <p>The House of representatives has recently passed a bill that will substantially change Brazilian Antitrust Law by merging SEAE and SDE antitrust regulation powers into CADE, and create, as a consequence, a single antitrust agency. Furthermore, the bill establishes mandatory pre-merger notification, abolishes the market share threshold, and establishes a simplified procedure for promptly clearing transactions that may not produce anticompetitive effects. Voting in the Senate is expected to occur by mid-2009.</p> <p>Until mid-2007, merger of banks and financial institutions were submitted exclusively to the Brazilian Central Bank. Recently, however, the Federal Court of Appeals for the First Region, ruled that transactions in the banking and financial industries are not exempted from antitrust scrutiny and must also be reviewed by the CADE. While litigation is still pending, Congress is considering a bill that will make antitrust review of transactions in such industries mandatory.</p> |
| <p>Recent Cases or Illustrative Precedents</p> | <p>In <i>Vale v. CADE</i>, 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 Ferteco or alternatively renounce its exclusive right of buying the mining production of CSN, a major steeling company. It was the first merger review case to reach the Supreme Court and a landmark victory for CADE.</p> <p><u>Background:</u> In <i>Vale-Ferteco-Caemi-Socoimex-Samitri</i>, decided in 2005, CADE analyzed the acquisition by Vale of four iron ore mining companies and their associated railroads in the southeast region of Brazil. CADE founded that the transactions would cause Vale to monopolize the national iron ore mining market. Thus, it ordered Vale either to divest Ferteco 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.</p> <p><u>Final Review:</u> 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</p> |

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| | <p>the President's vote. The Supreme Court ruled that Vale failed to demonstrate a violation to the Federal Constitution.</p> <p>In <i>BCN-Bradesco v. CADE</i>, the Federal Court of Appeals for the First Region decided that transactions in the banking and financial industry must also be reviewed by CADE. Previous interpretation of banking law indicated that such operations should be submitted solely to the Central Bank.</p> |
| <p>Frequently Asked Questions</p> | <p>1. How is corporate control defined?</p> <p>It is important to notice that any transactions, including but not limited to joint-ventures, change of control, and minority interest transactions, that result in de facto concentration or potential restraint of competition, including but not limited to, information sharing and influence on decision-making process, must be notified.</p> <p>Corporate control is defined, in case law, as the fact of either holding more that 50% of the voting shares or having the ability to make strategic decisions concerning price, production levels, sales, investments or R&D policy.</p> <p>Corporate reorganizations and minority interest transactions are exempted only when the concurrent conditions established by CADE's Interpretative Rule n. 2 apply (see Current Legal Developments in Merger Review Procedures above).</p> <p>2. What is the substantive test for clearance?</p> <p>Brazilian Antitrust Act proscribes transactions that "limit or restrain competition, or result in dominance of any product or service relevant market" and do not generate specific efficiencies capable of benefiting consumers at least to the same extent as the merging parties (Article 54, §1).</p> <p>In practice, SEAE, SDE and CADE follow the methodology established by the Horizontal Merger Guidelines and analyze the possibility of lessening of competition through unilateral effects or coordinated interaction.</p> <p>The ultimate test is the factual possibility of creating or enhancing unconstrained market power, absent offsetting efficiencies.</p> |

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| | <p>3. How are specific efficiencies considered in the review?</p> <p>According to Brazilian law, transactions that generate specific efficiencies capable of benefiting consumers, at least to the same extent as the parties, 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. (Article 54, §1, items I to V).</p> <p>Authorities have taken productive efficiencies seriously, adopting econometric models for assessing economies of scale and scope as well as reductions in transaction costs. Assessment of dynamic efficiencies, however, is still incipient.</p> |
| <p>MERGER REMEDIES</p> | |
| <p>Types of Remedies</p> | <p>CADE has adopted both structural and behavioral remedies. CADE's decisions are enforced by Federal Courts. It is important to notice that, following issuance of SEAE's and SDE's opinions, parties may propose and negotiate remedies with CADE's commissioners.</p> |
| <p>Recent Cases or Illustrative Precedents</p> | <p>In <i>Nestlé–Garoto</i>, decided in 2004, CADE blocked the acquisition of Garoto, the third largest Brazilian chocolate producer by Nestlé, which alternated leadership with Lacta in the Brazilian chocolate market. CADE found that the merger substantially increased horizontal concentration and there was no evidence of effective rivalry or timely and sufficient entry capable of hindering the enhanced market power. For the first time, CADE's findings were based on economic models and econometrical studies that predicted post-merger quantities as well as cost reductions required to offset the increase in market power expected to result from the merger. Based on the data, CADE blocked the transaction. The court for the Federal District, however, has stayed the administrative order pending appeal.</p> <p>In <i>PepsiCo–CBB</i>, CADE reviewed, in 2004, the licensing of the rights to produce, distribute and sell Gatorade in Brazil as granted by PepsiCo to CBB (Brazilian Beverage Company). CBB produced Gatorade's main competitor, Marathon, in a duopolistic market. CADE decided that the transaction could be cleared only if CBB divested the trademark Marathon to a third party which must execute a specific agreement to produce and sell the beverage.</p> <p>See also <i>Vale v. CADE</i> above.</p> |

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| Frequently Asked Questions | <p>Are there Merger Remedies Guidelines?</p> <p>No. CADE has broad discretion in imposing remedies, subject to review by federal courts. The Commission, however, has held that remedies should address specific threats to competition and, thus, should be limited in scope. CADE has most commonly adopted behavioral remedies and proposed partial restructuring of transactions rather than adopting structural remedies or blocking operations (see Statistics below).</p> | |
| PRIVATE ENFORCEMENT ACTIONS | | |
| Standing to Challenge a Transaction | <p>Third parties, including consumers, competitors and suppliers have standing and may formally challenge a transaction, present evidence, and argue the case before the agencies.</p> | |
| Third-Party Actions and Rights of Appeal | <p>Third parties may appeal both to the Commission or the Judiciary, pursuant to the Brazilian rules of administrative and civil procedure.</p> | |
| Recent Cases or Illustrative Precedents | <p>In <i>Nestlé–Garoto</i> (see above), competitors successfully challenged the merger by presenting their case, economic evidence, and expert opinions which were partially used by the commissioners to substantiate their opinions.</p> | |
| Frequently Asked Questions | <p>Are competitors claims seriously considered?</p> <p>Yes. SEAE, SDE and CADE often specifically address competitors’ claims and considerations regarding a proposed merger. Notwithstanding their specific interests, competitors are considered an important alternative source of information on the relevant market’s structure and dynamics.</p> | |
| STATISTICS | | |
| Statistics on Mergers Notified, Extended Reviews, Required Remedies and Prohibited Transactions | <p style="text-align: center;"><u>Merger Review – Fiscal Year 2007</u></p> <table border="1" style="margin-left: auto; margin-right: auto;"> <tr> <td style="text-align: center;">Transactions</td> </tr> </table> | Transactions |
| Transactions | | |

| <i>Notified</i> | <i>Cleared</i> | <i>Abandoned</i> | <i>Conditionally Approved</i> | <i>Blocked</i> |
|-----------------|----------------|------------------|-------------------------------|----------------|
| 563 | 514 | 12 | 37 | 0 |

| Procedures | |
|-------------------|------------------------|
| <i>Fast Track</i> | <i>Standard Review</i> |
| 426 | 137 |

| Transactions Conditionally Approved | | |
|---|---|------------------------------------|
| <i>Nature of Restriction</i> | | |
| Limitations concerning the scope/period of non-competition agreement/clause | Transaction Restructuring / Behavioral Remedies | Structural Remedies (Divestitures) |
| 24 | 9 | 4 |

Merger Review – Fiscal Year 2006

| Transactions | | | | |
|---------------------|----------------|------------------|-------------------------------|----------------|
| <i>Notified</i> | <i>Cleared</i> | <i>Abandoned</i> | <i>Conditionally Approved</i> | <i>Blocked</i> |
| 402 | 363 | 19 | 20 | 0 |

| Procedures | |
|-------------------|------------------------|
| <i>Fast Track</i> | <i>Standard Review</i> |
| 302 | 100 |

| Transactions Conditionally Approved | | |
|---|---|------------------------------------|
| <i>Nature of Restriction</i> | | |
| Limitations concerning the scope/period of non-competition agreement/clause | Transaction Restructuring / Behavioral Remedies | Structural Remedies (Divestitures) |
| 9 | 10 | 1 |

Fiscal Year 2005

| Transactions | | | | |
|---------------------|----------------|------------------|-------------------------------|----------------|
| <i>Notified</i> | <i>Cleared</i> | <i>Abandoned</i> | <i>Conditionally Approved</i> | <i>Blocked</i> |
| | | | | |

| | | | | | |
|--|---|---|------------------------------------|-------------------------------|----------------|
| | 497 | 456 | 4 | 37 | 0 |
| Procedures | | | | | |
| | <i>Fast Track</i> | | <i>Standard Review</i> | | |
| | 377 | | 120 | | |
| Transactions Conditionally Approved | | | | | |
| <i>Nature of Restriction</i> | | | | | |
| | Limitations concerning the scope/period of non-competition agreement/clause | Transaction Restructuring / Behavioral Remedies | Structural Remedies (Divestitures) | | |
| | 12 | 16 | 9 | | |
| <u>Fiscal Year 2004</u> | | | | | |
| Transactions | | | | | |
| | <i>Notified</i> | <i>Cleared</i> | <i>Abandoned</i> | <i>Conditionally Approved</i> | <i>Blocked</i> |
| | 651 | 585 | 22 | 43 | 1 |
| Transactions Conditionally Approved | | | | | |
| <i>Nature of Restriction</i> | | | | | |
| | Limitations concerning the scope/period of non-competition agreement/clause | Transaction Restructuring / Behavioral Remedies | Structural Remedies (Divestitures) | | |
| | 37 | 6 | 0 | | |
| USEFUL WEB SITES | | | | | |
| Useful Web Sites | www.cade.gov.br (CADE - Administrative Council for Economic Defense, federal commission responsible for issuing final and binding decisions on mergers and anticompetitive practices) www.mj.gov.br/sde (SDE - Secretariat for Economic Law within the Ministry of Justice, responsible for bringing administrative actions, | | | | |

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| | <p>investigating, collecting evidence, and issuing preliminary opinions)</p> <p>www.seae.fazenda.gov.br (SEAE - Secretariat for Economic Monitoring within the Ministry of Finance, responsible for issuing analytical economic opinions)</p> |
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| Disclaimer | <p>This report aims to provide preliminary information on the jurisdiction's merger review procedures and does not constitute legal advice or substitute for analyzing the relevant statutes, case law, regulations and guidelines in any particular case. Please consult local attorney to discuss any specific case.</p> |