

# New trends of merger control in Brazil

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This article briefly describes the most important elements of merger control review in Brazil, focusing on notifiability issues, also tackling issues regarding the structure of the Brazilian Competition System, the review procedures and deadlines.

Even though the Brazilian Competition Policy System<sup>1</sup> is still maturing and there is a long way to go before a clear perception of antitrust enforcement is cemented among the business community, there is no doubt that during the last years the awareness regarding competition law and policy in Brazil has been continuously increasing, mainly due to the intensification of the enforcement activities, both in terms of anti-competitive conduct investigation and merger control review.

A number of issues could be tackled in relation to those recent trends; however, this article aims at providing the reader with an overview of the main aspects of the Brazilian merger control review in Brazil, focusing on some debatable issues regarding notifiability.



It is worth noting that in late 2005, a Bill proposing substantial amendments to the Brazilian merger control and the institutional structure, as well as some modifications in the anti-competitive behaviour investigation procedures was sent to Congress. Even though it is not possible to know if the amendments shall be accepted and when, such Bill is currently being intensely discussed and it is possible that it be approved during this second term of office of President Luis Inácio Lula da Silva. Until such enactment, some significant – but not as substantial – changes have been taken and are yet expected to take place in relation to merger control issues, mainly in view of the redrafting of the notification form, as well as of certain specific other rules regarding the deadline for notification and criteria for notifying minority interests.

## Notifiability

Merger control review in Brazil is governed mainly by article 54 of Law 8,884/94 ('the Brazilian Competition Law'). Article 54 provides that "any acts, irrespective of their form, that may limit or somehow harm competition or result in the dominance in relevant markets of goods or services must be submitted for review by CADE (*Conselho Administrativo de Defesa Econômica* – Administrative Council for Economic Defense)." According to article 54 §3, "the acts mentioned include acts aimed at any kind of economic concentration, whether through mergers between companies, the incorporation of companies to exert control over

other companies, or any kind of corporate association giving rise to a 20% market share of the resulting company or group of companies in a given relevant market or in which any of the parties had a turnover of R\$400m<sup>2</sup> in the previous fiscal year."

The above notifiability test (even if viewed from the perspective of the recent decisions handed down by CADE and other applicable regulations) does not necessarily comply with all the Guiding Principles and Recommended Practices for Merger Notification and Review Procedures of the International Competition Network (ICN). Given the legal and institutional degree of uncertainty regarding merger control in Brazil, parties normally need to seek extra advice on how to deal with the lack of guidance and the vagueness of the applicable rules in relation to a particular transaction.

In theory, when assessing whether a transaction is notifiable under the Brazilian Competition Law, the elements that should be considered are whether or not;

1. It involves a concentration;
2. It could have effects in Brazil (therefore rendering the Brazilian legislation applicable);
3. The turnover or the market share threshold requirement has been met; and
4. The triggering event has occurred. Based on a logical interpretation of the law, these four conditions would all need to be met in order to make the notification mandatory. Nevertheless, there is still much difficulty on how to interpret and apply each of these criteria.

Even though there is not much debate over whether a transfer of control (broadly understood as covering decisive influence as well) is a notifiable concentration, recent decisions have reinforced the uncertainty as to whether certain types of collaborations among competitors and distribution or supply agreements are also to be reviewed under the merger control regime. Likewise, the Brazilian authorities have yet to issue guidelines or a more consistent set of decisions that would allow for a safe conclusion that simple acquisitions of minority stockholdings are or not considered to be concentrations and, as such, shall be notified.

Specifically in which refers to the acquisition of minority stockholding, CADE's recent precedents allow the interpretation that the simple acquisition of minority voting interest, when not coupled with any type of special rights shall not subject to merger control in Brazil. A *contrario sensu*, whenever a minority voting stake is acquired by a new party/investor, and such acquirer has any type of special rights (that could be understood as guaranteeing any relevant or influent dominance in the company), CADE's precedent shall lead to the conclusion that such an acquisition falls under the merger control notification rules. Generally speaking, CADE has indicated that, among others, the right to 1) appoint management members, 2) determine commercial policies; and/or 3) veto any corporate-related decisions; shall be subject to notification<sup>3</sup>, possibly as they can be understood as implying 'relevant or influent dominance'. Nevertheless, as there is no set of precedents that clearly define what precisely is a 'relevant or influent dominance', specific assessments shall be needed to verify if a certain transaction is or not subject to notification to the Brazilian antitrust authorities.

Likewise, there are no specific rules that could lead to assured conclusions on whether the Brazilian legislation is indeed applicable to cross-boarder deals, which is particularly worrisome considering that the turnover threshold does not fully address this issue either. Broadly speaking, in most cases, the parties should assess whether the target company has activities in Brazil or whether it could be perceived as an uncommitted entrant, for example. There is no such thing as a *de minimis* rule, so such an assessment must be made on a case-by-case basis.

If Brazilian legislation is applicable and a transaction constitutes a concentration, the relevant thresholds for notification are: 1) annual turnover in Brazil of at least one of the parties involved (buyer or seller), or the group of companies to which it belongs, exceeding R\$400m in the fiscal year

preceding the transaction; or 2) a market share of 20% or more in the relevant markets defined for the review of the transaction at hand.

If a transaction falls within the parameters discussed above, it must be notified within a 15-business-day period that is triggered by the signing of the 'first binding document' entered into by the parties. Depending on some deal structures, such as those resulting from hostile or friendly bids, the 'triggering event' shall be analysed *vis-à-vis* the concrete case.

Fines for late filings or non-submission may vary from about R\$60,000 to R\$6m, according to a number of criteria such as: the economic status of the parties involved, the effects of the transaction in Brazil, lateness and recidivism. Large fines have been ranging around R\$500,000.

## General remarks

Merger control procedures in Brazil usually follow a series of steps that conform to conventional antitrust wisdom. In theory, a typical procedure might be ultimately described as a technical-economic analysis to determine the nature of the net effects on consumer welfare associated with the merger. Approval of transactions with negative net effects on consumer welfare – if acceptable at all – will be conditional on compliance with divestiture requirements and/or performance commitments.

Once filed, a case will normally go through three different stages until a final decision is reached. Merger control cases must be filed with SDE in three identical sets, two of which are sent to SEAE and CADE. At the first stage of the analysis, SEAE issues a technical-economic opinion covering relevant aspects involved in the competitive assessment of the transaction. Following SEAE's economic analysis, the case is then briefly examined by SDE. After SDE's opinion is issued, the case is reviewed by CADE's Attorney General Office. After that, the Board member in charge of the case reviews it more closely and prepares a Report before the matter is finally forwarded to CADE's full Board for a final decision. Even though these technical opinions are independent from each other and not binding on CADE, SEAE's opinion usually provides the most important substantive and analytical contribution on which the subsequent stages of the procedure will be based.

The Brazilian Competition Law establishes, in article 54 §6, the deadlines the authorities should meet in their assessments of concentration acts. For instance, SEAE and SDE have, in principle, 30 days each to issue their technical opinions. After that, the transaction is to be reviewed by CADE, which

would then have at most 60 days to issue its final decision. The constant use (and abuse) by the authorities of the power to forward to the parties information requests that suspend these deadlines tends, however, significantly to extend the period of time until a final decision is reached by CADE.

In an attempt to speed up the merger review procedure, the Brazilian antitrust authorities jointly issued a directive in early 2003 defining which transactions are subject to be reviewed under a simplified proceeding. Analysis in a simplified proceeding usually takes around less than four months and most of the transactions submitted to the Brazilian antitrust authorities are eligible for such a fast track review - e.g. acquisitions of interest in local companies by foreign companies/investors without activities in Brazil. Nevertheless, the decisions as to the situations in which the summary procedure is applicable are taken by the authorities in their own discretion. In certain cases, SEAE and SDE might conduct with their analysis simultaneously and even issue a joint technical opinion.

In Brazil, antitrust clearance is not a necessary

condition for the closing or the effective implementation of a transaction (i.e. there is no bar on closing the transaction before the clearance by the competition authorities). However, if there is *prima facie* evidence that the transaction raises significant antitrust concerns (mainly based on the market share resulting from the overlap), the authorities may issue, *ex officio*, an injunction determining that the transaction shall not become effective prior to its final approval. Alternatively, in that type of case, the parties may execute an agreement with the authorities in order to ensure the 'reversibility' of the transaction in the case the authority does not approve, or partially approves, the transaction at the end of the review. These agreements could be considered as a less drastic alternative (at least in practice) to the issuing of preliminary orders by the authorities. From the point of view of both the applicants and the antitrust authorities, the advantages over the equivalent preliminary order are clear, considering the controversies over the lawfulness of preliminary orders in the context of the merger review process, as well as the resistance of private parties to attack

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such measures at the judicial level while the administrative decision on the merits is still pending.

#### Notes:

<sup>1</sup> CADE (*Conselho Administrativo de Defesa Econômica* – Administrative Council for Economic Defense), an independent governmental agency, is the main administrative authority responsible for the enforcement of antitrust laws in Brazil. CADE's functions include taking final administrative decisions on antitrust matters (in both merger control and antitrust violations such as cartels, predatory behaviour, etc). There are two other administrative bodies involved in antitrust enforcement in Brazil: the Secretariat of Economic Law of the Ministry of Justice (*Secretaria de Direito Econômico do Ministério da Justiça* – SDE/MJ), mainly focused on the investigation of anticompetitive behavior, and the Secretariat of Economic Monitoring of the Ministry of Finance (*Secretaria de Acompanhamento Econômico do Ministério da Fazenda* – SEAE/MF), mainly focused on merger review and competition advocacy in regulated sectors.

<sup>2</sup> This amount corresponds to approximately US\$187m, according to an exchange rate of US\$1= R\$2.14, as of December 31, 2006.

<sup>3</sup> This interpretation is mainly based on a specific guideline concerning the need of notifying the acquisition of minority interests in certain types of consolidation of control, which has been approved by CADE on August 22, 2007, and coincidentally published in the Official Gazette today. The guideline reads as follows: 'The acquisition of minority voting interest by a shareholder that already controls the majority of the shares does not trigger the need to file a merger control submission (according to article 54 of Act n° 8.884/94) if the following conditions

are cumulatively met: (i) prior to the transaction, the seller had no right (derived from the law, by-laws or agreements) to (i.a.) appoint managers, (i.b.) determine commercial policies; and (i.c) veto any corporate-related decisions (ii) the agreement by means of which the transaction is carried out does not contain (ii.a) non-competition covenants with a term longer than five years and/or geographic scope larger than the area in which the resulting entity is active and (ii.b) covenants that result in any kind of control between the parties after the transaction' (Súmula CADE No. 2, August 22, 2007). Even though the guideline does not apply specifically to a minority acquisition by a new investor, we understand that it shall be taken as a proxy for interpreting this type of case. In this sense, even though we would not agree with CADE's interpretation on the matter (as we see it being too comprehensive), we understand that, as mentioned, the best interpretation to the matter is that a filing would be mandatory if a party acquires a minority interest and has the right either to appoint managers (even if one), to determine commercial policies; and/or to veto any corporate-related decisions, provided that the thresholds are met.

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