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The International Comparative Legal Guide to:

Merger Control 2008

A practical insight to cross-border merger control issues

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Chapter 13

Brazil

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1 Relevant Authorities and Legislation

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

The relevant merger authorities in Brazil are: (i) the Secretariat of Economic Control - **SEAE**, a body of the Ministry of Finance; (ii) the Secretariat of Economic Law - **SDE**, a body of the Ministry of Justice; and (iii) the Administrative Council of Economic Control - **CADE**, the independent administrative competition agency. Prior to the final determination on a given merger, the dockets will be further reviewed by the Office of the Attorney General of the CADE - **ProCADE** and, eventually, by the Office of the Federal Attorney General - **MPF**. Said Secretariats, the **ProCADE** and the **MPF** issue non-binding opinions.

Should the merger refer to the telecommunication industry, in lieu of the above-mentioned Secretariats, the Telecommunications National Agency - **ANATEL**, will first review the merger.

All decisions made by the **CADE** are subject to voluntary judicial control.

1.2 What is the merger legislation?

Law No. 8,884, of July 11, 1994 governs the merger control. Such is a federal Law enforced nation-wide and providing for extraterritorial jurisdiction.

1.3 Is there any other relevant legislation for foreign mergers?

Foreign and domestic mergers are treated equally by Law No. 8,884/1994.

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

As mentioned above, **ANATEL** reviews all mergers in the telecommunication sectors in lieu of the **SEAE** and the **SDE**.

In other regulated markets, such as the electric power sector, the oil sector, the insurance sector, the road transportation sector, the port sector and others, although not mandatory, securing the non-binding opinions of the respective regulatory agencies is a customary practice by the competition authorities.

There is currently a controversy whether the financial sector is subject to regular merger control Law No. 8,884/94. Although **CADE** claims to have jurisdiction over mergers among financial institutions, it is common practice not to submit such transactions to such agency's scrutiny. Such mergers are reviewed by the Central Bank of Brazil - BACEN under Law No. 4,595, of December 31, 1964. Such exception, however, does not apply to non-financial activities by financial institutions, which are subject to the general merger control laws.

2 Transactions Caught by Merger Control Legislation

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

Pursuant to Article 54 of the Brazilian Competition Law, all acts of (market) concentration (horizontal concentrations, vertical integration and conglomerate mergers of any kind), that may in principle restrain or in any way injure free competition are subject to the **CADE** notification requirements.

Any concern enjoying a 20% market share is presumed to enjoy a dominant position.

2.2 Are joint ventures subject to merger control?

Joint ventures are also subject to merger control.

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

All transactions affecting companies that individually enjoy a 20% market share or that have a gross turnover in Brazil in excess of R$400 million (approximately US$200 million) in the preceding fiscal year are subject to the **CADE** notification requirement.

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

Merger control does apply in the absence of a substantive overlap, provided that such cases are usually reviewed under summary proceedings.

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?

Provided that any of the parties to the transaction has any direct or

indirect (e.g. via exports) business with Brazil all "foreign to foreign" transactions that meet any of the two objective thresholds mentioned above (market share and turnover thresholds) are subject to the **CADE** notification requirement.

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

There are no mechanisms available to override the jurisdictional thresholds, other than in the case of mergers in the financial sector, with are governed by applicable banking laws under the authority of the **BACEN**.

2.7 Where a merger takes place in stages, what principles are applied in order to identify whether the various stages constitute a single transaction or a series of transactions?

Should a merger take place in stages from the outset, that is, should the transaction documents clearly indicate that an interim transaction is only a vehicle for the ultimate consummation of the deal, then it is possible to argue before the competition authorities that the transaction is a single transaction in stages. It is assumed, however, that the economic units involved in the transaction in each stage are the same; otherwise, it is likely that **CADE** will require multiple notifications.

A decision as to whether a merger case in stages is a single transaction is subject to the discretionary decision of **CADE**. There are no clear rules governing this matter, which is to be reviewed on a case-by-case basis.

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?

Notification is compulsory whenever the jurisdictional thresholds are met. Filing must be made within 15 business days from the "date of the transaction" (Article 54, paragraph 4). Although the Brazilian Competition Law fails to define such expression, **CADE** Resolution No. 15/98 defines such date as the date of the "first binding document", save if the parties can demonstrate that the competitive relationships between them or between any of them and third parties have been modified at a different date (the exception is uncommonly considered).

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

No exceptions are considered. The only pending question is whether a merger between financial institutions is subject to **CADE´s** review. Currently, such transactions are only reviewed by the Central Bank of Brazil - **BACEN**. Non-financial operations of financial institutions are not included in such question.

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

Failure and extemporaneous filings are subject to fines, ranging between approximately R$60,000 (approximately US$30,000) to approximately R$6 million (approximately US$3 million), without prejudice of the commencement of an administrative against the offender. **CADE** Resolution No. 36/04, as amended by **CADE** Resolution No. 44/07 defines a mathematical formula to calculate the fine taking various considerations into account, such as the time of the delay, the potential injury to competition, the value of the transaction, the economic standing of the parties, recidivism and whether the late filing is voluntary.

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

Prior clearance is not mandatory in Brazil. Nevertheless, it is possible to carve out local completion of a merger regardless of global completion, if desired.

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

Notification must be filed within 15 business days from the "date of transaction", which is usually defined as the date of execution of the "first binding document". Caution should be made in defining a "first binding document", which may be a Letter of Intent, a Memorandum of Understanding or other preliminary documents, depending on its terms and regardless of any provision disqualifying the document as a "binding document". Consulting an expert in Brazilian competition laws is highly recommended to determine the notification triggering event.

3.6 What is the timeframe for scrutiny of the merger by the merger authority? What are the main stages in the regulatory process? Can the timeframe be suspended by the authority?

Law No. 8884/94 formally establishes a 120-day term for the completion of the merger review. The **SEAE** (Ministry of Finance), the first body to be engaged in the merger review, has 30 days, the **SDE** (Ministry of Justice) has another 30 days and **CADE** has sixty days, subject to tacit approval of the transaction. However, such terms can be (and are) easily extended if additional information is requested by the Competition Authorities. In practice a simple case enjoying fast track or summary proceedings can be reviewed in an average of 90 days, while more complex cases may take one year on average.

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

No. Brazil has adopted an *a posteriori* criterion and transactions may be completed prior to clearance or even prior to notification. The risks in completing before clearance are associated with the risks of conditional approvals or divestment orders, which are to be priory assessed with experts in Brazilian competition laws.

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

CADE has adopted a notification form known as Annex I (of **CADE** Resolution No. 15/98, as amended by **CADE** Resolution No. 45/07). A written motion for the merger review that follows no prescribed format, however, precedes such Annex. Currently **CADE** is considering a procedural review by creating an electronic

filing form for the filings, but there is no estimate when (and if) such format will be adopted.

3.9 Is there a short form or accelerated procedure for any types of mergers?

Simple cases, such as corporate reorganisation with no change in control, lack of horizontal and vertical overlaps, market entries, mere substitution of market players and similar cases *prima facie* causing no anticompetitive concerns usually enjoy a summary review proceeding, or fast-track proceeding, which takes, on average, 3-4 months.

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

All parties involved must file notifications, although filing by any of the parties individually are accepted, provided such notifying party supplies certain basic information on the other party or parties. There is a notification fee of R$45,000 (approximately US$22,500).

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?

Mergers will be assessed based on a structure-conduct-performance test. The determination of the relevant market and of its structure is primarily based on the Hypothetical Monopolist Test. Should high concentration levels be determined; the review of the potential exercise of market power is reviewed. The use of the HHI plays a significant role, and determining the existence of barriers to entry may be an important portion of the analysis. Should high barriers be found, the Authorities will proceed by reviewing eventual efficiencies yielding from the transaction.

Such structure-based methodology is currently being questioned as to adequacy given the role of innovation in state-of-the-art markets, and tend to be replaced by a methodology based on market strategy of the relevant parties to determine competitive concerns or the pro-competitive nature of the deal.

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

Once a notification is filed, the **SDE** will promptly publish summons in the Federal Official Gazette, inviting the market in general to comment on the transaction. In the course of the merger review proceedings, it is customary that the authorities will address official letters requesting comments from competitors, suppliers, clients and trade associations.

Any third or interested party is permitted to comment or file statements of objections, and are not limited by any rules as to the contents of their comments or statements. Comments on the impact of the transaction on the market structure, on barriers to entry and on potential unilateral or collective exercise of market power yielding from the deal are welcome. On the other hand, should the comment address an actual anticompetitive conduct by any of the parties, such comment is usually not entertained in depth in a merger review case, and the party is advised to file a separate compliant covering the issue.

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

The Authorities enjoy unrestricted information gathering powers in formally requesting information, as long as the requested information is pertinent to the review proceedings. The Authorities also enjoy the same powers vis-à-vis third parties and governmental bodies or agencies.

Dawn raids and similar coercive actions, however, do not apply to merger control reviews.

Failure by a private party to timely respond to an official request for information is subject to a daily fine. Unjustified refusal to respond may eventually be characterised as a criminal offence.

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

Confidential information is to be clearly identified by the interested party in submitting data to the Authorities. Save for matters in which confidentiality is ensured by law (e.g. banking and tax information), the Authorities have full discretionary powers in determining whether given information is to be treated on a confidential basis or not.

Article 44 of the **CADE** Internal Regulations (**CADE** Resolution No. 45/2007) and Article 26 of SDE Ordinance No. 4/2006 govern the matter. Such regulations contain a list of information that is generally held to be confidential, that is: (i) accounting records; (ii) economic and financial information on the notifying parties; (iii) tax and banking information; (iv) trade and business secrets; (v) production processes; (vi) turnover information; (vii) date, amount and payment terms relating to the transaction; (viii) the transaction documents; (ix) the latest Annual Report (if not public); (x) sales (value and volume) and financial statements; (xi) list of clients and suppliers; (xii) installed capacity; and (xiii) production and R&D costs. Such list is neither mandatory nor exclusive.

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

5.1 How does the regulatory process end?

Once all non-binding Opinions are obtained, the **CADE** Examiner (who is appointed upon the notification) shall prepare a Final Report and submit it along with his Opinion to the Panel of **CADE** made of six Councillors and the President, in a Public Session. The Attorney General of **CADE** and Counsel for the parties may address the Panel short of the definitive casting of votes.

All **CADE** decisions may be questioned at, and reviewed by the regular Courts.

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

Where competition problems are initially identified, the Authorities may freeze the transaction (in total or partially) through a Preventive Measure or the entering into an Agreement on the Reversibility of the Transaction - **APRO**. The adoption of a Preventive Measure and/or the entering of an **APRO** are usually preceded by discussions among the Authorities, the parties and complainants, if any.

There is no official mechanism to negotiate "remedies" to a competition problem, but often alternatives to divestiture orders

and/or to originally conceive stricter remedies are not uncommon. Remedies are primarily structural and only occasionally behavioural. **CADE** has full discretion to negotiate or not any "remedies".

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

There is no specific timing for an eventual negotiation of remedies. Informal discussions usually commence when the first authority in the course of the merger review expresses his/her concern. Should the concern fail to be discarded through discussions on the merit thereof, then alternative mechanisms are considered.

Whenever a remedy is the consensus of the Authorities and the parties, they are frequently integrated into the transaction documents in order to facilitate the final approval of the merger by **CADE**.

5.4 If a divestment remedy is required, does the merger authority have a standard approach to the terms and conditions to be applied to the divestment?

There is no standard approach to divestment orders, the terms of which are placed on a case-by-case basis, depending on the nature of the competition problem (i.e. if the problem is the level of concentration, or the presence of significant barriers to entry, or the lack of rivalry or market contestability, or the potential abusive exercise of market power).

5.5 Can the parties complete the merger before the remedies have been complied?

Brazilian law permits *a posteriori* notifications. The parties are free to close the transaction prior to notifying. Failure to comply with imposed remedies may result in the definitive rejection of the transaction (full divestment order), fines and eventually judicial intervention, as the case may be.

5.6 How are any negotiated remedies enforced?

A specific department of **CADE**, known as **CAD/CADE** follows negotiated remedies. Failure in compliance may result in the reversal of the approval, the imposition of fines and, ultimately, in judicial intervention.

5.7 Will a clearance decision cover ancillary restrictions?

Clearance shall always cover ancillary restrictions, if any.

5.8 Can a decision on merger clearance be appealed?

A decision on a merger clearance cannot be appealed at the administrative level, but may be questioned or reviewed by the regular Courts. Third party complainants have no legal standing to appeal either at the administrative level or at the Courts, but occasionally are admitted as *amicus curiae* in Court proceedings.

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

Brazilian Competition Law provides for no statute of limitation for enforcement of merger control legislation. **CADE** rulings and *praxis*, however, tend to accept a five-year term. Recent rulings, however, have decided that such term shall not preclude **CADE** from reviewing the merits of a merger older than five years, and that the lapse of time shall only result in the exemption of the fine otherwise imposed on late notifications.

6 Miscellaneous

6.1 To what extent does the merger authority in your jurisdiction liaise with those in other jurisdictions?

CADE is a member of the International Competition Network and the Competition Authorities have entered into bilateral Agreements with certain foreign authorities, such as the US, Argentinean, Russian and Portuguese competition authorities. However co-ordinating and discussing scrutiny of a particular merger is not common.

Brazil is also a member of the Mercosul and is bound to international treaties on competition entered by the Mercosul countries.

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

31 August 2007.

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