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Recent Developments in Brazilian Competition Law and Policy

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I. INTRODUCTION

Nowadays, Brazil is considered an increasingly sophisticated jurisdiction in competition law matters.² The Brazilian competition authorities are internationally recognized for a strong and creative cartel enforcement program and their efforts to streamline merger review procedures. They are also respected in other parts of the government, by the courts, and by the business community.

More recently, the Brazilian competition agencies have been implementing some very important initiatives to further increment the effectiveness of their enforcement activities. New investigative techniques, increased co-operation with criminal and foreign enforcement agencies, better working methods, and enhanced transparency are just some of these initiatives.

The present article aims at providing a brief summary of such recent developments. In order to do so, it will focus on the following topics: (i) institutional aspects of the Brazilian competition policy; (ii) recent antitrust policy developments; and (iii) summary of conclusions and legislative discussions.

II. INSTITUTIONAL ASPECTS

The main legal act governing competition policy in Brazil is Law n. 8.884/94, known as the Brazilian Competition Law (“BCL”). This Law provides general directions concerning merger control and disciplines the analysis of anticompetitive practices. Besides that, the BCL also establishes the roles of the three agencies that compose the Brazilian Competition Policy System (“BCPS”), namely the Secretariat of Economic Law (“SDE”), the Secretariat for Economic Monitoring (“SEAE”) and the Council for Economic Defence (“CADE”).

SDE is part of the Ministry of Justice, and is the main investigative agency regarding anticompetitive practices. It also has the power to issue non-binding opinions in merger cases. SEAE, by its turn, is part of the Ministry of Finance and its main responsibilities are the

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² Since 1994, the Brazilian federal government has been pursuing the establishment of a modern competition policy in the country. Although the country had had a full competition law since 1962, and even some earlier statutes addressed competition issues, competition policy enforcement was virtually ineffective until the 90's, when liberalization reforms by the federal government made clear the need for a modern competition policy.

competitive assessment of mergers and the evaluation of regulatory programs carried on by the federal government.

In order to save scarce resources and better allocate the increasing workflow, the two Secretariats agreed to specialize beyond what is required by law. SEAE is carrying on merger review analysis, leaving the investigation of anticompetitive conducts to SDE. On the other hand, SDE usually agrees with the merger analysis done by SEAE, notwithstanding its power to issue a separate opinion.

CADE is the administrative tribunal that makes the final rulings with regard to both anticompetitive practices and merger review. It is an independent administrative tribunal composed of 6 Commissioners and its President. All relevant decisions related to merger review and anticompetitive conducts are decided by its Full Council by majority vote. Its decisions cannot be reverted in the administrative sphere, but are subject to general judicial review.

The main problem of these agencies is their lack of human and financial resources. In order to analyze around 600 merger cases and investigate anticompetitive practices throughout Brazil (a large country with a complex economy), SEAE has just 22 competition specialists, SDE has 30, and CADE has just 52 non-administrative staff members on competition enforcement.³ Moreover, there are several inefficiencies due to separation among those agencies.

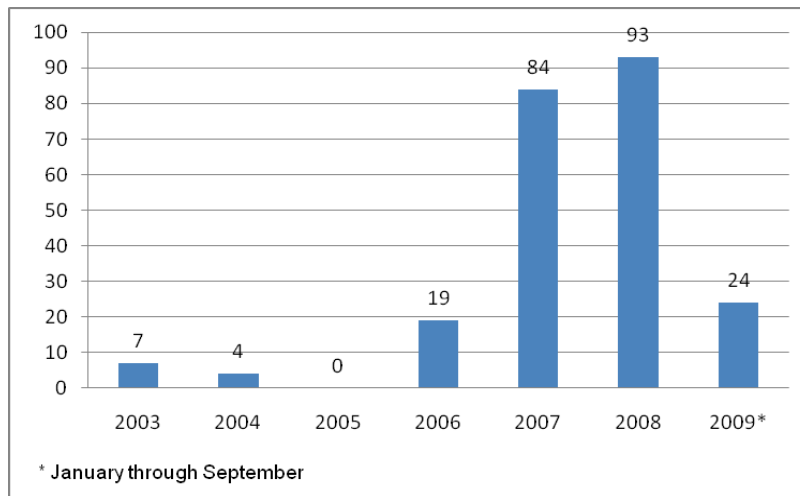
It is worth noting that the BCL establishes the possibility of civil damages, by means of lawsuits from both private plaintiffs and Public Prosecutors. However, these lawsuits are still uncommon in Brazil. Furthermore, Law n. 8137/90, known as the Economic Crimes Law, defines cartels and some other anticompetitive practices as crimes. Thus, criminal law enforcement agencies, such as the Police and Public Prosecutors, have broad powers to investigate cartels. Based on that, SDE is now strongly pushing for co-operation with these law enforcers, as will be described below.

III. RECENT POLICY DEVELOPMENTS

A. Persecution of Hard-Core Cartels

As have its counterparts abroad, the BCPS, with special emphasis from SDE, has defined the persecution of hard-core cartels as a top priority. In 2000, the Competition Law was amended to grant enhanced tools to investigate cartels, including the power to conduct dawn raids and to execute leniency agreements. Since 2003 SDE has been using these mechanisms to prosecute cartels, and CADE is imposing larger fines on companies and executives found liable for anticompetitive conduct. This new priority can be demonstrated by the growing number of search warrants executed by SDE since 2003, when the first dawn raid took place.

³ According to Global Competition Review (GCR) Rating Enforcement 2010.

Figure 1: The anti-cartel effort - number of search warrants

Source: OECD, *Competition Law and Policy in Brazil: a Peer Review*, 2010, p.15.

It is worth noting that many of these inspections are the result of leniency applications. Although the BCL provided the possibility to offer immunity since 2000, the first leniency agreement was only executed in 2003. Between 2003 and 2009, 15 agreements were executed by SDE, most of them after 2006, when new guidelines of the leniency program provided further transparency to potential applicants. They have been recently updated and expanded by Ordinance n. 456 of March 15, 2010, of the Minister of Justice.

The main feature of the Brazilian leniency program is that it follows the *winner takes all approach*: only the first party involved in an alleged cartel is eligible for immunity. Due to the incentives provided by this approach and to the visible efforts of BCPS in cartel enforcement, many companies being investigated for taking part in alleged international cartels are seeking leniency in Brazil.⁴ SDE is accepting a significant number of applications, which, considering the lack of resources of the agency, has created a reasonable critique by the Brazilian competition bar that the agency should prioritize some cases.⁵

The same critique applies to the development of the investigations themselves. SDE is able to open many investigations but faces difficulties in finishing them all. In fact, many cases remain open for years before SDE closes the discovery phase and issues its non-binding opinion to CADE. This suggests that the agency should define more focused investigations.

Another very important development is the recent emphasis on co-operation with criminal authorities, since cartel is also a criminal offense in Brazil. This co-operation is one of the main reasons for the steep increase in the number of search warrants carried on by SDE, as indicated in the figure above, and involves the joint investigation of cartel cases between criminal

⁴ According to OECD Peer Review, “Approximately 60% of these agreements were with parties to international cartels, in situations in which the participants had entered into leniency agreements in other countries. Still, there were also some prosecutions of domestic cartels resulting from leniency agreements. [...] SDE has been especially proactive in promoting the leniency programme. It sent a letter to 1,000 businesses in Brazil informing them of the programme, which caused several companies to come forward to discuss their eligibility” (OECD, *Competition Law and Policy in Brazil: a Peer Review*, 2010, p. 16).

⁵ GCR Rating Enforcement, *Brazil's Secretariat of Economic Law (SDE)* (June 15th, 2010).

and administrative authorities, both at the federal and state levels. Such efforts were institutionalized in October 2009, with the creation of the National Anti-Cartel Enforcement Strategy (“ENACC”), a working group organized by SDE to increase coordination among these enforcement agencies.

These efforts have also led SDE to increasingly co-operate with foreign agencies in the investigation of international cartels. On February 17, 2009 there were simultaneous dawn raids in Brazil, the United States, and Europe (Italy and Denmark), in connection to the investigation of an alleged cartel among producers of hermetic compressors used in refrigerators.⁶ This was the first time such sort of coordinated action took place involving Brazilian authorities and it will probably not be the last.

CADE, by its turn, is now basing its decisions on direct evidence of collusion, and therefore is raising the fines imposed on cartels. The BCL establishes that CADE can impose fines on companies ranging between 1 percent to 30 percent of their gross revenue in the year prior to the beginning of the investigation. In a recent case—the Construction Sand Cartel—CADE established that the fine in hard-core cartel cases should have a floor of 15 percent, and applied a record fine of 22.5 percent of the company’s total yearly revenue.⁷

Another by-product of these changes is that CADE is successfully defending its decisions in court. However, these judicial disputes may take years. For example, in 1999 CADE’s first cartel condemnation, the Steel Cartel, imposed a fine of BRL 58.4 millions, but a federal court of appeals only confirmed the agency’s decision in June 2010, and that sentence is still appealable to the Superior Court of Justice and the Supreme Court.

Taking this into consideration, CADE is pursuing a more collaborative approach by offering defendants settlement alternatives. In this sense, the BCL was amended by Congress in 2007 with the support of the BCPS to allow direct cartel settlements during administrative investigations.⁸ Since then, many companies have reached settlements with CADE and have paid a mandatory “monetary contribution” (instead of a fine), calculated by the Council by considering the amount of a possible future fine in the case of a condemnation, as well as the time and costs involved in administrative and judicial litigation. For instance, the Brazilian subsidiary of Whirlpool, the American home appliances group, executed a settlement with CADE concerning the alleged Hermetic Compressors Cartel investigation⁹ by which it paid a monetary contribution of BRL 100,000,000.00 (one hundred million reais).

In the same sense, a final development worth noting is the possibility of a judicial settlement with CADE concerning cartel cases. The first example involved CADE’s decision in the Crushed Rock Cartel case from 2005,¹⁰ which was appealed by many defendants in court. In February 2010, CADE agreed to settle with three of such companies, which obtained a reduction in the fines imposed by CADE in exchange for prompt payment.

B. Abuse of Dominance Cases

⁶ Administrative Proceeding n. 08012.000820/2009-11.

⁷ Administrative Proceeding n. 08012.000283/2006-66, judged on December 17th, 2008.

⁸ Law n. 11.482/2007. CADE’s Internal Rules set forth that the settlement proposal could be submitted only once to CADE (one shot game). An agreement must be reached within 30 days, but the Reporting Commissioner may request a 30-day extension of the negotiation period, if necessary.

⁹ Administrative Proceeding n. 08012.000820/2009-11; Settlement Proposal n. 08700.001369/2009-09.

¹⁰ Administrative Proceeding n. 08012.002127/2002-14.

Dominance (or unilateral) cases have not been given as much emphasis by the BCPS, especially when compared to cartel enforcement. However, there are two recent decisions that are relevant for the development of Brazilian competition law in this area.

The first one involved AmBev, the brewing company that is part of the Anheuser-Busch Inbev group. In 2004, SDE initiated an investigation against AmBev related to a loyalty program for bars and restaurants.¹¹ On its face, the program was not exclusionary, but the investigation, which included an inspection at Ambev's headquarters, led SDE to argue that retailers were being required to purchase all (or nearly all) of their beer demand from the company, and that AmBev should be considered to have a dominant position in the market as it controlled an approximately 70 percent market share.

Based on this investigation, and not without controversy, in July 2009 CADE found AmBev's conduct to be abusive, ordered AmBev to cease the program, and fined the company BRL 353 million (USD 206 million),¹² the largest fine ever imposed by the authority. AmBev immediately appealed to the Federal Courts, leading to a judicial dispute that is likely to be long-standing.

The second relevant case refers to the payment cards industry. In 2006, SEAE, SDE, and the Brazilian Central Bank entered into a co-operation agreement to produce a detailed report about this sector, which was completed in 2009.¹³ By then, Visa and Mastercard each had a sole acquirer in the country to deal with merchants—Visanet and Redecard, respectively. In the case of Visa-Visanet, the sole acquirer relationship derived from a legal structure in place since the creation of Visanet in the 90's.

The Report recommended that the legal structure between Visa and Visanet should be abandoned in order to increment competition in the market. Based on that, SDE launched an investigation against Visa and Visanet, alleging that the companies were abusing their dominant position, and adopted an interim measure giving the companies 30 days to suspend the sole acquirer relationship.

The parties appealed to CADE,¹⁴ which rejected the arguments brought by SDE, and fully reversed the measure in September 2009. The Council accepted Visa's and Visanet's claims that the legal structure was in place since 1995 and that it had a determined deadline to end the relationship (June 30, 2010), with no justification for the interim measure. In December 2009, CADE executed an administrative settlement with Visa and Visanet to suspend the investigation, requiring these companies to actively seek other partners to increase competition in this market. Visa should licence other acquirers to start operating after June 2010, and Visanet (now Cielo) should work with other brands, such as Mastercard.

This case is particularly important because it was the first time CADE reversed *in totum* an interim measure from SDE. Also, the settlement in the case was quite innovative, being the first to implement pro-active obligations of the parties in order to expand competition in the market, going well beyond an agreement to cease and desist the alleged harmful conduct. Indeed, since July 1st both acquirers operate with both major brands.

¹¹ Administrative Proceeding n. 08012.003805/2004-10.

¹² Equivalent to 2 percent of Ambev total revenues in Brazil in 2002.

¹³ Available at http://www.bcb.gov.br/htms/spb/Relatorio_Cartoes.pdf (in Portuguese).

¹⁴ Voluntary Appeal n. 08700.003097/2009-73 and 08700.003085/2009-49, under the Administrative Proceeding n. 08012.00005328/2009-31 – Visa International and Visanet (Cielo).

C. Merger Review

Brazilian merger review regime has some very peculiar features. The most important one is being a *post merger* regime, what means that parties can close deals without the prior approval of the competition authority. Besides that, transactions are notified to the three authorities – SDE, SEAE, and CADE.¹⁵ Finally, the turnover threshold for mandatory notifications is BRL 400 million received, in Brazil, in the previous year for any participating economic group. This is a relatively high figure but, on the other hand, it can still catch many completely innocuous transactions because the requirement also applies to the seller.

In the first years of the BCL, the authorities focused most of their resources on merger control. But since 2003, this approach changed: The Secretariats agreed to divide their priorities, and now merger analysis is carried on almost exclusively by SEAE. This rationalization effort also lead to the development of the “fast track” procedure for simple cases,¹⁶ by which SEAE issues a very simple report and SDE takes a few days to formally approve it. More recently, CADE also expressly agreed to adopt a simplified procedure for these cases.¹⁷ These efforts are leading to a significant decrease in the time spent to review mergers, especially simple ones, with recent examples of a total 45 days for the whole procedure in these simple cases.

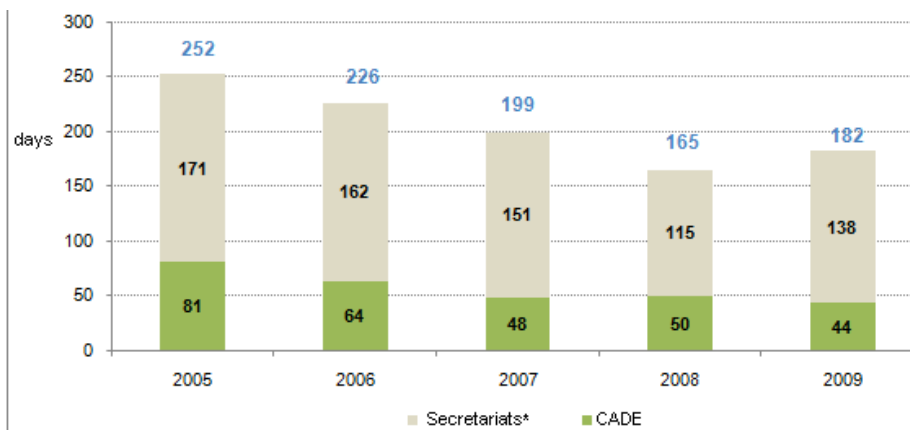


Figure 2 - Duration of merger review procedures at the BCPS

Source: CADE’s website (<http://www.cade.gov.br/Default.aspx?f031f33cc05fa1b98bcc>)

* The figure includes the time spent by ANATEL to evaluate mergers in the telecom sector. See Footnote 15.

Although there have been improvements concerning simple cases, those with more complex features usually face a very lengthy analysis that may take more than a year. One of the causes is certainly the lack of resources of SEAE to deal with them. And there are currently many large deals being analyzed by the BCPS that follow under this longer time frame.

Another development concerns the fact that CADE is imposing structural restrictions in some cases. A recent important example is the acquisition by Owens Corning of the glass fibre

¹⁵ In the telecommunications sector, the analysis is carried by the sectoral regulator, ANATEL, and not the Secretariats, according to the Telecommunications Law (Law n. 9472/1997).

¹⁶ Joint Ordinance SEAE/SDE n. 01, of 2003.

¹⁷ Agreement between CADE, SDE, and SEAE, of March, 2009.

reinforcements and composite fabric assets of Saint-Gobain.¹⁸ The key issue was the definition of the relevant geographic market: the merging parties argued that it was worldwide, which would include Chinese manufacturers. But clients stated this was not a sufficient alternative because of the quality and time required for these imports. After evaluating the case, SEAE and SDE recommended CADE block the merger. CADE agreed with the Secretariats and required the divestiture of Saint Gobain's plant in Brazil in August 2008.

Another example worth noting is the acquisition by Sanofi-Aventis, a large French brand drug maker, of Medley, a Brazilian company specialized in generics.¹⁹ There was intense discussion about the exact definition of the relevant market. The approval of this case in May 2010 was subject to commitments, by which the parties agreed to sell specific brands registered before the National Patent Office and the National Health Surveillance Agency to smaller companies in the pharmaceuticals market, due to high concentrations found in certain therapeutic classes of drugs.

The last merger worth noting in this brief article concerns a case where CADE had to evaluate the possible anticompetitive impact of minority corporate stakes between competitors. Telco, in which Telefonica has a significant equity interest, bought a shareholding stake in Telecom Italia.²⁰ Although it was a foreign-to-foreign transaction, it had clear consequences in Brazil, since there is a connection between the merged companies and the two major mobile phone operators in Brazil: Vivo (jointly controlled by Telefonica and Portugal Telecom) and TIM (controlled by Telecom Italia).

CADE concluded that this corporate participation should be of a passive nature in order to avoid any negative effect. After a detailed analysis, CADE approved the merger in April 2010 subject to commitments prohibiting any direct or indirect exchange of confidential, strategic, or competitive business information regarding their Brazilian activities between any directors or representatives of Telefonica and Telecom Italia.

IV. CONCLUSION

Brazil has improved significantly its competition policy, especially due to a clearer definition of priorities by the BCPS. It is possible to claim that the BCPS has established a strategy for competition policy in Brazil, what makes it easier to manage and evaluate the most urgent problems as well as deal with the scarcity of resources.

Recent developments show a clear focus of BCPS on cartel enforcement, with a growing number of leniency applications and new investigations. SDE has increased its cooperation both with other law enforcement agencies in Brazil and with other jurisdictions, with a significant expansion of dawn raids in recent years. In turn, CADE has increased the fines on hard-core cartels and has improved its record on judicial review. All this action has led to intense developments in settlement agreements regarding cartel cases, including those with international dimensions.

BCPS has also showed some activity in dominance cases. Both loyalty programs in the beer industry and structures of sole acquirers in the payment cards industry were recently attacked. The first investigation resulted in the largest fine ever imposed by CADE, now under

¹⁸ Concentration Act No. 08012.003189/2009-10.

¹⁹ Concentration Act No. 08012.003189/2009-10.

²⁰ Concentration Act No. 53500.012487/2007.

judicial review. The second led to an innovative settlement, forcing companies to actively work to enhance competition in the market.

On the mergers front, institutional developments have increased efficiency in analyzing easy cases. However, complex cases still often require more than one year to be cleared. Structural measures have been imposed by CADE in recent cases, including a decision to block one case with full divestiture.

As for future developments, there is currently a Bill being discussed at the Congress that consolidates SDE and CADE into one agency, establishes a pre-merger notification regime, and increases the number of permanent staff positions (Bill 6/2009). It was approved by the House of Representatives in December 2008, and is currently under debate in the Federal Senate. However, there is no clear prediction for the bill due to the national elections to be held in October this year.

In sum, Brazil has come a long way in the past few years, implementing a sophisticated competition policy. The next steps require further institutional building, more human and financial resources to the authorities, and the corresponding responsibility to wisely allocate such resources.