

PINHEIRO NETO ADVOGADOS

Competition Law at a Glance

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Draft Bill Proposing Fundamental Changes to the Competition Act is Released by the Government

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CADE's DECISIONS

New Criterion for Notification of Mergers and Other Agreements is Confirmed by CADE During February Judgments

During the judgment sessions held in February 2005, the Board of CADE¹ confirmed on several occasions its new interpretation of the criteria for submission of certain mergers, acquisitions and related deals set forth in Law 8884 of June 11, 1994 (the Competition Act).

According to the new interpretation given by CADE in its decision of January 19, 2005 on the *ADC/Krone Case*, only economic groups with a turnover exceeding R\$ 400 million in Brazil or a market share of 20% should be required to notify their deals to the Brazilian competition authorities.

Therefore, since January 19, 2005, the Board of CADE has consistently refused to assert jurisdiction over transactions involving economic groups whose turnover in Brazil was below R\$ 400 million in the preceding year and whose relevant market share does not exceed 20%.

Despite CADE's confirmation of its decision on the *ADC/Krone Case* in the judgments held in February 2005, CADE is still expected to issue a precedent statement on the matter in the near future, offering legal security to market players. To that effect, CADE has already passed a new resolution providing the rules for issuance of precedent statements.

Further comments and explanations concerning CADE January 19 decision on the *ADC/Krone Case* are found in the attached article entitled "*Control of Mergers, Acquisitions and Related Deals: Changes in Sight*".

*Vertical Restraints:
Shopping Mall
Administrator Fined
for Imposing
Territory-Based Non-
Competition Clause*

On January 19, 2005, the Board of CADE sentenced **Shopping Center Norte** (“**Center Norte**”) for having allegedly abused its dominant position by imposing a territory-based non-competition clause (also known as “radius clause”) in the lease agreements executed with its shopkeepers.

According to the impeached clause, the renters/shopkeepers were not allowed to have another establishment that engaged in the same economic activity within a thousand meters radius from **Center Norte**. The Board of CADE held that, in view of its dominant position and the high barriers to enter the market, **Center Norte** was unreasonably (i) limiting the access of new enterprises to the market; and (ii) posing difficulties to the development of shopkeepers.

In view of the allegedly unjustified restriction, a fine set at 1% of **Center Norte**’s gross revenues in the year 2000 was imposed by the Board of CADE, which also ordered the exclusion of the clauses condemned, in addition to publication of an extract of the decision in a newspaper in the city of São Paulo for two days.

The decision unfavorable to **Center Norte** seems to be in line with the decision rendered in 2004 by the Board of CADE on similar clauses executed by **Shopping Center Iguatemi** with its shopkeepers.

*BAT’s Subsidiary to
Pay Fine and Face
Accusations for
Breach of Consent
Decree*

On January 19, 2005, the Board of CADE fined the Brazilian subsidiary of **British American Tobacco, Souza Cruz Ltda.** (“**Souza Cruz**”), for maintaining illegal exclusivity arrangements with cigarette retailers, in breach of the terms of the cease-and-desist commitment (consent decree) it had executed in September 2000.

The cease-and-desist commitment was undertaken at that time by **Souza Cruz**, which holds approximately 85% of the Brazilian cigarettes market, in response to the administrative proceedings prompted by Brazilian competitor **Phillip Morris Brasil S.A.** (“**Philip Morris**”).

Considering the charges pressed by **Philip Morris**, **Souza Cruz** then agreed to terminate most exclusivity arrangements it held with specific retailers, but, according to CADE’s recent ruling, it failed to do so in the express terms of the cease-and-desist commitment.

Therefore, the Board of CADE imposed a daily fine of approximately US\$ 3,500 on **Souza Cruz** and ordered SDE² to reopen the administrative proceedings for review and eventual sentencing of **Souza Cruz**’s allegedly anticompetitive practices.

**SDE's
INVESTIGATIONS***SDE Recommends
Restrictions for
Approval of Vale do
Rio Doce
Transactions*

On February 14, 2005, the Head of SDE issued a single opinion recommending a conditional approval of four transactions involving **Companhia Vale do Rio Doce** (“**CVRD**”) and some mining companies active in the iron ore and transportation markets (railways and ports). According to SDE, an independent review of each of the four transactions would not allow an analytical interpretation of their joint effects.

The first and second transactions involved the acquisition of **Mineração Socoimex S/A**, a Brazilian company that explores the Gongo Soco mine in Minas Gerais and produces iron ore in the south of Minas Gerais (the “South Production System”); and the acquisition of **Samitri – Mineração da Trindade S/A**, a company acting in the production of iron ore in the South Production System and in ore transportation (ports).

The third and fourth transactions involved the acquisition of **Ferteco Mineração S/A** (“**Ferteco**”), a company that produces iron ore in the South Production System, and the indirect acquisition of **Minerações Brasileiras Reunidas S/A**, a company that is also active in iron ore mining in the South Production System.

According to SDE, the transactions under scrutiny enabled **CVRD** to control all or most of the equity interest in four mining companies that used to be **CVRD**'s competitors, mainly in the iron ore market.

After analyzing each of the six relevant markets identified, SDE concluded that even if all of the efficiencies presented by **CVRD** were to be implemented, the transactions would still maintain their potential to harm competition, due to the fact that **CVRD** would retain a post-transaction dominant position in all of the relevant markets. In this sense, SDE recommended that CADE should impose the following restrictions on **CVRD**:

(a) Sale of its ownership interest in MRS (acquired due to the acquisition of **Ferteco**) to third parties so that **CVRD** may participate in the controlling group of MRS through one entity only, not owning, directly or indirectly, more than 20% of the voting capital of MRS;

(b) Amendment to the MRS Shareholders Agreement to limit **CVRD**'s participation only to meetings discussing the tariff policies of MRS and to prohibit **CVRD** from nominating members to the MRS board; and

(c) Incorporation of a wholly-owned subsidiary to hold all of the shares in EFVM – Estrada de Ferro Vitória a Minas, and transfer of the Concession Agreement with the Brazilian Transportation Agency – ANTT to the new subsidiary.

Further, SDE also suggested a set of “subsidiary structural remedies” to be adopted if the ones listed above are held to be unviable. According to SDE, the suggested remedies have the objective of making feasible the entrance of a new player capable of questioning any exercise of dominant position in the iron ore market by **CVRD**. The remedies defined by SDE also intended to facilitate the implementation of a true competitive environment in iron ore transportation, as there would be more players competing in this market.

The case records are already at CADE for a final analysis and judgment at the administrative level.

NEWS

Draft Bill Proposing Fundamental Changes to the Competition Act is Released by the Government

In February 2005, the Head of SDE, along with the President of CADE and the Head of SEAE³, released to the members of think-tank **IBRAC (Brazilian Institute for Consumer Relations, Competition and International Trade)**, a draft bill intended to restructure the Brazilian Competition Defense System and change important aspects of the Competition Act.

Amongst the changes proposed, it seems relevant at this point to highlight: (a) the creation of a pre-merger notification system with thresholds designed to capture transactions that can effectively generate concerns to the Brazilian authorities/markets; (b) the elimination of mandatory analysis of cases by three different agencies (SEAE, SDE and CADE); and (c) the transformation of SDE into a division of CADE, which will also be formed of a Competition Tribunal and the Chief Economist.

Some of the proposed changes concern a lot of competition specialists and are already being subject to comments and counter-proposals that are being forwarded to SDE. The Federal Government is apparently unwilling to open the draft bill to public consultations for a determined period, allowing a thorough examination by society at large before examination by the Brazilian Congress.

In fact, the draft bill is expected to be sent to the Brazilian Congress within the next few weeks, where it will most likely be discussed in some aspects. Further information on the draft bill and the proposals to come will be provided in the next issues of this *Competition Law at a Glance*.

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- (1) *CADE (Conselho Administrativo de Defesa Econômica) - The Administrative Council for Economic Defense is the Brazilian primary competition authority in charge of rendering final decisions, at the administrative level, with regard to restrictive business practices and concentration acts (mergers, joint-ventures and acquisitions), based on the opinions issued by SDE, SEAE and any relevant regulatory agency that may be involved.*
- (2) *SDE (Secretaria de Direito Econômico) - The Economic Law Office, which reports to the Ministry of Justice, is the department in charge of investigating restrictive business practices and rendering non-binding opinions on concentration acts, which are subject to CADE's final judgment.*
- (3) *SEAE (Secretaria de Acompanhamento Econômico) - The Economic Monitoring Office, which reports to the Ministry of Finance, is the department in charge of rendering non-binding opinions on the economic aspects of concentration acts and assisting SDE in the investigation of anti-competitive business practices, which are subject to CADE's final judgment.*

TRANSACTIONS NOTIFIED: PARTIES & MARKETS

SDE has published notices inviting interested parties to comment on the following transactions:

CZT/Sola: glass lenses
Kwikasairpar/AIG: transportation
CCB/Sita: concrete
Kone/Macgregor: mechanical industry
VNN/MCI Services: IT and telecommunications
Sonae/Febernati: retailers
Wheaton/Goldcorp: precious stones extraction
Smiths/Medex: medical equipment
Fluke/Radiation: medical equipment
GE/APC: airplanes electric power units
Sita/Holcim: concrete
Itaucard/Rio Elba: vehicle financial services

Dover/Datamax: IT
Siemens/VA Tech: electric energy
Organon/SEM: pharmaceuticals
KSR MX/Niken/Ksrniken: automotive industry
Copelmi Mineração/UTE Seival/ Steag: electric energy
Refrigerantes do Noroeste/Forsab: beverages
TPV/Philips: electronic industry and computers
Symantec/Veritas: software
JPMP/PQ: glass materials, silicate and zeolite
Venise/HMY: supermarket furniture
UTC/Kidde: equipment and services for fire fighting
Cendant/Octopus/Donvand: travel agency
Macedo/Norsergel: valuables transportation and safety
GLO/Algorithmics: business risks management
Petrobrás/EDP: electric energy
Paul/DME: equipment for steelmakers
Grundfos/Alldos: environment technology
Nuplex/Akzo Nobel: chemicals
Sadia/Só Frango: food
Stile /Masonite: furniture
Elsevier/Impetus: books
WPP/Breeze: automotive parts
Noorderhout/ELB/Wessanen/Intermarque: food
Hudson/SPX: axial fans
Bemis/Dixie Toga: paper and packaging
TFSB/TFIRB: media
UGS/Tecnomatix: software
Dow/Dupont/DDE: elastomers
Petters/Polaroid: imaging equipment
AXN/Locomotion: communication and entertainment
Kodak/Orex: electronics industry
Maple/MWV: pulp and paper
EDS/Towers Perrin: human resources services
Vallourec/MRW: metal industry
Monsanto/Seminis: agriculture
Icatu/Nationwide: pension fund
Compradores/Nationwide: insurance and pension
Kraft/Batávia: food
Nova FBA/Destivale/Destiagro/Auto Posto/Agrícola: agriculture
P&G/Gillete: personal hygiene products
FNM/Baes: airplane components and electronics
BAC1/BAC2/Kuhn: mechanical industry
Nova América/Açúcar União: sugar and food
Kodak/Creo: electronics

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