

PINHEIRO NETO ADVOGADOS

Competition Law at a Glance

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NEWS

OECD Issues Report on Brazil's Competition Regime and Makes Suggestions for Improvements

On October 6, 2005, after seven-month peer review proceedings requested by Brazil, the **Organisation for Economic Co-Operation and Development (OECD)** released its comprehensive report on the Brazilian Competition Policy System (BCPS).

In brief, **OECD** concludes that the BCPS has made “substantial headway” since 2000, when the first **OECD** report on Brazilian competition regime was prepared. For **OECD**, CADE,¹ SDE² and SEAE³ demonstrated a “strong institutional dedication to high standards of integrity, autonomy, sound policy, and fair procedure.”

As expected, the **OECD** report acknowledges the problems generated by a counter-productive institutional structure (because of the existence of three agencies), understaffing, certain statutory provisions that interfere with efficient and effective law enforcement, and a slow judicial review system that is unfamiliar with competition law.

The **OECD** goes further to make suggestions for the system improvement, such as: (a) consolidate the investigative, prosecutorial, and adjudicative functions of the BCPS into one autonomous agency; (b) modify the merger notification and review process; (c) modify the leniency program; (d) consider designating specialized judges and appellate panels to resolve on competition law issues; (e) limit the Economic Crimes Law to cartel violations; and (f) consider limiting civil suits for antitrust damages to parties and conducts that have been subject to a specific finding of illegality by CADE; (g) extend the terms of the CADE commissioners to at least four years (preferably, five).

The **OECD** report is the result of a dedicated work not only by the **OECD** consultants, but also by the Brazilian officials who participated actively in the peer review, and should prove to be a very useful tool for the Brazilian community and to foreign authorities and practitioners.

*Draft Bill Proposing
Fundamental Changes
to the Brazilian
Competition Act is
Sent to Congress*

On September 1, 2005, the President of the Republic sent to Brazilian Congress a draft bill to restructure the Brazilian Competition Policy System, changing important aspects of Law 8884 of June 11, 1994 (the **Competition Act**), and already taking into consideration various of the recommendations made by OECD in the report mentioned above.

Although the draft bill was not submitted for public consultation as wished by many practitioners, the proposal sent to Brazilian Congress suffered some alterations when compared to its February 2005 release, in view of the suggestions presented during the discussions held amongst members of entities such as FIESP (Federation of São Paulo State Industries), FGV (Getúlio Vargas Foundation), and IBRAC (Brazilian Institute for Consumer Relations, Competition and International Trade).

As stated in the document released by the authorities explaining the draft bill, the idea was to tackle the main problems of the current system, such as:

- (a) the existence of two bodies (SDE and SEAE) that conduct investigations for a decision to be rendered by the administrative tribunal (CADE), which generates redundancy and reworks;
- (b) the extremely broad thresholds for merger and acquisition filings;
- (c) the judgment of each and every case by CADE, jeopardizing the focus on complex cases; and
- (d) the ineffective examination of merger and acquisition filings, which impedes the allocation of scarce resources to the investigation of anticompetitive practices.

Amongst the changes proposed by this draft bill are: (i) the creation of a pre-merger notification system with thresholds designed to capture only transactions that can effectively generate concerns to the Brazilian authorities/markets; (ii) the elimination of mandatory analysis of cases by three different agencies (SEAE, SDE and CADE); (iii) the transformation of SDE into a division of CADE (General Authority), which will also be composed of an Administrative Tribunal, the Economic Studies Department, and the Attorney General's Office; (iv) the change in the commissioners' terms of office, which will be a four-year term without reappointment for the subsequent period; and (v) the federalization of economic crimes, which would facilitate the negotiation of leniency agreements.

*New Members
Appointed to CADE to
Be Approved by the
Federal Senate*

Although the bill is considered one of the priorities of the **Lula da Silva** Administration's positive agenda for reforms, the Brazilian Congress will hardly be able to approve the bill before the end of this year, in view of the political turmoil currently in place. In any event, you will find further information on the congressional discussions regarding this bill in the next issues of our *Competition Law at a Glance*.

With the end of the terms of Commissioners **Luiz Alberto Scaloppe** (in September 2005) and **Roberto Castellanos Pfeiffer** (in October 2005), CADE is expected to suffer a considerable change in its composition within the next months. Three new (out of seven) commissioners are to be approved by the Federal Senate in the near future.

On October 10, 2005, President Lula sent to the Federal Senate for scrutiny the names of two new commissioners: economist **Abraham Benzaquen Sicsú** and lawyer **Luis Fernando Schuartz**.

The Board of CADE is currently composed of President **Elizabeth Farina** (economist), Commissioners **Luiz Rigato de Vasconcellos** and **Luiz Carlos Delorme Prado** (economists), and Commissioner **Ricardo Villas Boas Cueva** (lawyer).

The antitrust community expects **President Lula** to appoint another new member and the Federal Senate to approve the nominations in due course, as a delay in these proceedings will impair the ability of the Board of CADE to judge the cases and will suspend some of the terms established in the Competition Act.

CADE's Decisions

*CADE Conditions the
Approval of Vale do
Rio Doce's Deals in
the Iron Ore and
Transportation
Markets*

On October 5, 2005, the Board of CADE rejected the motions for clarifications filed by **Companhia Vale do Rio Doce (CVRD)** and **Companhia Siderúrgica Nacional (CSN)** and confirmed its August 10, 2005 ruling to impose conditions on the approval of four transactions involving **CVRD** and some mining companies active in the iron ore and transportation markets (railways and ports).

As explained in the January-February edition of our *Competition Law at a Glance*, 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.

Based on the casting vote of President Elizabeth Farina and on the grounds that the transactions would enabled **CVRD** to control all or most of the equity interest in four mining companies that were once **CVRD**'s competitors, mainly in the iron ore market, the Board of CADE gave **CVRD** the right to opt between two sets of restrictions to be applied at its best convenience:

The first option consists of two restrictions that should be applied simultaneously:

(a) termination of **CVRD**'s right of first refusal for acquisition of **CSN**'s excess iron ore output at Casa de Pedra mine, for both domestic and external markets, and

(b) concentration of the direct and indirect equity interest in the controlling group of logistics provider **MRS** into one company, which should not make use of its veto power; and an amendment to **MRS** Shareholders' Agreement to restrict some advantages that **CVRD** might have in the **MRS** Board.

The second option is to sell **Ferteco**, which owns mines, shares of **MRS** and docks.

Concurring with the SDE and SEAE opinion on the effects generated by the transactions, the Board of CADE found 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.

CVRD has signaled its intention of challenging CADE's decision at the Judiciary Branch.

On September 30, 2005, after an intense judicial battle aimed at postponing the case judgment that reached even Brazil's highest infra-constitutional tribunal, the Superior Court of Justice, the Board of CADE imposed penalties against Brazilian major steel producers **Gerdau S.A. (Gerdau)**, **Companhia Siderúrgica Belgo Mineira (Belgo Mineira)** and **Siderúrgica Barra Mansa S.A. (Barra Mansa)** for price-fixing cartel in the market of rebars used in buildings, bridges and roads.

*Steel Producers
Found Guilty of Price-
Fixing Arrangements*

*Highest Fine Ever
Imposed by CADE For
Illegal Acquisition of
Quotas by a
Competitor*

After examining the complaint filed by the **Civil Construction Industries Association of the State of São Paulo (Sinduscon/SP)** and by the **Association of Sales, Purchasing, Rental and Administration of Residential and Non-Residential Property Companies in São Paulo (Secovi)**, and after reviewing the evidence obtained by SDE during its investigations, the Board of CADE found that **Gerdau, Belgo Mineira** and **Barra Mansa** were illegally establishing concerted prices and other conditions for steel rod sales, and also publicizing in advance price lists and/or an increase in prices.

In line with SDE's opinion, the majority of the Board of CADE members also held that **Gerdau, Belgo Mineira** and **Barra Mansa** infringed the Competition Act by entering into agreements to divide the rebars market and by imposing minimum prices on distributors.

Amongst the penalties imposed, the Board of CADE ordered **Belgo Mineira, Gerdau** and **Barra Mansa** to pay a fine of about **7%** of their 1999 gross revenues, taking into account (a) the severity of the violation; (b) the violator's good faith; (c) the advantages obtained by the violator; (d) the occurrence of violation; (e) the extent of damage to consumers; (e) the adverse economic effects on the market; and (f) the violator's economic status.

On August 24, 2005, the Board of CADE held for the first time that the non-notified acquisition of quotas of a competitor may amount to illegal collusive practice and also to abusive use of one's dominant position.

On that occasion, the Board of CADE imposed a fine of **25%** of cable TV operator **DR-Net Ltda.**'s 2000 gross revenues and a fine of **20%** of **Antenas Comunitárias Brasileiras Ltda. (BTV)**'s 2000 gross revenues. Although the Competition Act allows for the imposition of fines up to 30% of the violator's gross revenues, it was the first time CADE imposed a 25% fine. In this case, CADE considered that the companies had acted in bad faith with the purpose of circumventing the ANATEL⁴ prohibition against this kind of acquisition.

After examining the complaint filed by ANATEL, CADE concluded that the merger of **BTV** into **DR-Net** without the ANATEL authorization operated as an abuse of dominant position by these companies offering mass media communication programming services in the region of Blumenau, State of Santa Catarina.

According to CADE, the transaction generated a concentration of 93% in such relevant market, and allowed the companies to charge higher prices and to offer identical services, excluding the possibility of choice by consumers.

*Crushed Rock
Producers Caught in
On-the-Spot
Investigation Fined
for Cartel Behavior*

CADE also ordered **BTV** and **DR-Net** to present the acquisition as a concentration act for examination of the Brazilian Competition Policy System.

On July 13, 2005, the Board of CADE fined the **São Paulo State Crushed Rock Mining Industries Association (Sindipedras)** and several crushed rock producers, for alleged cartel behavior.

Based on the opinion rendered by SDE, CADE understood that the group, which accounts for 55% of the crushed rock output to the São Paulo region, acted in collusion for market division, sales arrangements and output control, with a view to increasing prices. By majority vote, the Board of CADE imposed several penalties, including a fine of **15%** of the 2001 gross revenues of companies that took part in the cartel, and of **20%** of the 2001 gross revenues of companies that acted in the management of the cartel.

This was the first CADE judgment of a case initiated after an unprecedented on-the-spot investigation carried out by SDE at the premises of the **Sindipedras** in July 2003. As informed in our *Competition Law at a Glance*, the search was authorized by the 17th Federal Court in São Paulo, which granted a warrant allowing the raid team to seize documents, reports, software for monitoring the alleged cartel activities, receipts, bidding notices, six PCs, and audio and videotapes.

Sindipedras and the companies fined are expected to challenge CADE's decision before the Judiciary Branch in the near future.

**SDE's
INVESTIGATIONS**

*SDE Concludes
Another Investigation
into LPG Distributors*

The Head of SDE has suggested CADE to impose penalties on eight liquefied petroleum gas (LPG) distributors and their senior managers for alleged hardcore cartel behavior in the LPG markets of Uberlândia and Araguari, in the State of Minas Gerais.

SDE allegedly found evidence that LPG distributors **Agip, Ultragaz, Copagaz, Minasgás, Butano, Onogás, Shell Gás and Supergasbrás** met regularly to fix the prices for products supplied in the regions of Uberlândia and Araguari, in the State of Minas Gerais. In his opinion, the Head of SDE concluded that defendants were unreasonably (i) setting concerted prices and conditions for gas supply; (ii) adopting concerted business practice; and (iii) imposing abusive prices.

Based on a complaint filed before SEAE in September 2002 by a reseller with activities in the regions of Uberlândia and Araguari and on an investigation that was already being conducted by the Public Prosecutor Office of the State of Minas Gerais, the Head of SDE held there was sufficient evidence that the eight LPG distributors violated the Competition Act by restraining free competition in the 13kg gas bottle resale market in the State of Minas Gerais. According to SDE, documents obtained during the investigations proved that the LPG distributors held regular meetings to discuss prices. SDE announced that it had access to phone records that evidenced the existence of regular meetings between the LPG distributors, written documents suggesting that an increase in prices and rules respected the 'distributors flag', and records showing that meetings had been held in various hotels in the region, with the attendance or on behalf of the investigated companies.

The case records of these administrative proceedings have already been sent to CADE for final judgment at the administrative level. CADE may impose fines up to 30% of the companies' annual gross revenues.

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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.*

(4) *ANATEL (Agência Nacional de Telecomunicações), the Brazilian Telecommunications Agency, is in charge of investigating restrictive business practices in the telecommunications sector and rendering non-binding technical opinions on concentration acts involving telecommunications services providers. ANATEL's opinions on such issues are also 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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