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Merger Control in Brazil: Maturity

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Before explaining how merger control filings are considered in Brazil and their problems and features, it is important to quote a short legal text.

Article 54 of Law 8,884 of 1994 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.’

Paragraph 3 of the same article says:

The acts dealt with in the main section of this article also include any action intended for any form of economic concentration, whether through merger or into other companies, organisation of companies to control third companies or any other form of corporate grouping, when the resulting company or group of companies accounts for twenty per cent (20 per cent) of a relevant market, or in which any of the participants has posted on its last balance sheet an annual gross revenue equivalent to 400,000,000 reais.

And finally for our purposes, the first part of paragraph 7 of the same article says: ‘The effectiveness of any acts dealt with in this article will be conditioned to approval thereof, which approval shall be retroactive to the date of occurrence of such acts.’

Examining the interpretation issued by the ultimate competition authority in Brazil, the Conselho Administrativo de Defesa Econômica (CADE), we must first establish whether the transaction has an impact of any kind on the Brazilian economy, whatever legal form it takes (merger, acquisition, joint venture, joint administration, etc). It must be emphasised that there are no legal exemptions in Brazil.

If the transaction occurs in Brazil, there is of course no doubt about the impact; but if it occurs abroad, the Brazilian authorities only have jurisdiction over those that may in any way affect the Brazilian market. Thus we have to know whether the participating companies have assets, subsidiaries, affiliated companies or non-sporadic activities (including sales) in Brazil. CADE’s jurisprudence includes those cases in which, despite causing no changes at all in the market shares, there is a substitution of players. Outside Brazil it is said that Brazilian jurisdiction is very broad.

One interesting point here is that CADE usually discusses the need for submission, and the results of these discussions (whether appreciated or not) provide us with orientation, almost like an official guide.

Then we get to the second stage, which is to determine the existence of one of two conditions, each one applicable by itself.

The first condition is the market share in a relevant market, which must be 20 per cent for the resulting company or group of companies. The second condition is the annual gross revenue, which must be more than 400 million reais (approximately US\$242 million) for the whole group to which either of the participating companies belongs. Although the law is not explicit on this point, up to the start of 2005 this turnover was considered to be global. However, following a landmark decision enacted in January 2005, this revenue threshold must now be considered as national. The decision has dramatically reduced the number of cases that must be taken to merger control.

Of course, in order to determine the first condition, it is important to define the relevant market by its products and by its geographical aspect: the relevant product market includes roughly all products that can reasonably be substitutes for each other, and the relevant geographical markets cover the regions where competing companies operate (the idea of substitution is still present, but in a geographical sense). This may be the world, a region, country or city. Defining a relevant market, mainly in order to establish whether a transaction must be notified to the competition authorities, is always difficult because it can lead to conflicting results (besides the possibility of changes over time), and choices are usually made strategically. Of course, the choice of relevant market may not be accepted by the authorities, who sometimes call on the parties to file, although there is always the possibility for the parties to explain their choice and the reasons for not filing the transactions. This is a permanent source of stress.

It is obvious, however, that the second condition is far easier to decide upon – a threshold is an easily detachable fact – and normally the analysis of the relevant market does not take much effort and is not so important in terms of deciding whether a particular transaction must go through merger control.

The only decision-making agency is CADE, but there is also the Secretaria de Direito Econômico (SDE) of the Ministry of Justice, which issues non-binding opinions to and below CADE, the Secretaria de Acompanhamento Econômico (SEAE) of the Ministry of Finance and, dealing only with telecommunications (in this case replacing both the SDE and the SEAE), Agência Nacional de Telecomunicações (ANATEL) of the Ministry of Telecommunications. The SDE and SEAE are not independent, as they are parts of ministries; ANATEL was created as independent but has recently suffered all kinds of influence from the executive branch; and CADE is a completely independent agency. Filing also depends on opinions issued by the Office of the Attorney General of CADE and the Office of the Attorney General of the Republic. A typical filing will go through in the following order: the SEAE, the SDE, the Office of the Attorney General of CADE, the Office of the Attorney General of the Republic, before finally being decided by CADE.

Until recently, all filings had to go through full reviews, regardless of the size of the companies and of the relevant transactions. Although there is no such thing as a block exemption system, Joint Administrative Act No. 1 of the SDE and the SEAE, enacted in 2003, created what may be termed as a ‘fast track’ for cases that, because of their simplicity, according to both the SDE and the SEAE, cannot potentially harm competition. According to this administrative act, both the SDE and the SEAE have to define whether a case is eligible for the fast track and, if it is, each has 15 days to issue an opinion. Even with the fast track, a case is not exempt from all above-related opinions and, although this can be considered a real improvement, it may take somewhere between two and four months.

The notification must be made within 15 business days of the date of the first binding document. CADE’s decisions have defined the first binding document as that through which, or as a consequence of which, one company starts to have influence over the

other's business, competing behaviour or strategy. Put more simply, it is the moment at which competition between the relevant companies ceases. It may not be a formal agreement (although it usually is) and there may not even be a document at all (although usually there is), but, if there is no formal agreement or document, consequences must be shown in the market.

An additional problem here is the definition of the first binding document when the parties are not competitors (when there is substitution of players with no overlap) because CADE has understood that, whenever the threshold is met, the transaction must go through merger control. This has become a major issue within CADE and many fining decisions, having upset the parties, have been taken to court, but with no definitive outcomes yet, as they are still subject to further appeals.

The other point on which CADE had been criticised was the consideration of letters of intent, memoranda of understanding and equivalent documents as first binding documents. Despite a general outcry, CADE has issued many fines, most of which have been taken to the judiciary and are still awaiting definitive decisions.

CADE has recently become more liberal, turning its back on the past, and is now considering the signing of the agreements as first binding documents rather than preliminary documents, provided that they do not carry definitive provisions.

The problem, however, continues unsolved because the law considers the occurrence of the transaction as the trigger date, whereas resolution 45 of CADE interprets the occurrence of the transaction as the first binding document. Instead of changing its resolution (which has been challenged in court as unconstitutional, because under this questioning, first, it is not up to CADE to issue such resolution, and second, a resolution cannot change the law), CADE adapted its jurisprudence not to harm the parties with fines that would almost always end in the judiciary.

The fines were imposed under criteria that were very difficult to understand; in fact, there was no criterion as such. Issuing a new resolution, however, CADE has created an objective criterion that considers items such as revenues and time of delay. According to CADE's resolution 44, the fine for late filing is calculated pursuant to a fixed formula that consists of the following three elements: (i) a starting minimum fine of 60,000 UFIR (a Brazilian unit that corresponds to 1.0641 reais), approximately US\$36,000; (ii) an additional amount for each day that elapsed after the expiry of the filing deadline of 600 UFIR, approximately US\$360; and (iii) in cases where the average between the parties' groups revenues in Brazil is higher than 400 million reais, an additional fixed amount is added in function of the parties' combined turnover in Brazil: the combined turnovers are divided by 2, and 0.005 per cent of that figure is added to the starting amount.

In some transactions, mainly when the market share is high, CADE may require a performance commitment that may have its clauses negotiated but gives everybody the certainty that CADE will keep the concerned companies under some kind of control for a given period of time (periodical reports have to be issued during this period of time). There are indeed very few cases in which CADE has barred transactions.

CADE has also created the Agreement to Preserve the Reversibility of the Transaction (APRO) for cases with high market shares or in which there is a reasonable risk to competition. Considering that the notification can be made after the transaction and that the system is not generally suspensory (unless CADE decides it in specific cases), CADE can freeze a transaction if a final prohibition would be impossible, or very problematic, to be implemented. So, the APRO

can be seen as an exception to the non-suspensive quality, freezing the transaction until clearance. The difference between an injunction order and the APRO is that, in the second, the freezing conditions can be negotiated until a certain limit.

An important APRO that should be mentioned was in the industrial gas industry, which is an oligopoly in Brazil, with only four players. Two competitors, White Martins (the main player in this market) and Air Liquide, signed a joint venture agreement for a specific project, the construction of a ground plant. An APRO was signed in this case, but it was not made concerning structural concentration, but in order to avoid behavioural violations, such as the possibility of information sharing and cartelisation. According to the APRO, White Martins and Air Liquide will keep separate their properties and the management of the new ground plant (that will be Air Liquide's role as agreed).

A perspective on remedies may, at this point, be of value. They are mostly behavioural (under the minimal interference principle) but sometimes structural. Three important cases can be mentioned here as clear examples of structural and behavioural remedies resulting in barred transactions.

One of the most emblematic cases, in which the transaction was barred, is the chocolate case in which Nestlé tried to acquire Garoto, in a market with three big players (Nestlé, Garoto and Kraft/Lacta). In one of the markets (for chocolate topping), the overlap grew to about 95 per cent, against 5 per cent of a producer from Argentina. Barriers to entry were analysed thoroughly. It became clear to CADE that, although the entrant could be a large corporation, the costs of marketing and distribution (considering that Brazil is a very big country with problems of infrastructure) would make it very difficult to have a return on the investment. It might also be important to note that in this market there is a very high fidelity to known brands and tastes. It takes many years for a new brand to be accepted by customers: in fact, within the 16 leading brands, the newest was 11 years old.

Considering that the efficiencies of the transaction would not be transferred to the market and to the consumers, CADE barred the transaction in a very clear example of structural remedy, which caused a flood of criticism, including over the lack of analysis of buyer power (mainly the big supermarket chains) and the fact that the deal relates to a superfluous good with a small influence on the economy as a whole.

Another case concerned Companhia Vale do Rio Doce (CVRD), a mining company with a global approach. The filing jointly analysed seven CVRD acquisitions, of which only one was barred (because of a near-monopoly in one specific market).

Recently, on 23 July 2008, CADE barred its third transaction, which concerned the acquisition of Saint Goban's glass fibre business by Owens Corning. CADE barred this transaction because of a near-monopoly in this market, and because the efficiencies from the transaction were not enough for its approval.

In Brazil, antitrust cases are first analysed in an administrative sphere but the federal constitution guarantees that all administrative acts can be reviewed by the judiciary.

Incidentally, the cases mentioned above were taken to the judiciary, where we see an almost dead-end situation. Judges are, in fact, not at all familiar with this fairly new law, taught in very few law schools and not considered as a subject in contests for judges all over the country. Oddly, even most competition lawyers make it strange and difficult to share. The economic grounds, indeed, are something new in Brazil, where judges are not used to economic considerations in their decisions. We must consider that in Brazil there

are no exemptions as to what can be taken to the judiciary, including administrative decisions of all kinds. This is, in fact, a problem that must be worked out – both inside the judiciary and among the competition community – if we want to have a real merger control system.

In behavioural cases, the judiciary is already reviewing and even modifying the merits of CADE's decisions. In merger control, however, this is not so common, but it is starting to happen.

The above-mentioned *Nestlé-Garoto* case is an example. According to Brazilian antitrust rules, CADE has 60 days in which to issue its final decision, but this deadline is suspended when an official letter is issued with questions relevant to the analysis of the case. The judge modified CADE's decision to bar the transaction because he understood that CADE's deadline had expired, as the several official requests that were issued were not relevant, but only dilatory motions. One can say that this judge actually revised the merits of the case to issue his decision.

Which jurisdiction is used to be a very sensitive issue because all notifications would be analysed despite the connection to the Brazilian jurisdiction. Without cases of dismissal, there would be no jurisprudence to base this upon, but this started in the second half of 2003 when CADE began to dismiss cases without nexus to the Brazilian jurisdiction.

Notification thresholds are still a concern, mainly when facing the market share threshold, because it is difficult to measure and can lead to conflicting results.

Timing of notification is still a pending matter but it is now under control and causes no concern. The only real issue is the consideration of whether the period of 15 business days is fair or not. It is important to mention that the authorities are accepting filings to be completed with relevant information that could not be obtained during the 15 business days, but in these cases the fast track, even when applicable, is not automatically granted. With this information, it is possible to consider this period of time as fair enough.

In fairness to the Brazilian authorities, it must be said that the review periods have been shortened considerably, although possibly not as much as desired. Under the present structure, however, with the severe shortage of resources – both human and material – faced by most areas of the government, this is just about as much as could be achieved. Besides, the system is post-merger, meaning it is non-suspensive, which could be seen as an advantage in view of

the mentioned situation. However, it is important to mention again the possibility of a freezing injunction or the execution of an APRO. Both measures can freeze the transaction until CADE's analysis is finished. The fast track, although still needing improvements, is grounds for celebration.

It is only fair to say that the Brazilian system is widely transparent (the decisions of CADE are issued in public hearings) and fairly predictable when the cases are simple. In some cases, the parties are advised about the existence of problems that may hinder approval but this is not the general rule. The costs are unreasonable for minor transactions although reasonable for the major ones. Confidentiality has not been a problem.

With regard to procedural fairness, the Brazilian authorities are subject to the constitutional rule of due process of law, although interpretation of what this is may take some effort. Although an adverse decision is not necessarily preceded by a warning, recently, in a very tumultuous decision after the change in the terms of the transaction, the parties had, in practice, a second chance. Third parties are allowed (and sometimes welcome) to express their views. There is no review by a different adjudicative body, although an adverse decision can always be taken to court, even considering the unpredictability of both time and costs.

Interagency coordination among the SDE, the SEAE and CADE has in the past been a cumbersome issue in Brazil, mainly because of the existence of the SDE and SEAE. Recently, they have reached a very high level of coordination, but this is thanks mainly to the individuals in these governmental bodies. We must bear in mind that there are no legal provisions for such coordination.

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Important changes are anxiously expected in next few months, primarily for two reasons: five of the seven CADE commissioners were recently replaced, as their term of office came to its end, which can change substantially the case law, and CADE's Resolution 49, dated 23 July 2008, established a new filing form to be submitted when a transaction is notifiable. It is an electronic form, which should be completed with the parties' information and sent online to the Brazilian antitrust authorities. Further to this procedural change, the new form raised substantially the level of detail and specific information that the parties of a notifiable transaction should submit to the authorities.

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Barcellos Tucunduva Advogados is a 54-year-old firm, with extensive and well-known experience in business law, litigation and administrative procedures, as well as in consulting activities. With a philosophy based on personal attention to clients, the law firm has highly qualified professionals and provides its legal services with excellence. Its competition area, however, only began to develop in 2007, with the admission of Mauro Grinberg, as a partner, and his entire team, which resulted in the inclusion of Barcellos Tucunduva Advogados in the GCR 100 special edition of *Global Competition Review 2008*.

Mauro is an experienced attorney, former commissioner of the Brazilian competition agency and former attorney of the National Treasury, and noted by *The International Who's Who of Competition Lawyers*, from *Global Competition Review*, as one of 'the world's leading lawyers' from 2002 to 2008. Natália is a specialist in economic law and has published articles in Brazil and abroad about merger control and cartels.

Regarding competition, Barcellos Tucunduva represents clients both in merger control and behavioural cases, acting not only before the relevant competition bodies but also in court, whenever necessary.

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Mauro Grinberg is a partner of Barcellos Tucunduva, a traditional firm founded in 1954 and located in São Paulo, Brazil.

Mr Grinberg is a University of São Paulo Law School graduate and has a Master's degree in Business Law from the Federal University of Pernambuco. He was a commissioner of CADE, the Brazilian antitrust agency, from 1986 to 1990, a time when CADE began to assume greater importance in the Brazilian economy. He was also an attorney of the National Treasury from 1976 to 1998, and retired having reached the highest rank of the organisation (Subprocurador-Geral da Fazenda Nacional).

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Mauro has been a member of the International Bar Association, antitrust and trade law committee since 1999. He has also been a founding member and current member of the executive board of the Brazilian Institute of Studies of Competition and Consumption Relations (Instituto Brasileiro de Estudos das Relações de Concorrência, Consumo e Comércio Internacional – IBRAC) since 1992, and is currently the president of IBRAC (2008 to 2009).

He joined Barcellos Tucunduva in September 2007, after a successful career in public and private practice. His role included enhancing the firm's antitrust activity and working with some very important clients, some of which are publicly known (eventually mentioned in the Official Gazette) such as Hewlett-Packard, Solvay, Linde, Merck, Merck Sharp & Dome, Abbott, Siemens, Google, Gempus and United Medical. Under the leadership of Mauro Grinberg, Barcellos Tucunduva became well known nationally and internationally, and featured in *Global Competition Review's* GCR 100.

Mauro has contributed articles to many Brazilian and international publications (including *Global Competition Review's* *Getting the Deal Through: Cartel Regulation* and *The Antitrust Review of the Americas*) and has made speeches in many conferences and workshops including those of the IBA, ABA, CADE and IBRAC. ■



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Natália joined Mauro Grinberg's team in 2006, providing her prior experience in litigation and civil procedure, contributing to clients' representation not only before the antitrust administrative bodies (the Administrative Council of Economic Defence (CADE), Secretariat of Economic Law (SDE), and Secretariat of Economic Supervision (SEAE)), but also before all the Brazilian courts, working on clients' judicial defences concerning antitrust matters and also on reviews of antitrust authorities' decisions, as necessary.

She published the article 'Brazil Merger Control: Update on Evolution' in *The Antitrust Review of the Americas – Global Competition Review 2008* with Mauro Grinberg and the article 'Considerations about deterring cartels in Brazil in the magazine *Consultor Jurídico* (2008). ■