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Overview

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The regulatory framework for antitrust matters in Brazil is set out in the Antitrust Law No. 8,884 of 11 June 1994. The three government agencies involved in antitrust analysis in Brazil are the Secretariat for Economic Monitoring of the Ministry of Finance (SEAE), the Secretariat of Economic Law of the Ministry of Justice (SDE) and the Administrative Council of Economic Defence (CADE). The SDE is the chief investigative body in matters related to anti-competitive practices. The SEAE has more general powers with respect to monitoring prices in the various sectors of the economy. CADE is the administrative tribunal, composed of seven commissioners, including a chairman, which makes the final judgment on both merger reviews and on investigations regarding anti-competitive practices.

The SDE and the SEAE may undertake on-site inspections, search and seizure warrants and wiretapping (with judicial order requested by the Office of the Attorney General). Recently, the SDE has implemented a taskforce involving the federal police and the Office of the Attorney General in order to fight cartels more effectively. Through that, between 2003 and October 2008, 171 search-and-seizure warrants were executed by the SDE. The Office of the Attorney General plays a special role as it is entitled to request judicial orders to conduct investigations, phone-tapping and searches and seizures.

Anti-competitive practices

Restrictive practices are regulated by the law on abuse of market power (articles 20 and 21 of the Antitrust Law). Requests for clearance of restrictive practices cannot be submitted to the competition authorities. There are no specific substantive rules concerning restrictive practices. Many horizontal and vertical practices may be considered anti-competitive under the rule of reason.

In relation to both restrictive agreements and practices, the SDE has a wide range of investigative powers, including the right to request information, documents and data from the undertakings involved in the potentially restrictive agreement or practice, and from third parties.

The fight against cartels has clearly been a priority for the Brazilian authorities since 2003. In the next few years, the focus on cartels will be maintained, especially when bid-rigging is involved – particularly in relation to the World Cup in 2014 and the Olympic Games in 2016 taking place in Brazil.

Merger control

Merger control applies to any form of economic concentration, whether effected through a merger, acquisition or any other form of corporate grouping, when certain thresholds are met. An economic concentration must be notified if either of the following thresholds is met (Antitrust Law):

- The annual gross turnover of any of the parties or economic groups exceeds 400 million reais (about US\$238 million) in Brazil in the previous financial year. Note that only the turnover of undertakings or their groups in Brazil (not worldwide) is considered.
- The concentration results in a joint market share of at least 20 per cent in the relevant market. This is defined as the market where there is an overlap between the parties' businesses or, if there is no overlap, the market in which the target undertaking acts. CADE understood that even if one of the undertakings had a market share exceeding 20 per cent in a relevant market before the transaction, the concentration should still be notified for clearance by CADE – even if it resulted in no concentration in that market. CADE is currently changing its stance in this regard, considering that the meeting of the 20 per cent threshold must be a consequence of the concentration that results from the transaction.

Notification is mandatory for economic concentrations that meet either of the thresholds and must be done within 15 working days of a transaction's execution date. There is much debate about what triggers the 15-day deadline. CADE has stated that the moment of execution of the

transaction for the purpose of the filing deadline is when the parties execute the first binding document (Rule No. 45/07). There is no clear first binding document definition in law – it is constructed by CADE case law. A binding document is usually interpreted as almost any document signed by the parties that may minimally decrease competition between the parties. Even letters of intent and memoranda of understanding have been considered sufficient to execute a transaction.

CADE can impose restrictions and conditions on mergers to prevent subsequent anti-competitive effects on the market. It can make any approval conditional on structural remedies such as divestment and behavioural undertakings. Conditions of clearance can be accepted at the end of the administrative process, after CADE's decision. However, it is possible to negotiate remedies during the process and propose different conditions of clearance to CADE before it reaches its final decision.

Significant recent developments

There are significant recent developments regarding anti-competitive practices. Authorities have been focusing greatly on enhancing investigative methods and efficiency. The SDE, the body in charge of investigations, has recently increased cooperation with the federal police in order to jointly fight cartels, culminating in a formal cooperation agreement in December 2007. There are at present over 300 investigations in progress, 100 firm managers facing criminal cartel

investigations and at least 34 managers have been convicted with rulings currently under appeal.

Since May 2007, the execution of a cease-and-desist agreement and payment of a monetary contribution to a Fund for the Defence of Diffuse Rights has allowed the suspension of the administrative procedure against the parties under investigation. Regulators can now accept formal commitments from the parties during the administrative process to suspend the restrictive agreement or practice without a judgment against it and the parties can apply to sign a cease-and-desist agreement at any stage of the investigation. The cease-and-desist agreement must, however, be approved by CADE to be effective.

Additionally, we also expect major developments over the coming years. The House of Representatives approved, in December 2008, a draft bill providing for the restructuring of the Brazilian antitrust system. Following that, in 2010, the Senate approved the draft bill with several modifications in the text formerly approved by the House of Representatives. Because of those changes, the draft bill in its current status has to be reviewed and approved again by the House of Representatives.

In summary, the draft bill consolidates the following main changes: the institutional restructuring of the system and a reorganisation of the merger-control process.

The institutional restructuring of the Brazilian antitrust system is aimed at increasing efficiency, better allocating human resources and avoiding

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duplicate work. The Competition Department of the SDE would be incorporated into CADE, becoming a directorate general, and would continue to investigate anti-competitive practices and provide non-binding opinions in merger reviews. CADE would continue to be an independent administrative tribunal, but would now acquire – after the incorporation of the SDE – responsibility for investigating and judging cases. The term of office of CADE commissioners would change from the current two-year once-renewable period to one four-year non-renewable term. The SEAE would acquire a competition advocacy responsibility.

Second, a pre-merger system would be introduced. At present mergers and acquisitions may be filed with Brazilian antitrust authorities up to 15 working days after the signature of the first binding agreement between the parties. Additionally, there would be changes regarding merger notification criteria, with optimised thresholds regarding the actual importance of the transactions in Brazil, early termination for simple mergers and the possibility of closing merger cases by settlement.



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