



Attachment  
*Biblioteca Informa* Newsletter  
No. 2109

## Antitrust actions in the mining sector: expected developments

---

May 30 – June 5, 2010

---

Written by

- **Leonardo Peres da Rocha e Silva**
- **Ricardo Ferreira Pastore**

Partner and Associate in the Litigation Area of Pinheiro Neto Advogados

---

The mining sector is undoubtedly one of the most important in Brazil's economy. The boom in prices, particularly metal commodities (specifically between 2003 and 2008), has led to intense activity within the mining industry, with many mergers, acquisitions and consolidations.<sup>1</sup>

Brazil is one of the countries with the greatest mineral potential worldwide. From 2002 to 2008, there was a significant increase in the granting of mineral rights by the National Department of Mineral Production - DNPM (exploration licenses and mining concessions).<sup>2</sup> The rise in value of mineral commodities attracted investments in mineral exploration in Brazil of approximately US\$ 500 million in 2008.<sup>3</sup>

Within this context of rapid development of the mining sector in Brazil, companies have had their activities increasingly scrutinized by the competition authorities. The Administrative Council for Economic Defense - CADE has been reviewing more and more transactions involving mining companies, and the Economic Law Office - SDE has been looking into allegedly anticompetitive practices of companies operating in this sector.

In recent years, CADE reviewed certain transactions involving supplementary mineral exploration agreements and mineral right lease commitments,<sup>4</sup> under which a company leased mineral rights still subject to geological and economic feasibility studies to another

---

<sup>1</sup> *Economia Mineral do Brasil*. Coordination, Antonio Fernando da Silva Rodrigues. Brasília: DNPM, 2009. p. 733.

<sup>2</sup> *Economia Mineral do Brasil*. Coordination, Antonio Fernando da Silva Rodrigues. Brasília: DNPM, 2009. p. 737.

<sup>3</sup> *Economia Mineral do Brasil*. Coordination, Antonio Fernando da Silva Rodrigues. Brasília: DNPM, 2009. p. 738.

<sup>4</sup> Concentration Acts Nos. 08012.007297/2008-72, 08012.007296/2008-28 and 08012.007298/2008-17.

---

Compilado para uso exclusivo dos integrantes do escritório. Cópias dos atos noticiados neste boletim podem ser solicitadas à Biblioteca. Orientação legal será dada exclusivamente pelos advogados – © 2010. Direitos autorais reservados a Pinheiro Neto Advogados.



## Antitrust actions in the mining sector: expected developments

---

May 30 – June 5, 2010

---

company, to confirm their existence and the respective possibility of economic use.

It has been discussed at CADE whether these agreements should have been reported as “economic concentration acts,<sup>5</sup>” since they dealt with the exploration phase, or whether the companies should have waited until the Government had issued the mining concession before reporting the transaction to CADE for review. The companies requested CADE to stipulate whether it was necessary to report transactions involving the assignment of mineral exploration rights.

CADE decided that filings related to agreements dealing with the acquisition of mineral exploration rights should be considered anticipated filings because there was no certainty that said exploration would result in an economically feasible ore deposit and in its development and mining. However, CADE took the stand that mineral exploration rights may give rise to competition issues, depending on the structure of the market concerned, since the dominant company that holds mineral exploration rights may be encouraged to bar potential competitors from entering the market.

In these CADE decisions, there are no indications that CADE actually discussed the matter with DNPM before arriving at its conclusions. In these cases, CADE apparently made use of opinions of the DNPM issued in other cases to support its decisions, without actually submitting a formal consultation to the DNPM. A consultation to the DNPM could have saved time for CADE in the review of this type of transaction or even assisted CADE in signaling to the parties that this type of mineral exploration rights transfer agreement needs not be reported to CADE in view of the specific circumstances of the exploration licenses.

Another recent example of a transaction in the mining sector that could have had a greater involvement of the DNPM was the concentration act<sup>6</sup> involving the extraction of iron ore in the region of Corumbá, Mato Grosso do Sul State.

Although CADE and the Economic Monitoring Office - SEAE<sup>7</sup> have extensively reviewed the

---

<sup>5</sup> Under article 54 of Law No. 8884 of June 11, 1994, “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.” Still according to paragraph 3 of this same article, “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 with or into other companies, organization of companies to control third companies or any other form of corporate grouping, when the resulting company or group of companies accounts for twenty percent (20%) of a market, or in which any of the participants has posted in its latest balance sheets an annual gross revenue equivalent to R\$ 400,000,000 (four relevant hundred million of Reais). [As amended by Law No. 10149/2000].”

<sup>6</sup> Concentration Act No. 08012.001347/2009-99.

<sup>7</sup> SEAE is the body of the Ministry of Finance that prepares economic opinions on reported transactions, pursuant to article 54 of Law 8884/94.



## Antitrust actions in the mining sector: expected developments

---

May 30 – June 5, 2010

---

transaction, checking the various markets affected by it, it seems to us that these authorities had difficulty in understanding the dynamics of the “relevant markets”<sup>8</sup> involved. SEAE even sent an official letter to the DNPM, which answered it. However, one infers from the CADE decision that little weight was given to the opinion issued by DNPM, which could have played a more important role in the discussion regarding the impacts of the transaction on the Brazilian and worldwide markets.

According to data gathered by SEAE, approximately 98% of the iron ore produced in the center-west region of Brazil is earmarked for export. Nevertheless, CADE and SEAE defined the relevant geographic market as the iron ore production market in the center-west region. CADE and SDE seemed to have disregarded the fact that iron ore is a commodity traded worldwide and that practically all the production from the center-west region is exported. Although the transaction was approved without restrictions, the authorities missed a good opportunity to shape a more accurate definition of relevant geographic market in the iron ore sector, an extremely important sector for the Brazilian economy.

The reviews of these transactions, at least as far as the decisions are concerned, could have involved a greater interaction between SEAE and CADE and DNPM, which would have allowed the antitrust bodies to obtain more accurate information about the relevant markets involved and the application of mineral legislation with respect to mineral exploration licenses and mining concessions. The DNPM would certainly have more to contribute to make CADE’s decision more appropriate in these cases.

Within this context, the signing last April by CADE and DNPM of the Technical Cooperation Agreement (“DNPM-CADE Agreement”) is a very positive development. The purpose of this agreement, which has been extensively commented on in the media, is to foster and establish mechanisms for technical cooperation between both agencies, aimed at developing and implementing information exchange systems for promotion of the regulatory and monitoring activities carried out by CADE and by DNPM.<sup>9</sup>

The main steps to be taken by CADE and DNPM to enforce the agreement are:

- (i) supply of appropriate information, such as: (a) statistical data on the mining sector;
- (b) results of studies and research carried out by the parties unilaterally but that are of

---

<sup>8</sup> Law 8884/94 does not define “relevant market”. The Annex to CADE Resolution 20/99 states that “*The relevant market is the space--in terms of product or geographic area--in which it is reasonable to think of the possibility of abuse of dominant position. By adopting the hypothetical monopolist test, the relevant market is defined as the smallest group of products (or the smallest geographic area) in which a supposed monopolist can maintain its price above competition levels for a significant period of time.*”

<sup>9</sup> Article 2 of the Agreement.



## Antitrust actions in the mining sector: expected developments

---

May 30 – June 5, 2010

---

interest to both; (c) information concerning indications of mineral legislation violations or anticompetitive practices detected as a result of their specific activities; (d) information required to analyze anticompetitive practices and practices that constitute abuse of market power; and (e) legal opinions, information bulletins, orders, reports, opinions and technical opinions of interest to the parties;<sup>10</sup>

(ii) mutual assignment of public servants, employees and consultants to observe, learn and possibly improve their knowledge regarding methods and techniques adopted or to be adopted by one of the parties;<sup>11</sup>

(iii) forwarding of guidelines, rules, regulations, resolutions, decisions, abstracts, procedures or any other decision-making instruments pertaining to their respective activities, particularly the forwarding of newsletters, journals and any other publications issued under their responsibility or sponsorship;<sup>12</sup>

(iv) conduction of joint research and studies to better know the characteristics and the operation of the mineral production market, the factors that affect it and their repercussion on the economic order;<sup>13</sup> and

(v) exchange of information and opinions to prepare or review regulatory rules on matters that may have repercussions on the parties' areas of activity.<sup>14</sup>

It is hoped that these measures will be actually implemented, so that CADE's decisions on the transactions and practices of mining companies involve the participation of DNPM and take into account the specific features of the sector.

A review of the main measures to be adopted by CADE and DNPM and the latest CADE decisions involving the mining sector shows us that these agencies intend to work together to implement actions that will greatly contribute to a better understanding of the mining sector by CADE and of the importance of competition in this sector by DNPM.

It is expected that actual implementation of the agreement will allow CADE to benefit from DNPM's knowledge of the mining sector, at least to better support reviews of economic concentration acts; to resolve doubts of those subject to its authority with respect to the need of reporting certain types of agreements adopted by companies of this sector; and to obtain

---

<sup>10</sup> Article 3 of the Agreement.

<sup>11</sup> Section 3.2 of the Agreement.

<sup>12</sup> Section 3.3 of the Agreement.

<sup>13</sup> Article 4 of the Agreement.

<sup>14</sup> Section 4.2 of the Agreement.



## Antitrust actions in the mining sector: expected developments

---

May 30 – June 5, 2010

---

detailed information to define the relevant markets in the mining sector.

The competition authority, regulatory bodies and those under their authority will all benefit from having a better knowledge of the specific features of regulated sectors, as this allows for laws being applied more correctly and efficiently.

Brasília, June 4, 2010