

PINHEIRO NETO ADVOGADOS

Competition Law at a Glance

HIGHLIGHTS

Nestlé/Garoto Merger Case: Federal Judge Suspends CADE's Decision After Nestlé's Motion for Clarification is Rejected by CADE

Abuse of Dominance: Dock Companies Fined for Imposing Terminal Handling Fee

AGCO/Kone/Valtra Deal Cleared Despite High Concentration

Acquisition in the Frozen and Industrialized Meats Markets Fully Approved

Pharmaceutical Company's Pricing Policy Held Lawful 10 Years Later

More LPG Distributors under Investigation for Cartel Behavior

Driving Schools' Association Ordered to Stop Inducing the Use of Price Lists in São Paulo

Merger Control and Enforcement Against Anti-Competitive Practices: SDE's 2004 Actions at a Glance

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This is a publication of Pinheiro Neto Advogados issued with the intention of providing our clients with news on developments in the competition law field in Brazil.

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CADE's DECISIONS

Nestlé/Garoto Merger Case: Federal Judge Suspends CADE's Decision After Nestlé's Motion for Clarification is Rejected

On April 27, 2004, the Board of CADE¹ rejected, by unanimous opinion, the motion for clarification filed by **Nestlé Brasil Ltda.** (“**Nestlé**”) regarding CADE's decision to block **Nestlé's** acquisition of Brazilian chocolate manufacturer **Chocolates Garoto S.A.** (“**Garoto**”). As explained in the previous issues of our *Competition Law at a Glance*, the **Nestlé/Garoto** deal was blocked twice last year because of the high concentration levels to be generated by the transaction as well as on account of the barriers to enter the Brazilian markets of chocolates in all forms (snacks, candy bars, etc.) and chocolate topping.

As the Board of CADE held that its October 2004 decision contained no omissions or contradictory elements justifying a change in its terms, **Nestlé** filed an ordinary action on May 24, 2005, aiming at annulling CADE's decision on the grounds that due process had not been respected by CADE, which also had purportedly failed to comply with the 60 businessdays' period for a final judgment of the case.

On May 30, 2005, Judge Catta Preta of the Fourth Lower Federal Court sitting in Brasília granted an injunction suspending the 150-day deadline CADE had set for the sale of **Garoto**. Judge Catta Preta held that after CADE's answer he will delve into the parties' arguments to decide whether the injunction will be maintained until a final judgment is rendered on the ordinary action.

Further information on CADE's Attorney General Office measures against Judge Catta Preta's decision will be included in the next issues of our *Competition Law at a Glance*.

*Abuse of Dominance:
Dock Companies
Fined for Imposing
Terminal Handling
Fee*

On April 27, 2005, the Board of CADE sentenced four vertically integrated dock companies active at the Port of Santos for abusing their dominant position, in view of the illegal imposition of a terminal handling charge for release of cargo containers. Dock companies **Tecondi**, **Libra Terminais**, **Usiminas** and **Santos Brasil - Tecon** were fined 1% of their respective gross revenues from storage of containers at bonded warehouses.

According to the Board of CADE, as the four dock companies are the only terminals with piers for docking and handling of private containers, the fee consisted of an illegal exclusionary practice against independent terminals, which charge different fees on conditions less favorable as compared to dock companies.

For the Board of CADE, this fee is unjustifiable in terms of costs; it not only limits access of new entrants to this market, but also poses difficulties for the development of competitors, such as independent (non-integrated) terminals.

Such decision will have a considerable impact on a number of other investigations currently underway before SDE², which is scrutinizing the sector since at least 2003.

*AGCO/Kone/Valtra
Deal Cleared Despite
High Concentration*

On April 6, 2005, the Board of CADE approved the acquisition of **Kone Corporation** (“**Kone**”) by **AGCO Corporation** (“**AGCO**”), despite the high concentration generated by the transaction, which resulted in the acquisition of tractor manufacturer **Valtra do Brasil Ltda.** (“**Valtra**”).

The transaction consisted in the 2003 worldwide acquisition of **Kone**’s agricultural tractors business by **AGCO** and was fiercely opposed by competitor **CNH Latino Americana Ltda.** (“**CNH Latino**”), in view of the allegedly damaging impact on the Brazilian tractor market.

Based on the favorable opinions issued by SEAE³ and SDE, which developed their own deep economic studies for the first time, the Board of CADE concluded that, despite the high concentration arising from the transaction, there was no need to impose conditions for its approval as there is significant competition in the Brazilian tractor market, where major international players compete (John Deere, CNH Latino and others) with a wide range of substitutable products.

*Acquisition in the
Frozen and
Industrialized Meats
Markets Fully
Approved*

On March 17, 2005, the Board of CADE cleared the acquisition of **Só Frango Produtos Alimentícios Ltda.** (“**Só Frango**”) by one of Brazil’s biggest food company, **Sadia S.A.** (“**Sadia**”). The transaction affected the Brazilian markets for frozen meats (poultry) and for industrialized meats (hams, sausages and others).

The acquisition of **Só Frango** allowed **Sadia** to consolidate its leading position in the market for frozen meats (with a combined market share of 13.77%) and to become the new leader in the market for industrialized meats (with a combined market share of 28%).

Relying mainly on the economic opinion rendered by SEAE, the Board of CADE decided that the acquisition does not generate competition concerns, given the existence of other significant players in the relevant markets involved and because of the limited market shares held by **Só Frango** in such markets – 0.85% in the market for frozen meats, and 0.80% in the market for industrialized meats.

*Pharmaceutical
Company’s Pricing
Policy Held Lawful 10
Years Later*

On March 3, 2005, the Board of CADE published its decision to shelve a 10 year-old investigation of an allegedly abusive increase in the prices of Novoseven®, a medicine sold by the Brazilian subsidiary of a Danish pharmaceutical giant, **Novo Nordisk Farmacêutica do Brasil Ltda.** (“**Novo Nordisk**”).

In its defense, **Novo Nordisk** alleged that the price increase resulted exclusively from the currency exchange variation during the period under investigation (March to April 1999), as the product was imported from its parent company based in Denmark.

In accepting **Novo Nordisk**’s defense, CADE ruled that as the prices charged were below international price levels, and since the products were purchased under bidding proceedings, the alleged abuse of dominant position on the part of **Novo Nordisk** was found bereft of grounds. Moreover, CADE held that there was no possibility of serious prejudice to consumers, as the medicines were sold exclusively to hospitals and not directly to individuals.

SDE's INVESTIGATIONS

LPG Distributors under Investigation for Cartel Behavior

The Head of SDE has recently initiated an administrative proceeding to investigate the alleged cartel behavior of liquefied petroleum gas (LPG) distributors **Tropigás** (an Agip company), **Minasgás** (an SHV company) and **Paragás** (a Nacional Gás Butano company), which operate in the State of Pará.

Such administrative proceeding was prompted by an extensive detailed opinion filed by SEAE in March 2005, containing indications of cartel behavior that needed to be further investigated by SDE. SEAE conducted preliminary investigations and gathered evidence on the purportedly anti-competitive conduct based upon a complaint lodged by LPG National Dealers Association (**Fergás**) in mid-2004.

According to SEAE, **Tropigás**, **Minasgás** and **Paragás** acted in collusion, setting resale prices and dividing markets, imposing exclusivity agreements and refusing purchasing orders from dealers that attempted to acquire products from more than one distributor. These practices intended to create obstacles to new entrants and to restrain free competition in the LPG sector in the State of Pará.

Additionally, these allegedly anti-competitive practices would have the intent of blocking the effects of an ordinance issued by the Brazilian Petroleum Agency (ANP) in late 2003, which allowed the marketing of products from more than one distributor by the dealers and aimed at the development of competition inside the LPG market to lower product purchase prices and, as a result, raise the LPG final consumers' welfare.

After the fact-finding phase of the administrative proceeding, SDE will issue a report with its conclusions, which will then be sent to CADE for judgment. If CADE decides on punishment, the distributors may be fined 1% to 30% of their gross revenues, among other penalties.

Driving Schools' Association Ordered to Stop Inducing the Use of Price Lists in São Paulo

In view of the alleged existence of signs of irreparable damage to the market, the Head of SDE has imposed a preventive measure restraining the disclosure of price lists by the Driving Schools' Association of the State of São Paulo. The challenged price lists contained minimum and maximum prices to be charged from candidates to driving licenses. The Association's website stated that the adoption of values below those indicated on the price list would be an illegal practice by the affiliates.

According to SDE, the price list shall be deleted from the Association's website and the driving schools shall be informed by mail that the price list need not be followed. In case of contempt, the Association will be ordered to pay a daily fine of around US\$ 2,500.

Apart from imposing the preventive measure set forth in the Competition Act, the Head of SDE has also initiated administrative proceedings to examine whether the Association was unreasonably procuring the adoption of uniform conduct by member driving schools.

NEWS

Merger Control and Enforcement Against Anti-Competitive Practices: SDE's 2004 Actions at a Glance

SDE has recently announced that in 2004 it took less than the 30-day period prescribed by the Competition Act for review of mergers, acquisitions, joint-ventures and related deals (the so called "concentration acts"). In the last years, SDE's reviews took approximately 40 days on average, while in 2004 an average of 23.88 days were necessary for the scrutiny of concentration acts.

This expeditiousness results from two measures adopted by SDE since 2003: a summary review of simple cases, and the SDE-SEAE joint review in complex cases. In 2004, the number of concentration acts reviewed was practically the same as in 2003 (572 in 2003 compared to 562 in 2004), whereas the number of mergers, acquisitions, joint-ventures and related deals filed was much greater than in 2003 (397 in 2003 compared to 497 in 2004).

With respect to anticompetitive practices, SDE set cartel investigations as its first priority. Since 2003, SDE has availed itself of all the instruments established in the Competition Act, such as dawn raids, inspections and leniency programs. SDE has rationalized its actions, improving its analysis procedures. The number of preliminary investigations initiated by SDE increased from 31 in 2003 to 91 in 2004, whereas the number of preliminary investigations concluded by SDE decreased from 51 to 24.

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ACKNOWLEDGMENTS

Leonardo Peres da Rocha e Silva (editor), José Alexandre Buaiz Neto, Renê Guilherme Medrado, Paola R. Petrozziello Pugliese, Lilian Barreira, Caroline Sanselme Vieira, Ricardo Ferreira Pastore, Tiago Cação Vinhas, Leonardo Felisoni Torre and Patrícia Saggioro Leal contributed to this *Competition Law at a Glance* issue.

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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.*

THE COMPETITION LAW PRACTICE GROUP

If you would like further information on any of the matters raised in this bulletin, please contact the following members of our team dealing with merger filings and assisting clients in administrative and judicial proceedings instated to assess compliance with the competition rules:

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