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Competition Volume 1

THE LAW AND LEADING LAWYERS WORLDWIDE 2010

Cross-border

Country Q&A

PLCWhich lawyer?

Lawyer profiles

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Brazil

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MERGER CONTROL

1. Are mergers and acquisitions subject to merger control in your jurisdiction? If so, please describe briefly the regulatory framework and authorities.

The regulatory framework for merger control in Brazil is set out in the Anti-trust Law (*no. 8,884, 11 June 1994*), which contains all general provisions concerning anti-trust matters.

Merger control is enforced by the Administrative Council for Economic Defence (*Conselho Administrativo de Defesa Econômica*) (Council), an independent federal authority. Before the Council decides whether or not to clear a merger, the Secretariat for Economic Monitoring at the Ministry of Finance (*Secretaria de Acompanhamento Econômico*) (SEAE) and the Secretariat of Economic Law at the Ministry of Justice (*Secretaria de Direito Econômico*) (SDE) analyse the market, conduct inquiries and issue non-binding opinions (*see box, The regulatory authorities*).

2. What are the relevant jurisdictional triggering events/thresholds?

Triggering events

Merger control applies to any form of economic concentration, whether it is a result of a merger, acquisition or any other form of corporate grouping, when certain thresholds are met (*see below, Thresholds*).

Thresholds

An economic concentration must be notified if either of the following occurs (*Anti-trust Law*):

- The annual gross turnover of any of the parties or their economic groups exceeds BRL400 million (about US$225 million) in the previous financial year. Only the turnover of undertakings in the same economic group in Brazil (not worldwide) is included.
- The concentration results in a joint market share of at least 20% 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. Even if one of the undertakings had a market share exceeding 20% in a relevant market before the transaction, the concentration should still be notified for clearance by the Council.

3. Please give a broad overview of notification requirements. In particular:

- **Is notification mandatory or voluntary?**
- **When should a transaction be notified?**
- **Is it possible to obtain formal or informal guidance before notification?**
- **Who should notify?**
- **To which authority should notification be made?**
- **What form of notification is used?**
- **Is there a filing fee? If so, how much?**
- **Is there an obligation to suspend the transaction pending the outcome of an investigation?**

- **Mandatory or voluntary.** Notification is mandatory for economic concentrations that meet either of the thresholds (*see Question 2*).
- **Timing.** Parties must file a notification within 15 working days of a transaction's execution date. There is considerable debate about what triggers the 15-day deadline. The Council 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*). A binding document is usually interpreted as almost any document signed by the parties. Even letters of intent and memoranda of understanding have been considered sufficient to execute a transaction.
- **Formal/informal guidance.** It is not possible to obtain informal guidance from the authorities about the likelihood of a merger being cleared.
- **Responsibility for notification.** All parties to a transaction are responsible for notification. However, the duty to notify can be met if only one of the parties files, as long as it provides information about the other parties. In practice, the buyer usually files the notification.
- **Relevant authority.** The parties must file the notification with the SDE.
- **Form of notification.** The parties must complete a form that provides detailed information on:
  - the parties;

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  - competitors;
  - barriers for new competitors in the relevant market;
  - the effects of the transaction on the relevant market.

  They must also provide copies of the agreements and all documents relating to the transaction.

- **Filing fee.** The filing fee is BRL45,000 (about US$25,300).
- **Obligation to suspend.** There is no obligation to suspend pending the outcome of the investigation. However, if a transaction raises significant anti-trust concerns, the Council can impose a preventive injunction to prevent the transaction completing before clearance. Alternatively, parties can give the Council a non-integration undertaking.

4. Please set out the procedure and timetable.

The merger review procedure is as follows:

- The parties notify the SDE. Shortly after that, competitors and customers may receive official letters asking for their comments on the transaction.
- The SEAE analyses the economic effects on the relevant market and must issue an opinion on clearance of the merger. The SEAE must issue its opinion on the economic effects of the transaction within 30 days of filing. If the case is very simple and no additional information is needed, SEAE can apply a fast track analysis and issue an opinion within 15 days of filing.
- The SDE issues its legal opinion within 30 days of the issuance of the SEAE opinion. If the case is very simple and no additional information is needed, SDE can issue an opinion in 15 days of filing.
- During the first 60 days, both the SEAE and the SDE can conduct investigations, request further information and hold meetings with the parties.
- The case then goes to the Council and if there is any legal controversy the General Attorney analyses it and issues a non-binding opinion within 20 days of receipt of the case. If there is no legal controversy related to the case, the Council's General Attorney issues its opinion orally at the case's decision by the Council's Commissioners. The General Attorney can ignore the SEAE's and SDE's opinion and give a different opinion.
- The Council's Board of Commissioners must give its final decision within 60 days of receiving the case. The Council does one of the following:
  - clears the merger;
  - clears the merger subject to conditions (such as divestment);
  - prohibits the merger.

  The authorities usually take about four months from notification to reach a final decision on less complex mergers. However, each time any of the authorities sends an official letter requesting further information, the deadline is suspended. As a result, complex cases are usually decided within six months of filing. In very complex cases, a final decision may take up to a year or more, as a lot of extra information is normally required from suppliers, competitors and consumers.

  For an overview of the notification process, see flowchart, *Brazil: merger notifications*.

5. In relation to merger inquiries:

- **How much publicity is given?**
- **At what stage of the procedure is information released?**
- **Is certain information automatically kept confidential?**
- **Can the parties request that certain information be kept confidential?**

- **Publicity.** The notification process is given full publicity (the public can access all files on the matter), although the parties can request that certain documents and information be kept confidential (*see below, Confidentiality on request*). The text of all opinions and the decision are also made public, except for information that is strictly confidential. To obtain confidentiality of a document or information, the party must request it and the authorities must agree to the request (*see below, Confidentiality on request*).
- **Procedural stage.** The documents and information filed are considered public from the date of filing.
- **Automatic confidentiality.** There is no automatic confidentiality for any document.
- **Confidentiality on request.** The parties can request that certain documents and information be kept confidential. A confidentiality request can be made at any time during the merger review. It is usually filed with the authorities at the same time as the document requesting confidentiality is presented.

6. Can third parties be involved in the procedure and, if so, how? What rights do they have to make representations, access documents or be heard?

Competitors, suppliers and customers can have a substantial influence on the final decision. Customers and competitors can become involved if the authorities require them to comment on the merger. They can also file a complaint, stating their reasons for objecting to the merger, and can follow all the proceedings except those that are considered confidential.

7. What is the substantive test?

Transactions that damage or limit competition are only cleared if they result in efficiencies for the participants of the merger that are both:

- Greater than the losses resulting from the concentration.
- Likely to be shared with consumers.

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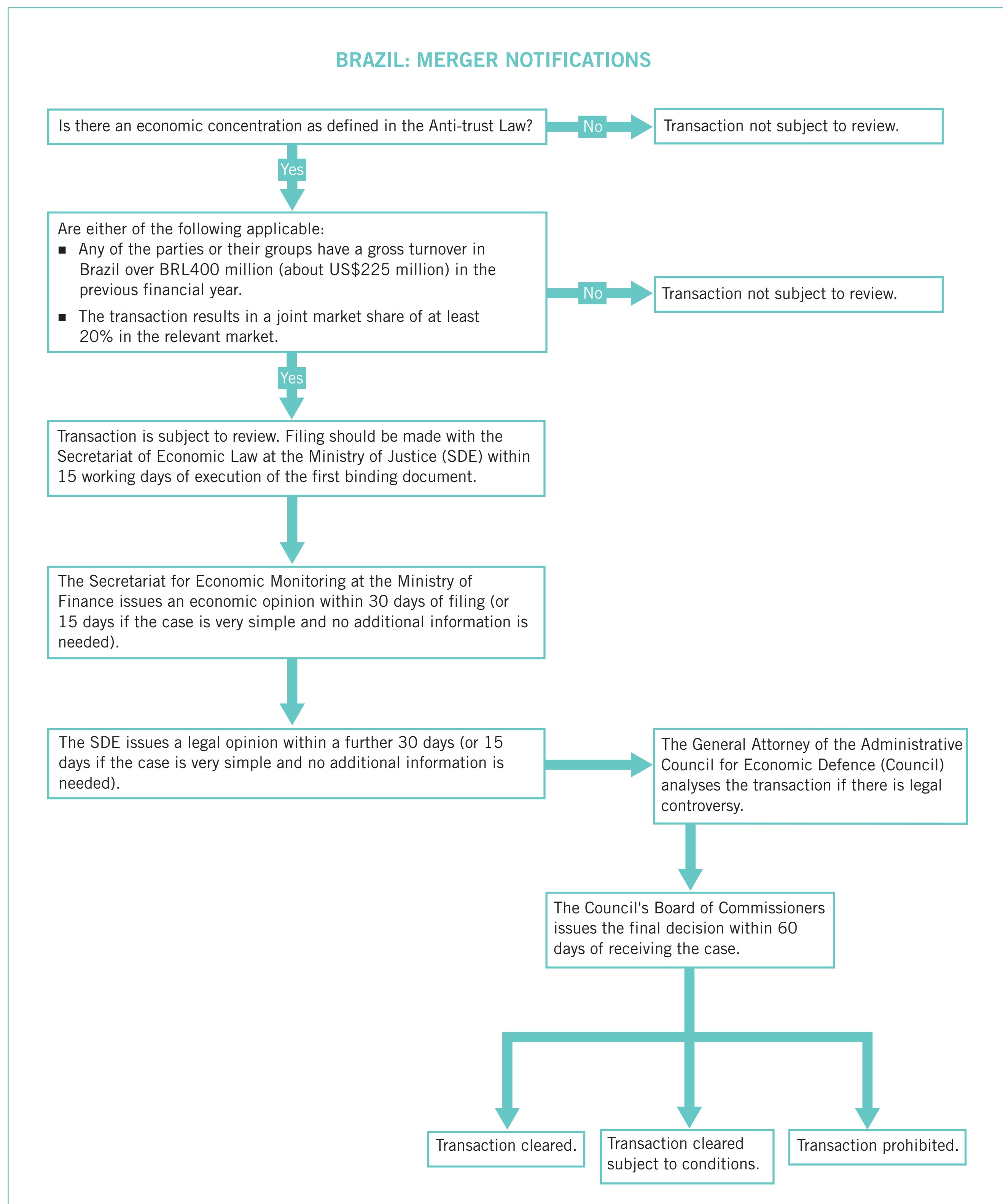

8. What remedies can be imposed as conditions of clearance to address competition concerns? At what stage of the procedure can they be offered and accepted?

The Council can impose restrictions and conditions on mergers to prevent 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 the Council's decision. However, it is possible to negotiate remedies during the process and propose different conditions of clearance to the Council before it reaches its final decision.

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9. What are the penalties for:

- **Failure to notify correctly?**
- **Implementation before approval or after prohibition of the merger?**
- **Failure to observe a decision of the regulator (including any remedial undertakings)?**

- **Failure to notify correctly.** Failure to notify and late filing can result in the Council imposing administrative fines on the undertakings to the transaction, and on the undertakings' managers responsible for the failure. Fines imposed on the undertakings' managers are 50% lower than those imposed on the undertakings themselves. Fines imposed on undertakings can range from BRL63,846 (about US$36,000) to BRL6.3 million (about US$3.5 million). The most recent fines imposed for late filing have been as high as BRL306,600 (about US$172,500).

  Failure to notify does not result in the transaction becoming invalid. If fines are not paid, the Council's decision to impose them is executed by the courts so that it can be enforced.

  If documents are missing from the notification, the filing is considered late, although a notification is rarely considered late for this reason. A notification filed without relevant documents usually receives a slower review, as authorities are likely to request the missing documents or pieces of information.

- **Implementation before approval or after prohibition.** Implementation before approval is possible if the Council's Board of Commissioners does not issue an injunction to prevent the implementation process (*see Question 3, Obligation to suspend*).

  Failure to adhere to a preventive injunction does not result in the transaction becoming invalid. Instead, if such an injunction is issued, implementation before approval results in the imposition of daily administrative fines. These can range from BRL5,320.50 (about US$3,000) to BRL106,410 (about US$60,000). The fines are imposed on the undertakings to the transaction, and can also be imposed on the undertakings' directors responsible for the failure. Fines imposed on undertakings' directors are 50% lower than those imposed on the undertakings themselves. If these fines are not paid, the Council's decision is executed by the courts so that it can be enforced.

  If a transaction is implemented after prohibition, specific penalties can be imposed (these are most commonly fines).

- **Failure to observe.** Failure to observe a Council decision:

  - results in the imposition of daily administrative fines, which are set out in the decision itself, and range from BRL5,320.50 (about US$3,000) to BRL106,410 (about US$60,000);
  - invalidates the transaction.

  Fines are imposed on the companies involved in the transaction, and can also be imposed on the undertakings' directors responsible for the failure. Fines imposed on the undertakings' directors are 50% lower than those imposed on the undertakings themselves. If they are not paid, the Council's decision is executed by the courts so that it can be enforced.

10. Is there a right of appeal against any decision and, if so, which decisions, to which body and within which time limits? Are rights of appeal available to third parties or only the parties to the decision?

Council decisions can be subject to full judicial review by the federal courts (*Article 5, Constitution*). There is no deadline for lodging an appeal, but it can only be lodged by the main parties to the original decision. There is no further right of appeal beyond this.

The parties can also ask the Council to reconsider its decision if new documentation emerges. The Council interprets "new documentation" broadly and subjectively. It is defined as any document related to the merger that existed before the Council's decision, but that was not known at the time (for example, a contract or minutes).

11. If a merger is cleared, are any restrictive provisions in the agreements automatically cleared? If they are not automatically cleared, how are they regulated?

Restrictive provisions are usually automatically cleared with the merger, although the Council can clear the transaction but prohibit its restrictive provisions. Clearance of a merger can also be made conditional on the exclusion of restrictive provisions.

12. Are any industries specifically regulated?

There is industry-specific regulatory legislation in the telecommunications, electricity, gas, financial, civil aviation and other sectors. Mergers in regulated industries are subject to review by the usual competition authorities, but some sectors are reviewed by both regulatory and competition authorities.

At present, there is a dispute between the Central Bank and the Council about jurisdiction over mergers in the banking sector. This dispute is only likely to be resolved when specific legislation is enacted, which may occur in the near future. On 29 August 2007, the Federal Court held that the Council must review mergers in the banking sector. The Federal Court decision is currently being reviewed by the Superior Court of Justice (*Superior Tribunal de Justiça*).

RESTRICTIVE AGREEMENTS AND PRACTICES

13. Are restrictive agreements and practices regulated? If so, please give a broad overview of the substantive provisions and regulatory authority.

Restrictive agreements are regulated by the merger control rules (*see Questions 1 to 12*), while restrictive practices are regulated by the law on abuse of market power (*see Questions 27 to 35*).

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Agreements that lead to a permanent structural change to the market (that is, they are not merely instruments for the co-ordination of the competitive activity) must be notified for clearance in the same way as mergers and acquisitions (*Article 54, Anti-trust Law*) (*see Questions 1 to 12*). Note that the turnover and market share thresholds relating to mergers and acquisitions do not apply to restrictive agreements (*see Question 2*).

The Anti-trust Law defines the term "restrictive agreements" broadly. It refers to all agreements that may limit or damage competition or result in market dominance. However, even if there is no permanent structural change to the market as a result of the agreement, it may still amount to a restrictive practice (*see below*).

Restrictive practices are regulated by the law on abuse of market power (*Articles 20 and 21, Anti-trust Law*) (*see Questions 27 to 35*). 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 (that is, if they unreasonably restrict trade). Articles 20 and 21 of the Anti-trust Law (*see Question 29*) set out examples of restrictive practices.

Criminal provisions

Beyond the Anti-trust Law, those who take part in cartels can be subject to criminal prosecution. Agreements between companies to fix prices or divide markets are illegal (*Law 8.137/90, Crimes Against Economy and Consumers*). Individuals participating in such practices can be imprisoned for two to five years' or fined.

Civil provisions

Private anti-trust litigation can be brought in relation to any of the anti-competitive practices set out in Articles 20 and 21 of the Anti-trust Law (*see Questions 27 to 35*) if there is evidence of civil damage.

14. Do the regulations only apply to formal agreements or can they apply to informal practices?

Formal agreements are regulated by the merger control rules (*see Questions 1 to 12*). Restrictive informal agreements and restrictive practices are regulated by the law on abuse of market power (*see Questions 27 to 35*). The answers to *Questions 15* to *26* relate to the regulation of formal restrictive agreements unless otherwise specified.

15. Are there any exemptions? If so, please provide details.

There are no formal exemptions. Past Council decisions can be used as guidance on whether certain kinds of agreements should be notified and whether they are likely to be cleared.

16. Are there any exclusions? If so, please provide details.

There are no formal exclusions (*see Question 15*).

17. Please give a broad overview of formal notification requirements. In particular:

- **Is it necessary (or, if not necessary, possible/advisable) to notify to obtain an individual exemption or other clearance?**
- **Is it possible to obtain informal guidance before, or instead of, formal notification? If there is no formal notification procedure, can any type of informal guidance or opinion be obtained?**
- **Who should/can notify?**
- **To which authority should/can notification be made?**
- **What form of notification is used?**
- **Is there a filing fee? If so, how much?**

- **Notification.** The restrictive agreement must be notified to the authorities 15 working days after signature of the first binding document (*see Question 3*).
- **Informal guidance/opinion.** No informal guidance is available (*see Question 3*).
- **Responsibility for notification.** Both parties are responsible for notification, although only one needs to submit the notification (*see Question 3*).
- **Relevant authority.** Notification must be filed with the SDE.
- **Form of notification.** The standard filing form, a copy of the agreement and all documents relating to the transaction must be filed (*see Question 3*).
- **Filing fee.** The filing fee is BRL45,000 (about US$25,300).

18. Can investigations be started by:

- **The regulator on its own initiative?**
- **A third party by making a complaint?**

- **Regulators.** The regulator can start an investigation on its own initiative by issuing an official order compelling notification.
- **Third parties.** Third parties can complain about a failure to notify and pressure the regulators to begin an investigation (*see Question 6*).

19. What rights (if any) does a complainant or other third party have to make representations, access documents or be heard during the course of an investigation?

Third parties have full access to non-confidential documents and have the right to be heard during an investigation (*see Questions 5 and 6*).

20. Please set out the stages of the investigation and timetable.

The following procedure applies to restrictive agreements when the parties have failed to notify and third parties lodge a complaint (*see*

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Question 18). It also applies to restrictive practices. If the regulator initiates an investigation into a restrictive agreement and compels the parties to notify, the applicable procedure is as set out in *Question 4*.

The procedure is as follows:

- **Preliminary investigations.** The SDE carries out preliminary investigations either on its own initiative or following a written and reasonable request of interested parties. A preliminary investigation must be concluded within 60 days of its opening.
- **Administrative proceedings.** After the conclusion of the preliminary investigations, the SDE Secretary decides whether or not to start an administrative proceeding (which can be subject to an appeal to the Council by third parties if he decides not to bring a proceeding).

  Administrative proceedings must begin no later than eight days after identifying any of the following:
  - underlying facts;
  - formal complaint;
  - closing of the preliminary investigation.
- **Discovery phase.** The defendant must:
  - file a defence within 15 days of receipt of a notification of the start of the administrative proceedings;
  - produce any evidence within 45 days after submission of the defence;
  - provide new documents at any time before the discovery phase lapses.
- **Report on proceedings.** On conclusion of the discovery phase, the defendant is summoned to put forward its final arguments within five days. The SDE Secretary issues a report (based on evidence) and forwards the case records to the Council for either review or closing (subject to appeals to the Council if the proceedings are closed).
- **Council's review.** Once the case records are submitted to the Council, the Council's President forwards them to the Reporting Official, who sends them to the Attorney General to issue an opinion within 20 days of their receipt. The Council then determines the case and concludes the proceedings.

  The Council does not have a deadline to make its determination, although Brazilian anti-trust law sets a statute of limitations. The Council cannot pass judgment on the case if, after three years:
  - a decision is not made;
  - no further information comes to light in relation to the matter;
  - the authorities do nothing to continue the investigation.

21. In relation to an investigation into a potentially restrictive agreement or practice:

- **What details (if any) of the investigation are made public?**
- **Is certain information automatically kept confidential?**
- **Can the parties (or third parties) request that certain information be kept confidential?**

- **Publicity.** Details of the investigation are made public unless sensitive information about the parties is kept confidential at their request (*see Question 5*).
- **Automatic confidentiality.** See *Question 5*.
- **Confidentiality on request.** See *Question 5*.

22. Please summarise any powers that the relevant regulator has to investigate potentially restrictive agreements or practices.

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.

23. Can the regulator reach settlements with the parties without reaching an infringement decision (for example, by accepting binding or informal commitments)? If so, please summarise the procedure and the circumstances in which settlements can be reached.

In relation to both restrictive agreements and practices, the regulator can reach settlements without reaching an infringement decision. Regulators can accept formal commitments from the parties to suspend the restrictive agreement or practice during the investigative process.

The parties can offer to sign a cease and desist order at any stage of the investigation. The Council must approve a cease and desist order for it to be legally effective.

Since May 2007, parties under investigation for cartel membership can suspend the investigation against them by signing a cease and desist order and contributing to a Fund for the Defence of Diffuse Rights.

24. What are the regulator's enforcement powers in relation to a prohibited restrictive agreement or practice? In particular:

- **What orders can be made?**
- **What fines can be imposed on the participating companies? What are the consequences if they are not paid?**
- **Can personal liability, including fines, attach to individual directors or managers?**
- **Is it possible to obtain immunity/leniency from any fines?**
- **Can an entire agreement be declared void (that is, not only any restrictive provisions)?**

- **Orders.** The Council can order termination of the restrictive clauses in an agreement.
- **Fines.** The Council can impose daily fines of between BRL5,320.50 (about US$3,000) to BRL106,410 (about US$60,000) for non-compliance with a decision regarding a restrictive agreement.

  Prohibited restrictive practices and informal agreements are subject to the same penalties as abuses of market power (*see Question 34*).

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Cartel participants can also be prosecuted under criminal law and subject to two to five years' imprisonment and/or fines (*see Question 13*).

- **Personal liability.** If an agreement is voluntarily notified to the authorities, no penalty can be imposed. If the agreement is not voluntarily notified, the parties to the agreement and their directors can be liable to civil and criminal penalties.

  Individuals involved in restrictive practices are subject to the same penalties as those involved in abuses of market power (*see Question 34*).

  Individuals who take part in cartels can also be prosecuted under criminal law, leading to two to five years' imprisonment, and fines (*see Question 13, Criminal provisions*).

- **Immunity/leniency.** It is possible to enter into a leniency agreement with the anti-trust authorities. A leniency agreement gives immunity from administrative fines. However, it does not prevent criminal action in the courts, which may still be brought, depending on the type of anti-competitive practice in question. For further information relating to leniency in Brazil, please see the *PLC Cross-border Competition Handbook 2010 Volume 2: Leniency* at *www.practicallaw.com/leniencyhandbook*.

- **Impact on agreements**. Restrictive clauses can be declared void and severed from the rest of an agreement, which remains valid. Usually, parties are required to amend an agreement to exclude restrictive clauses. If the purpose of the agreement is restrictive, the Council can order the entire agreement to be terminated.

  If a restrictive practice or informal agreement is prohibited, the whole practice or agreement must be terminated, and the parties will be subject to the same penalties as those that apply for abuse of market power (*see Question 34*).

25. Can third parties claim damages for losses suffered as a result of a prohibited restrictive agreement or practice? If so, please summarise any special procedures or rules that apply. Are class actions possible?

Third parties can claim damages through the courts for losses suffered as a result of a prohibited restrictive agreement or practice. Civil procedure law and the civil law code provide special procedures and rules for starting private litigation. Evidence established during an investigation concerning a prohibited agreement or practice can be used in the private litigation.

Private class actions are not possible. Public class actions are possible and must be started under the consumer and/or criminal laws by the Federal Prosecutors' Office.

26. Is there a right of appeal against any decision of the regulator and, if so, which decisions, to which body and within which time limits? Are rights of appeal available to third parties, or only to the parties to the agreement or practice?

All decisions by the Council are subject to judicial review (*see Question 10*).

MONOPOLIES AND ABUSE OF MARKET POWER

27. Are monopolies and abuses of market power regulated under civil and/or criminal law? If so, please give a broad overview of the substantive provisions and regulatory authority.

The SDE and the SEAE can start inquiries into abuses of market power (*see Question 32*) on their own initiative or at the request of third parties. In these investigations, both the SDE and SEAE can issue opinions, but the Council makes the final decision.

28. How is dominance/market power determined?

Dominance is presumed if a single company, or a group of companies under common control, holds a market share of 20% or more (*Anti-trust Law*).

29. Are there any broad categories of behaviour that may constitute abusive conduct?

The Anti-trust Law provides an extensive but not exhaustive list of practices that can constitute abusive conduct, such as:

- Price-fixing.
- Market allocation.
- Tied-in sales.
- Exclusivity clauses.
- Predatory pricing.

These practices are not considered illegal in themselves. However, they are illegal if they effectively harm competition and provide no compensatory efficiencies to undertakings and consumers.

30. Are there any exclusions or exemptions?

There are no formal exclusions or exemptions. Past Council decisions may provide informal guidance.

31. Is it necessary (or, if not necessary, possible/advisable) to notify the conduct to obtain clearance or (formal or informal) guidance from the regulator? If so, please set out briefly the procedure.

Practices cannot be notified to obtain clearance and no formal or informal guidance can be obtained.

32. Where different than for restrictive agreements and practices, please explain how investigations are started, the procedures that apply, the rights of third parties, what details are made public and whether the regulator can accept commitments.

Investigations are started when there is sufficient evidence that abusive practices occurred and produced anti-competitive effects on a relevant market.

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THE REGULATORY AUTHORITIES

Administrative Council for Economic Defence (*Conselho Administrativo de Defesa Econômica*) (Council)

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Outline structure. The Council's main body is the Board of Commissioners, which consists of six commissioners and a chairman. It has a General Attorney who is responsible for representing the Council in court and for following all internal procedures.

Responsibilities. The Council makes final decisions concerning reviews of:

- Mergers and acquisitions.
- Restrictive agreements and practices.
- Monopolies and abuses of market power.
- Joint ventures.

Its decisions are made by a simple majority vote of the Board of Commissioners.

Procedure for obtaining documents. The Council's website contains information on its procedures and rules as well as information on current and past inquiries. Some reports are available on the website. The Council also publishes other important documents on its website, including issued statements and hypothetical remedy statements. Reports issued before 1999 are not available on the website but can be obtained by post from the above address.

Secretariat of Economic Law (*Secretaria de Direito Econômico*) (SDE)

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Outline structure. The SDE is composed of a secretary, two departments (Anti-trust and Consumer) and three sector-specific divisions.

Responsibilities. The SDE is responsible for issuing legal opinions in reviews of:

- Mergers and acquisitions.
- Restrictive agreements and practices.
- Joint ventures.

The SDE is also responsible for investigating monopolies and abuses of market power.

Procedure for obtaining documents. The SDE publishes its legal opinions on its website. The website also provides access to the SDE procedural rules and guidance.

Secretariat of Economic Monitoring (*Secretaria de Acompanhamento Econômico*) (SEAE)

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Outline structure. The SEAE is composed of the secretary and six sector-specific divisions.

Responsibilities. The SEAE is responsible for issuing economic opinions in proceedings concerning:

- Mergers and acquisitions.
- Restrictive agreements and practices.
- Monopolies and abuses of market power.
- Joint ventures.

Procedure for obtaining documents. The SEAE publishes its economic opinions on its website. The website also provides access to the SEAE's procedural rules and guidance.

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Regulators can start investigations on their own initiative or following a complaint by a third party. After its investigations, the SDE can propose that the Council prosecute the parties for the breach, or end the administrative process without prosecution. However, the Council makes the final decision on the matter. The SEAE can also issue non-binding opinions regarding administrative proceedings.

Regulators can accept formal commitments from the parties during the investigative process and suspend the investigation without making an infringement decision. The parties can offer to sign a cease and desist order at any stage of the investigation. The Council must approve the order for it to be legally effective.

The rights of third parties and the publicity during the procedure are the same as those concerning restrictive agreement investigations (*see Questions 19 and 21*).

33. Please summarise the regulator's powers of investigation.

The SDE has a wide range of investigative powers, including the right to:

- Request information, documents and data from the respondent and third parties.
- Carry out inspections at the undertakings' premises.
- Request judicial authorisation to use the federal police to:
  - record telephone conversations or telecommunications;
  - seize objects, documents and electronic files from the respondent's office and plants.

34. What are the penalties for abuse of market power and what orders can the regulator make?

The penalties for abuse of market power are:

- For undertakings, an administrative fine of between 1% and 30% of the gross national turnover earned in the last financial year. The fine must not be less than the advantage obtained from the underlying violation, if assessable. If fines are not paid, the administrative decision is executed by the courts so that it can be enforced.
- For each manager directly or indirectly liable for their undertaking's breach, an additional personal administrative fine of between 10% and 50% of the fine imposed on the undertaking. If fines are not paid, the administrative decision is executed by the courts so that it can be enforced.
- For other individuals and public or private legal entities where it is not feasible to use a turnover fine (or their associates, including temporary ones, with or without legal identity, that do not engage in business activities), administrative fines vary from BRL6,384.60 (about US$3,600) to BRL6.384 million (about US$3.6 million). If fines are not paid, the administrative decision is executed by the courts so that it can be enforced.

In addition, the Council can impose the following penalties:

- An order that a summary of the decision be published in a newspaper.
- A prohibition on parties participating in government procurement bids.
- A restriction on parties receiving financing from public entities.
- Divestment orders, such as orders for the sale of assets and dissolution of the undertaking.

Continuation of prohibited practices is punished with daily fines of between BRL5,320.50 (about US$3,000) and BRL106,410 (about US$60,000).

35. Can third parties claim damages for losses suffered as a result of abuse of market power? If so, please summarise any special procedures or rules that apply. Are class actions possible?

For third party claims, see *Question 25*.

Public class actions are possible. They must be started by the Federal Prosecutors' Office under the consumer and/or criminal laws.

EU LAW

36. Are there any differences between the powers of the national regulatory authority(ies) and courts in relation to cases dealt with under Article 101 and/or Article 102 of the TFEU, and those dealt with only under national law?

Not applicable.

JOINT VENTURES

37. Please explain how joint ventures are analysed under competition law.

Joint ventures of all types are subject to the same regulation as mergers and acquisitions (*see Questions 1 to 12*).

INTER-AGENCY CO-OPERATION

38. Does the regulatory authority(ies) in your jurisdiction co-operate with regulatory authorities in other jurisdictions in relation to infringements of competition law? If so, what is the legal basis for and extent of co-operation (in particular, in relation to the exchange of information)?

Brazilian regulatory authorities do not formally co-operate with authorities in other jurisdictions to promote the exchange and use of information.

In practice, Brazilian authorities co-operate with authorities in other jurisdictions to improve anti-trust and competition control. However, the exchange of information in specific cases is limited to publicly available information. The exchange of confidential information is illegal.

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PROPOSALS FOR REFORM

39. Please summarise any proposals for reform.

Major developments on Brazil's legislation are expected in the near future. The House of Representatives approved, in December 2008, a draft bill providing for the restructuring of the Brazilian anti-trust system. At the time of going to press, the draft bill is still under senate scrutiny. The draft proposes two main changes:

- **Institutional restructuring of the system.** This is aimed at increasing efficiency, better allocating human resources, and avoiding 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 accumulate, after the incorporation of the SDE, responsibilities for investigating and judging cases. The mandates of CADE commissioners would change from the actual two-year once-renewable period to one four-year non-renewable mandate. The SEAE would receive a competition advocacy mandate.
- **Reorganisation of the merger control process.** A pre-merger system would be introduced. Presently, mergers and acquisitions may be filed to the anti-trust authorities up to 15 working days after the signature of the first binding agreement between the parties. Regardless of the draft bill, discussions regarding an electronic form for merger filings are already advanced. In addition, 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. The bill emphasises economic considerations since the bill itself creates the position for a chief-economist, who will be in charge of drafting economic opinions and studies, a function that does not currently exist. This will make possible a more detailed and profound economic analysis of both concentration acts and administrative procedures.

Besides these two major changes, the bill also proposes expansion of the definition of restrictive practices (*see Question 13*).

These proposals are being assessed by parliament. There is currently no date for approval or implementation of the proposals.

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Magalhães, Nery e Dias Advocacia is a traditional boutique law firm focused on antitrust and competition law. The three senior partners of the firm, Carlos Francisco de Magalhães, Nelson Nery Junior and Gabriel Nogueira Dias are recognized as pioneers and outstanding lawyers in the field. Our firm comprises 21 lawyers - 14 of them specialized in antitrust - and 3 economists in-house advisers. In addition to its permanent staff, the firm has also employed a selected and diversified team of consultants and advisers in antitrust, industrial organization, consumer protection and regulation made up of top-level Brazilian economists. Thus, we are proud to be recognised as the largest group in Brazil fully dedicated to antitrust and competition law and also very specialized in litigation. The firm has an office/branch also in Brasilia where the enforcement agencies and federal courts are located to provide full support to clients.

We are fully prepared to provide complete legal services to our clients.

Within our core antitrust and competition business, the main lines of Magalhães, Nery e Dias's activities are the following:

Mergers, acquisitions & joint ventures
We have a proven track record in securing or challenging clearance in Brazil for the most complex mergers, acquisitions and joint ventures of recent years.

Cartel, monopoly and restrictive practice investigations
We have extensive experience with cartel, monopoly and restrictive practice investigations by Brazilian antitrust authorities, advising both parties and interveners.

Antitrust and litigation
We are highly prepared to conduct cases before courts concerning economic law complex cases, advising clients on appeals against CADE's and Regulatory Agencies' decisions. The increase of Brazilian antitrust authorities and regulatory agencies investigations of possible cartels and restrictive practices indicates that appeals to the judiciary related to economic law complex cases will grow at rapid pace. We are already active in this scenario.

Counseling
We advise on all forms of horizontal and vertical commercial arrangements, including tying, bundling, pricing, distribution, standard-setting, trade associations, purchasing and licensing, and regularly work with clients to set up comprehensive and effective antitrust compliance programs.