



# Brazil

José Del Chiaro



Mariana Duarte Garcia de Lacerda



## Advocacia José Del Chiaro

### 1 Relevant Authorities and Legislation

#### 1.1 Who is/are the relevant merger authority(ies)?

The Brazilian Competition Policy System (BCPS) comprises three authorities, which are: the Secretariat of Economic Accompaniment - SEAE, from the Ministry of Finance; the Secretariat of Economic Defence - SDE, from the Ministry of Justice; and the Administrative Council for Economic Defence - CADE. SEAE is primarily responsible for providing economic analysis in BCPS proceedings; and SDE is the main investigative body, entitled to analyse a merger. Both Secretariats issue a non binding opinion over the analysed merger. CADE is the one to issue the final decision.

#### 1.2 What is the merger legislation?

The main Brazilian competition Law is law no. 8.884, of June 11, 1994. This law has been modified since for what concerns mergers by laws no. 9.021 of 1995 and 10.149, of 2000. There is also Regulation no. 15 from CADE that establishes the submission details and Regulation no. 36 on the fines imposed over the untimely presentation of the transaction.

#### 1.3 Is there any other relevant legislation for foreign mergers?

Brazilian law analyses all mergers that have effects on a Brazilian market, whether they involve national or foreign companies.

#### 1.4 Is there any other relevant legislation for mergers in particular sectors?

The regulated sectors, i.e. Telecommunications and Banks are governed by, respectively, law no. 9.472, of July 16, 1997 and 4.595, of December 31, 1964. For other regulated sectors the respective Agency can be consulted over a transaction submitted.

### 2 Transactions Caught by Merger Control Legislation

#### 2.1 Which types of transaction are caught - in particular, how is the concept of "control" defined?

Brazilian Law says: "Any acts that may limit or otherwise restrain

open competition, or that result in the control of relevant markets for certain products or services, shall be submitted to CADE for review". This literally means that any kind of contract that bind two or more companies together are subjected to merger control by the Brazilian Antitrust authorities. However, it is clear that if such contracts are firmned between companies from the same group (it is to say a partnership reorganisation) there is no need for submission.

#### 2.2 Are joint ventures subject to merger control?

According to what was stated in the previous answer, yes, joint ventures are subject to merger control.

#### 2.3 What are the jurisdictional thresholds for application of merger control?

In accordance with the Brazilian legislation, there are two objective criteria that determine the obligation of submission to the Brazilian Antitrust Authorities, which are: (i) a party, or the group to which it belongs, that holds 20% of the relevant market; or (ii) a party, or the group to which it belongs, that holds annual gross revenue of 400 million Reais. Regarding the revenue criteria CADE's interpretation was of considering the annual gross turnover of 400 millions Reais for the group of companies, whether in Brazil or abroad, and not for the company, on an individual basis and not only for the activity involved in the transaction. However, in a decision dated January 19, 2005, CADE modified the interpretation regarding the revenue criteria. It was stated that the revenue threshold would consider the revenue of a group of companies only in Brazil and not worldwide.

#### 2.4 Does merger control apply in the absence of a substantive overlap?

The overlap analysis is not relevant for the application of merger controls, thus it is applied even in the absence of a substantive overlap.

#### 2.5 In what circumstances is it likely that transactions between parties outside your jurisdiction ("foreign to foreign" transactions) would be caught by your merger control legislation?

If a transaction between foreign companies have any effect on the Brazilian Market - e.g. with imports or representation office - and it meets the thresholds stated in the question 2.3 of this Chapter, it shall indeed be submitted.

2.6 Please describe any mechanisms whereby the operation of the jurisdictional thresholds may be overridden by other provisions.

There is none.

### 3 Notification and its Impact on the Transaction Timetable

3.1 Where the jurisdictional thresholds are met, is notification compulsory and is there a deadline for notification?

If the thresholds are met, the notification is compulsory. The submittal of the transaction may be prior or after the realisation of the business. In this last case, the term to submit the transaction is **fifteen business days** as of the first binding document executed between the applicants, except when there is enough evidence demonstrating that considerable alterations in the competition relations between the parties (or at least between one of them and a third party), resulting in effects on the market, occurred in a different moment (article 54, paragraph 4, of Law 8884/94, combined with article 2 of Resolution no. 15, of August 19, 1998).

3.2 Please describe any exceptions where, even though the jurisdictional thresholds are met, clearance is not required.

There is none.

3.3 Where a merger technically requires notification and clearance, what are the risks of not filing?

The non compliance with the mentioned term of 15 business days for the submission of the act of concentration or contracts will give rise to the imposition of a fine by CADE, which may vary from about 60 thousand UFIRs to 6 million UFIRs (for your reference: 1 UFIR=R\$ 1,0641), notwithstanding any eventual filing of administrative process determining that the company present the concentration act, subject to the requirements and formalities of Resolution CADE No. 15/98, pursuant to the provisions of Article 54, 5th § of said law.

3.4 Is it possible to carve out local completion of a merger to avoid delaying global completion?

In Brazil, it is possible to proceed a post-merger notification and even when the notification is submitted before closing (usually in a 15 business-day term as of the signature of the agreement, to avoid any fine for untimely presented notification), the antitrust law (Article 54, §3) authorises the transaction to close prior to the antitrust approval (i.e., during the analysis), unless the authorities themselves (CADE or a Court) issue an injunction in order to bar closing or some of its effects.

According to paragraph 9 of article 54 of Law 8884/94, the transaction may close before antitrust approval (“...in the event the acts specified in this article did not occur under a suspensive condition, or if they have already produced effects vis à vis third parties, including fiscal effects...”), but the authorities (CADE’s Board) have powers to revert the closing or some of its effects (“...order the appropriate measures to undo them fully or partially, whether by dissolution, corporate spin-off, sale of assets, partial cessation of activities or any other act or measure that eliminates

the harmful effects on the economic order, independent of any civil liability for losses and damages that may have been caused to third parties”).

In case closing is barred by a judicial or administrative injunction, it is possible to carve out local completion to avoid delaying global completion.

3.5 At what stage in the transaction timetable can the notification be filed?

As mentioned in the question 3.1 above, the transactions have to be filed after signing the definitive agreements, but a earlier submission is possible.

In the past, there were a few isolated decisions of some CADE’s Commissioners considering mere preliminary agreements, such as memorandums of understandings, letters of intents and confidentiality agreements as the first binding document for the purpose of determining the *dies a quo* of the antitrust filing term.

In the last years, however, there have been many CADE’s decisions emphasising that, whenever the preliminary agreements do not allow the parties to transfer strategic information between themselves or result in unreasonable interference of the buyer on the target firm before the closing, referred agreements do not trigger the legal term for the antitrust filing in Brazil.

In general, the definitive agreement entered into by the parties is considered a strong competition inhibitor instrument, even when it is executed with suspending conditions, and thus it is usually pointed out as the first binding document.

3.6 What is the timeframe for scrutiny of the merger by the regulatory body? What are the main stages in the regulatory process?

After the transaction has been submitted, the first bureau to review the filing is SEAE and it has a **30- (thirty) day term** to issue its opinion (article 54, 6th § of Law 8884/94). However, **this term is suspended whenever complementary information is requested from the applicants or third parties**. SDE is the second bureau to review the filing, what shall happen in a **30- (thirty) day term** (Art. 54, 6th § of Law 8884/94), suspended whenever additional information is requested from the applicants or third parties.

After SDE has issued its opinion, the filing is sent to CADE for final decision. At CADE, the filing is analysed by a Reporting Commissioner, who will complete the investigation phase (if he deems necessary); CADE’s General Attorney issues a brief opinion as well in order to help the Commissioner in charge with the legal aspects of the analysis.

The Public Prosecution Office can also issue an opinion.

All decisions are taken by the CADE’s Board, composed by six Commissioners (including the Reporting Commissioner) and one President. CADE has **60 (sixty) days** to decide on the transaction (art. 54, 6th §). After said term, in case CADE does not decide, the transaction will be considered to have been automatically approved, with the publication of the decision in the Official Gazette. Identically to what happens at SEAE and SDE, **CADE’s term is suspended whenever additional information is requested from the Applicants or third parties**. CADE’s term comprises the opinion of CADE’s General Attorney but not from the Public prosecutor if he is requested to issue his opinion.

Thus, as to the analysis period, it is difficult to give a precise term. The term foreseen by the Brazilian law for a filing to receive clearance is indeed a 120-day term, because of the mentioned

suspensions and interruptions, this does not necessarily mean that clearance will be given within the term foreseen by the Brazilian Law.

However, if the applicants are able to clearly demonstrate that the transaction is not harmful to competition, SEAE and SDE may adopt a “quick analysis” (or “fast-track”). In this case, SDE generally issues a brief opinion, in which it agrees with SEAE’s. In this case the analysis term can be lessened considerably.

It is important to note that CADE’s analysis term is also interrupted due to the lack of minimum *quorum* (which is of 5 members).

### 3.7 Is there any prohibition on completing the transaction before clearance is received or any compulsory waiting period has ended?

There is no prohibition of completing the transaction at anytime. Therefore the parties can close in Brazil without receiving approval from CADE. In case a transaction is filed before the closing, it is necessary to inform BCPS of any modification of the information given in the Attachment I - for example, in transactions preceded by a hostile offer, we would have to inform BCPS as soon as the offer is accepted.

**However**, the authorities themselves (CADE or a Court) can issue an injunction in order to bar a closing or some of its effects. It’s possible for the parties to execute with CADE an agreement to preserve the reversibility of the operation (known in Portuguese as APRO). The APRO is an agreement by means of which the parties commit to not carrying on with some aspects of the transaction or to continue acting as two independent companies, while antitrust authorities analyse the respective impacts on competition. Its main purpose is to allow a post-closing notified operation to be fully reverted in case the antitrust authorities eventually oppose it (similar, in this sense, to an injunction, but with the major difference being that the APRO is bilateral and its terms are negotiable).

### 3.8 Where notification is required, is there a prescribed format?

To present the transaction to the Brazilian authorities the parties might fill in a formulary called Attachment I, foreseen in the CADE Resolution no 15/98.

### 3.9 Who is responsible for making the notification and are there any filing fees?

According to our law it is not mandatory to have both of the companies making the notification (the law establishes that “The application shall, when possible, be filed by the Applicants jointly, indicating, necessarily, all information required...”). If not all the parties participate in the submission, at least the missing party information shall be duly presented.

Parties also have to pay filing fees in the total amount of R\$ 45,000,00 and demonstrate (when filing) that the payment has been made.

## 4 Substantive Assessment of the Merger and Outcome of the Process

### 4.1 What is the substantive test against which a merger will be assessed?

In Brazil, the antitrust authorities’ guidelines for mergers

recommend that relevant markets are defined according to the Small but Significant Non-Transitory Increase in Price (also known as the “hypothetical monopolist test”) test, which takes into account demand-side substitution among products or areas.

Nevertheless, supply-side product substitutability has been accepted for the purpose of relevant market definition in several precedents.

It is also important to demonstrate: (i) financial difficulties and absence of alternatives to the parties (that would be less harmful to competition); (ii) low-barriers to entry in the relevant markets (even if only applicable to certain companies); (iii) that efficiencies are qualitatively and quantitatively sufficient to avoid a raise in prices in this country after the joint venture (if possible, demonstrate that prices will fall), according to Brazilian guidelines and precedents; (iv) present evidence of customers’ bargain power; and (v) that reinforcement materials are intermediate products that do not represent a high percentage in prices of the end-use products.

### 4.2 What is the scope for the involvement of third parties (or complainants) in the regulatory scrutiny process?

Third parties can oppose the submitted transaction.

They have full access to the non-confidential documents and act throughout the whole proceeding, whenever called by the authorities to give information on the relevant market or even by counter-arguing the information brought in by the petitioners.

### 4.3 What information gathering powers does the regulator enjoy in relation to the scrutiny of a merger?

The authorities have powers to request information from the Applicants and third parties (private parties or public entities).

According to the article 26 of the law no. 8884/94, in the event any data or documents requested by the authorities are unreasonably denied, concealed, tampered with or delayed by the Applicants or third private parties, this shall constitute a violation subject to a daily fine of 5,000 Ufirs, which may be increased up to twenty times in view of the violator’s economic status.

### 4.4 During the regulatory process, what provision is there for the protection of commercially sensitive information?

Confidential treatment of legal documents, objects and information could be granted if related to commercial accounting; economic-financial situation of the company; fiscal or banking secrecy; productive process and industry secrets, as processes and formulas to the manufacture of products; invoicing of the petitioner or its group; dates, value and payment of the transaction; documents that legalise the notified act; value and amount of sales; customers and suppliers; installed capacity; costs of production and expenditures with research and development of new products or services. A confidential treatment can be granted in other hypotheses, at the criterion of the Brazilian authorities.

It is mandatory that a public version of each confidential document is presented. In case of confidential information brought in at the body of a petition, the interested party will have to present an integral “CONFIDENTIAL VERSION”, identified as that in the first page - to be settled in the confidential separated files and a “PUBLIC VERSION” version identified as that in the first page, edited with marks, erasures or suppression, in order to forbear the

numbers, the strict words, or any other confidential reputed elements, that will then be settled to the main files. In case of documents reputed to be entirely confidential - for example the ones that legalise the notified act - just a mere reference to them in the public file is enough.

## 5 The End of the Process: Remedies, Appeals and Enforcement

### 5.1 How does the regulatory process end?

As mentioned in the question 3.6 above, CADE's Board is the one to give all final decisions. The Board can reach 3 different rulings.

In order of strictness, the first possible ruling would be the complete approval of the transaction with no restrictions or remedies imposed to the parties.

If the transaction generates antitrust concerns (after the analysis mentioned in our response to question 4.1 above), despite the existence of a good set of countervailing arguments (also presented in the response to question 4.1), CADE will (i) determine the adoption of structural measures (total or partial divestitures); or (ii) impose or negotiate behavioural measures.

On its decision, CADE will fix the terms for the implementation of the remedies or the steps for the reversal of the transaction to the *status quo ante*. CADE will verify the accomplishment of its decisions and, in case the parties do not comply with the determinations, go to Court in order to specifically execute its decision.

### 5.2 Where competition problems are identified, is it possible to negotiate "remedies" which are acceptable to the parties?

Yes it is possible to negotiate remedies with CADE's Board. In addition, as mentioned in question 3.7, during the process the parties can negotiate an "APRO" with the authorities.

### 5.3 At what stage in the process can the negotiation of remedies be commenced?

Remedies negotiation (including an APRO) can be commenced from the very beginning of the process, when the first bureau is analysing the transaction.

### 5.4 How are any negotiated remedies enforced?

Negotiated remedies are enforced the same way as a final decision, as mentioned in the question 5.1 above.

### 5.5 Will a clearance decision cover ancillary restrictions?

Yes, a clearance decision does cover ancillary restrictions

### 5.6 Can a decision on merger clearance be appealed?

A clearance decision can be appealed by a third party.

It can also be reviewed, amended or revoked by CADE, if the clearance was given upon false or misleading information provided by the Applicants, or if any of the remedies negotiated or imposed by CADE as conditions to approval were not accomplished by the parties or benefits expected from the transaction were not met.

A decision of veto or approval with restrictions can also be appealed in Courts. There are a few cases in which CADE has administratively received and decided upon administrative appeals or requests for revision that brings merit discussions.

### 5.7 Is there a time limit for enforcement of merger control legislation?

The antitrust analysis must obey the timeframe provided in question 3.6.

The statute of limitation is 5 years in merger cases.

## 6 Miscellaneous

### 6.1 To what extent do the regulatory authorities in your jurisdiction liaise with those in other jurisdictions?

Brazil has cooperation agreements signed with the USA, Russia and Argentina for the exchange of information and investigation techniques.

### 6.2 Please identify the date as at which your answers are up to date.

These answers have been given as of September, 2006. To conclude, it is important to emphasise that such answers contain the general aspects of the antitrust law and practice in Brazil. A concrete case requires a specific analysis of its aspects and impacts.

**José Del Chiaro Ferreira da Rosa**

Advocacia José Del Chiaro  
Av. Brigadeiro Faria Lima, 2012 - 9º andar  
São Paulo-SP - CEP 01451-000  
Brazil

Tel: +55 11 3030 9000  
Fax: +55 11 3030 9037  
Email: [advocacia@josedelchiaro.com.br](mailto:advocacia@josedelchiaro.com.br)  
URL: [www.josedelchiaro.com.br](http://www.josedelchiaro.com.br)

José Del Chiaro is the founder of Advocacia José Del Chiaro, a firm initiated in 1991 that comprises eleven partners and three associates today.

Bachelor at law from University of São Paulo (USP), Mr. Del Chiaro has acted as consultant to the Industry Federation of São Paulo - FIESP. He is also a former secretary of the Secretariat of Economic Law of the Ministry of Justice. He is a member of the São Paulo Attorney's Institute, of the São Paulo Bar Association, and also founding partner of the Brazilian Institute for Competition Consumer Relation and International Trade Studies (IBRAC), and Director for Governmental Relations of the Brazilian Institute for Competition, Consumer Relations and International Trade Studies (IBRAC).

**Mariana Duarte Garcia de Lacerda**

Advocacia José Del Chiaro  
Av. Brigadeiro Faria Lima, 2012 - 9º andar  
São Paulo-SP - CEP 01451-000  
Brazil

Tel: +55 11 3030 9000  
Fax: +55 11 3030 9037  
Email: [advocacia@josedelchiaro.com.br](mailto:advocacia@josedelchiaro.com.br)  
URL: [www.josedelchiaro.com.br](http://www.josedelchiaro.com.br)

Mariana Duarte Garcia de Lacerda is a partner of Advocacia José Del Chiaro.

Bachelor at Law from Catholic University of São Paulo (PUC-SP); Ms Garcia de Lacerda is currently attending Commercial Law Masters at the same University.

## Advocacia José Del Chiaro

Advocacia José Del Chiaro, a firm initiated in 1991 that comprises eleven partners and three associates today, was founded by José Del Chiaro, a former enforcer and active lawyer.

The firm is specialised in anti-dumping, antitrust, regulation, consumer rights and international trade and assists national and international clients in both judicial and administrative proceedings before the Brazilian System of Economic Defence, the Brazilian Commercial Defence Authorities, the regulatory agencies and the consumer defence authorities.

The firm has participated in several business projects in different sectors, such as industrialisation agreements; joint ventures constitutions and reorganisation of distribution nets and of partnership. Some of the cases conducted by the firm were a real paradigm, such as the impugnation on the Chocolates Garoto acquisition by Nestlé, that lead to the veto of the transaction; and several proceedings related to the anticompetitive behaviour of the local telephone companies.