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Brazil

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MERGER CONTROL

1. What (if any) merger control rules apply to mergers and acquisitions in your jurisdiction?

Regulatory framework

The regulatory framework for merger control is currently set out in the new Anti-trust Law (*no. 12.529. 30 November 2011*). It entered into force on 29 May 2012 and contains the general provisions concerning anti-trust matters.

Regulatory authority

Merger control is enforced by the Administrative Council for Economic Defence (*Conselho Administrativo de Defesa Econômica*) (CADE) (Council), an independent federal authority.

The Council is composed of:

- A General Superintendence.
- An Administrative Tribunal.
- A Department of Economic Studies.

See box, *The regulatory authorities.*

Triggering events/thresholds

2. What are the relevant jurisdictional triggering events/thresholds?

Triggering events

Under the new Anti-trust Law, Article 90 defines the term "concentration act", stating that it takes place when:

- Two or more previously independent companies merge.
- One or more companies acquire, directly or indirectly, by purchase or exchange of stocks, shares, bonds or securities convertible into stocks or assets, whether tangible or intangible, the control or parts of one or more companies.
- One or more companies incorporate one or more companies.
- Two or more companies enter into an associative contract, a consortium or a joint venture.

Thresholds

A concentration act (*see above, Triggering events*), must be notified if both of the following apply (*Law No. 12.529/11*):

- The annual gross turnover of one of the parties or their economic groups exceeds BRL750 million in the previous fiscal year.
- The annual gross turnover of the other party or their economic groups exceeds BRL75 million.

Only the turnover of undertakings in the same economic group in Brazil (not worldwide) is included. In addition, the Council is able to review transactions that do not meet these mandatory notification criteria until up to one year from their execution.

Finally, concentrations formed to participate in public bids will no longer have to be filed (*see above, Triggering events*).

Notification

3. What are the notification requirements for mergers?

Mandatory or voluntary

Notification is mandatory for economic concentrations that cumulatively meet, the thresholds (*see Question 2, Thresholds*).

Timing

Brazil now adopts a pre-merger filing system, and transactions that meet the thresholds need to be filed with the Council before their execution. There is no specific deadline for the filing. However, CADE Regulation 1/2012 states that notifications must preferably take place after the signing of the formal and binding instrument and before any act related to the transaction is carried out (*Article.108, §1*).

Formal/informal guidance

As at the date of the writing of this chapter it is not possible to obtain informal guidance from the authorities about the likelihood of a merger being cleared.

Responsibility for notification

All parties to a transaction are responsible for notification. However, the duty to notify can be met if only one of the parties files, as long as it provides information about the other parties. In practice, the buyer is usually responsible for filing the notification.

Relevant authority

The parties must file the notification with the General Superintendence.

Form of notification

There are two types of notification, depending on the level of complexity of the transaction. Both forms of notification require that parties complete a form that provides detailed information on:

- The parties and their groups, including business details and revenues.
- Competitors.
- Barriers for new competitors in the relevant market and the effects of the transaction on the relevant market.

The parties must also provide copies of the agreements and all documents relating to the transaction.

For complex transactions, applicants must also:

- Present any internal documents that are relevant for market analysis, business plans and marketing reports.
- Inform the authorities of any previous convictions or ongoing investigations for cartel practices.

The Council can request that the parties amend their notification, if it considers that the notification lacks information, presents incomplete information, or contains controversial information (*Article 53, Anti-trust Law*).

Filing fee

The filing fee is BRL45,000. The parties are jointly responsible for paying the fee.

Obligation to suspend

Closing is prohibited prior to the clearance of the transaction. The competition conditions have to be preserved until the authorities reach a final decision concerning the transaction. Transactions executed before the authorities approval will be null and void and parties will be fined (fines range from BRL60,000 up to BRL60 million).

At the request of the parties, the Council may authorise the implementation of the transaction before a final decision about the case, but this exceptional authorisation is not necessarily a fast procedure.

Procedure and timetable

4. What are the applicable procedures and timetable?

Parties must notify the transaction directly before the Council. The Council has 240 days to reach a decision, which can be extended by 90 days to a maximum of 330 days in very complex cases. If the Council does not respect the deadlines, it implies that the transaction has been cleared. The Council can decide to analyse simpler transactions under a summary procedure. There is no specific time limit for this, but in practice decisions in fast-track cases take on average 18 days.

The General Superintendence of the Council has the primary responsibility of analysing the transaction. The Tribunal of the Council can examine cases that one (or more) Board Commissioners consider will need more detailed analysis.

If the General Superintendence or the Board Commissioner(s) choose to challenge the transaction, the parties will have the opportunity to make a reply, within 30 days from the Board Commissioner's call up, General Superintendence's challenge, or appeal by an interested party or regulatory agency.

Under the new anti-trust law the former Secretariat of Economic Law at the Ministry of Justice (*Secretaria de Direito Econômico*) (SDE) no longer exists and the Secretariat for Economic Monitoring at the Ministry of Finance (*Secretaria de Acompanhamento Econômico*) (SEAE) has no role in the analysis of mergers. In addition, time limits are no longer suspended when information requests are pending.

For an overview of the notification process, see flowchart, *Brazil: merger notifications.*

Publicity and confidentiality

5. How much information is made publicly available concerning merger inquiries? Is any information made automatically confidential and is confidentiality available on request?

Publicity

The notification process is given full publicity (the public can access all files on the matter), although the parties can request that certain documents and information be kept confidential (*see below, Confidentiality on request*). The text of all opinions and the decision are also made public, except for information that is strictly confidential. To obtain confidentiality of a document or information, the party must request it and the authorities must agree to the request (*see below, Confidentiality on request*).

Procedural stage

The documents and information filed are considered public from the date of filing.

Automatic confidentiality

There is no automatic confidentiality for any document.

Confidentiality on request

The parties can request that certain documents and information be kept confidential. A confidentiality request can be made at any time during the merger review. It is usually filed with the authorities at the same time as the document requesting confidentiality is presented.

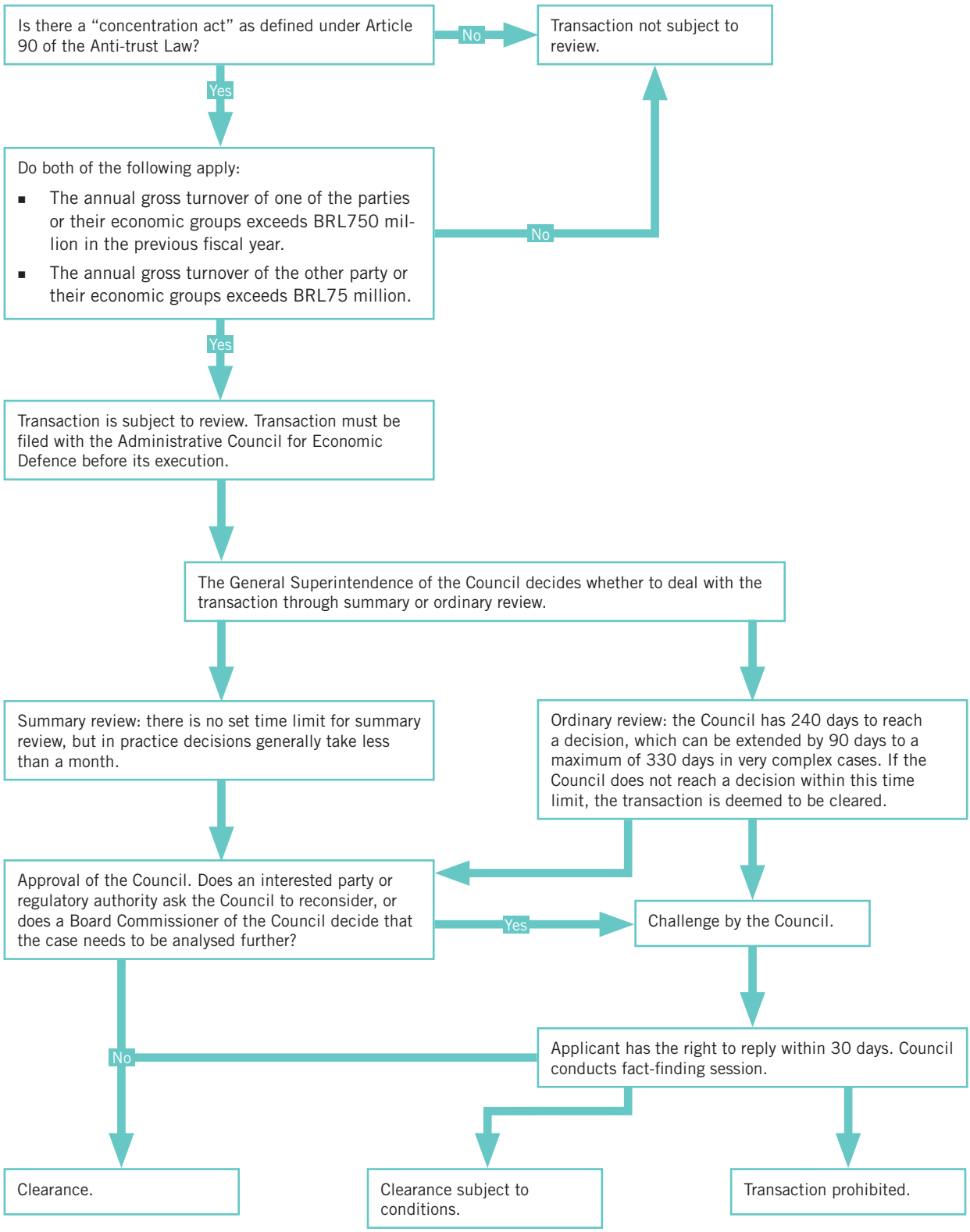
Rights of third parties

6. What rights (if any) do third parties have to make representations, access documents or be heard during the course of an investigation?

Representations

Competitors, suppliers and customers can have a substantial influence on the final decision. Customers and competitors can

BRAZIL: MERGER NOTIFICATIONS



Country Q&A

become involved if the authorities require them to comment on the merger. They can also file a complaint, stating their reasons for objecting to the merger, and can follow all the proceedings except those that are considered confidential.

Document access

Third parties can usually have access to any public documents in the case files.

Be heard

Third parties can present written arguments at any time and request meetings with the authorities to present their view about the case.

Substantive test

7. What is the substantive test?

The new law forbids concentration acts that involve elimination of competition in a substantial portion of the relevant market, which could create or strengthen a dominant position or that can result in the domination of the relevant market of goods or services. The exception to this rule, in which the Council will allow the transaction, will take place when strictly necessary to achieve the following results, cumulatively or alternatively:

- Increase productivity or the competition.
- Improve the quality of goods or services.
- Encourage efficient and technological or economic development, where a significant part of the transaction benefit is transferred to consumers.

Remedies, penalties and appeal

8. What remedies can be imposed as conditions of clearance to address competition concerns? At what stage of the procedure can they be offered and accepted?

The Council can impose restrictions and conditions on mergers to prevent anti-competitive effects on the market. It can make any approval conditional on structural remedies (such as divestment) and/or behavioural remedies (such as the acceptance of a series of behavioural obligations).

Conditions of clearance can be accepted at the end of the administrative process, after the Council's decision. However, it is possible to negotiate remedies during the process and propose different conditions of clearance to the Council before it reaches its final decision.

9. What are the penalties for failing to comply with the merger control rules?

Failure to notify correctly

Failure to notify a transaction that met the thresholds will invalidate the entire transaction. The Council can declare that the transaction is undone and impose fines (*see below, Implementation before approval or after prohibition*).

If any documents are missing from the notification, one filing amendment will be permitted, under penalty of dismissal. A notification filed without relevant documents usually receives a slower review, as authorities are very likely to request the missing documents or pieces of information.

If the parties failed to act on any remedial undertakings given, the Council can file a suit before the federal courts to guarantee the execution of its decisions.

Implementation before approval or after prohibition

Implementation is only possible with the Council's authorisation.

Implementation before approval is forbidden and can invalidate the transaction. It can be punished with fines ranging from BRL60,000 to BRL6 million issued.

Failure to observe

Failure to observe a Council decision regarding a transaction:

- Results in the imposition of daily administrative fines, which are set out in the decision itself, and range from BRL5,000 to BRL250,000.
- Invalidates the transaction.

Fines are imposed on the companies involved in the transaction, and can also be imposed on the undertakings' directors responsible for the failure. Fines imposed on the undertakings' directors are 50% lower than those imposed on the undertakings themselves. If they are not paid, the Council's decision is executed by the courts so that it can be enforced.

10. Is there a right of appeal against any decision? If so, which decisions, to which body and within which time limits? Are rights of appeal available to third parties or only the parties to the decision?

Rights of appeal and procedure

Council decisions can be subject to full judicial review by the federal courts (*Article 5, Constitution of the Federative Republic of Brazil*). There is no deadline for lodging an appeal, but it can only be lodged by the main parties to the original decision. There is no further right of appeal beyond this.

The parties can also ask the Council to reconsider its decision if new documentation emerges. The Council interprets "new documentation" broadly and subjectively. It is defined as any document related to the merger that existed before the Council's decision, but that was not known at the time (for example, a contract or minutes).

Third party rights of appeal

An appeal before the courts can only be lodged by the main parties to the original decision. However, third parties or companies that are directly interested in the outcome of the transaction (such as competitors) and interested third party regulatory agencies can ask the Council to reconsider its decision (*see above, Rights of appeal and procedure*).

Automatic clearance of restrictive provisions

11. If a merger is cleared, are any restrictive provisions in the agreements automatically cleared? If they are not automatically cleared, how are they regulated?

Restrictive provisions are usually automatically cleared with the merger, although the Council can clear the transaction but prohibit or alter its restrictive provisions. Clearance of a merger can also be made conditional on the exclusion of restrictive provisions. An example of restrictive provisions are non-compete covenants. These are usually altered by the Council if they exceed five years and/or have a broader geographic scope than the one the acquired party was active in. Clearance of a merger can be made conditional on the exclusion of restrictive provisions.

Regulation of specific industries

12. What industries (if any) are specifically regulated?

There is industry-specific regulatory legislation in the telecommunications, electricity, gas, financial, civil aviation and other sectors. Mergers in regulated industries are subject to review by the usual competition authorities, but some sectors are reviewed by both regulatory and competition authorities.

There is a dispute between the Central Bank and the Council about jurisdiction over mergers in the banking sector. This dispute is only likely to be resolved when specific legislation is enacted. On 29 August 2007, the Federal Court held that the Council must review mergers in the banking sector. The Superior Court of Justice (*Superior Tribunal de Justiça*) ruled on August 2010 that the Central Bank should review all mergers in the banking sector. The case is now being discussed before the Supreme Court.

RESTRICTIVE AGREEMENTS AND PRACTICES

Scope of rules

13. Are restrictive agreements and practices regulated? If so, what are the substantive provisions and regulatory authority?

Restrictive agreements are regulated by the merger control rules (*see Questions 1 to 12*), while restrictive practices are regulated by the law on abuse of market power (*see Questions 27 to 35*).

Agreements that lead to a permanent structural change to the market (that is, they are not merely instruments for the co-ordination of the competitive activity) must be notified for clearance in the same way as mergers and acquisitions (*Article 88, Law no. 12.529/11*) (*see Questions 1 to 12*). Note that the turnover threshold relating to mergers and acquisitions does not apply to restrictive agreements (*see Question 2*).

Law no. 12.529/11 defines the term "restrictive agreements" broadly. It refers to all agreements that may limit or damage competition or result in market dominance. However, even if there is no permanent structural change to the market as a result of the agreement, it may still amount to a restrictive practice (*see below*).

Restrictive practices are regulated by the law on abuse of market power (*Article 36, Law no. 12.529/11*) (*see Questions 27 to 35*). Requests for clearance of restrictive practices cannot be submitted to the competition authorities.

There are no specific substantive rules concerning restrictive practices. Many horizontal and vertical practices may be considered anti-competitive under the rule of reason (that is, if they unreasonably restrict trade). Article 36 of the Anti-trust Law (*see Question 29*) sets out examples of restrictive practices.

Criminal provisions

Beyond Law no. 12.529/11, those who take part in cartels can be subject to criminal prosecution. Agreements between companies to fix prices or divide markets are illegal (*Law 8.137/90, Crimes Against Economy and Consumers*). Individuals participating in such practices can be imprisoned for two to five years and fined.

Civil provisions

Private anti-trust litigation can be brought in relation to any of the anti-competitive practices set out in Article 36 of Law no. 12.529/11(*see Questions 27 to 35*) if there is evidence of civil damage.

14. Do the regulations only apply to formal agreements or can they apply to informal practices?

Formal agreements are regulated by the merger control rules (*see Questions 1 to 12*). Restrictive informal agreements and restrictive practices are regulated by the law on abuse of market power (*see Questions 27 to 35*). The answers to *Questions 15* to *26* relate to the regulation of formal restrictive agreements unless otherwise specified.

Exemptions

15. Are there any exemptions? If so, what are the criteria for individual exemption and any applicable block exemptions?

Law no. 12.529/11 does not establish sector-specific offences or exemptions. However, it does establish that merger transactions formed to participate in public biddings do not have to be filed before the anti-trust authorities (*see Questions 1 to 12*). This represents a more severe monitoring of the behaviour of companies involved in public biddings.

16. Are there any exclusions? Are there statutes of limitation associated with restrictive agreements and practices?

Exclusions

There are no formal exclusions (*see Question 15*).

Statutes of limitation

Limitation periods depend on whether an investigation has been started. If an investigation is started concerning illegal conduct, there is no term within which the authorities must conclude it. However, the Council cannot pass judgment on a case if after three years all of the following apply:

- A decision is not made.
- No further information comes to light in relation to the matter.
- The authorities do nothing to continue the investigation.

If no investigation is carried out, sanctions cannot be imposed if 12 years has passed since the date of conduct. However, as companies are not subject to criminal justice, the only sanctions that can be applied are administrative. The administrative sanctions cannot be imposed for legal persons (*persona ficta*) if five years have passed since the date of conduct. For continuing anti-competitive conduct, there is no prescription period for an investigation or imposition of sanctions.

The limitation period to investigate an illegal conduct that is also considered a crime is the same as that provided by the criminal law (*see Question 13, Criminal provisions*).

Notification

17. What are the notification requirements for restrictive agreements and practices?

Notification

Notification must be prior to the implementation of the transaction.

Informal guidance/opinion

No informal guidance is available (*see Question 3*).

Responsibility for notification

Both parties are responsible for notification, although only one needs to submit the notification (*see Question 3*).

Relevant authority

Notification must be filed with the Council (*see Question 1, Regulatory authority*).

Form of notification

The Council has issued a specific regulation regarding the filing form and documents to be presented (see *Question 3*). Among other data, the filing form requires information about the applicants and all overlapping products, including:

- Volume of sales and revenue.
- A list of clients, suppliers and competitors.
- Detailed information regarding distribution channels (for complex transactions).
- Strategy regarding prices (for complex transactions).

Filing fee

The filing fee is BRL45,000.

Investigations

18. Who can start an investigation into a restrictive agreement or practice?

Regulators

The Council can start an investigation on its own initiative by issuing an official order compelling notification.

Third parties

Third parties can complain about a failure to notify and pressure the regulators to begin an investigation (*see Question 6*).

19. What rights (if any) does a complainant or other third party have to make representations, access documents or be heard during the course of an investigation?

Representations

Third parties have full access to non-confidential documents and have the right to be heard during an investigation (*see Questions 5 and 6*).

Document access

Third parties can have access to any public documents.

Be heard

Third parties can present written arguments at any time and can request for meetings with Brazilian anti-trust authorities whenever they consider it necessary.

20. What are the stages of the investigation and timetable?

The following procedure applies to restrictive agreements when the parties have failed to notify and third parties lodge a complaint (*see Question 15*). It also applies to restrictive practices. If the regulator initiates an investigation into a restrictive agreement and compels the parties to notify, the applicable procedure is as set out in *Question 4*.

The procedure is as follows:

- **Preliminary investigations.** The General Superintendence carries out preliminary investigations either on its own initiative or following a written and reasonable request of interested parties. The preliminary investigation must be concluded in 180 days (which can be extended for a further 60 days if necessary).
- **Administrative proceedings.** After the conclusion of the preliminary investigations, the General Superintendence decides whether or not to start an administrative proceeding (which can be subject to an appeal to the Council by third parties if he decides not to bring a proceeding). Administrative proceedings must begin no later than ten days after identifying any of the following:
  - underlying facts;
  - formal complaint;
  - closing of the preliminary investigation.

- **Discovery phase.** The defendant must:
  - file a defence within 30 days of receipt of a notification of the start of the administrative proceedings which can be extended to 40 days on the defendant's request. All terms are duplicated in case of multiple defendants and only if the defendants are represented by different lawyers;
  - produce any evidence within 30 days after submission of the defence;
  - provide new documents at any time before the discovery phase lapses.
- **Report on proceedings.** On conclusion of the discovery phase, the defendant is summoned to put forward its final arguments within five days. Once these arguments are presented, the General Superintendence of the Council has 15 days to issue its opinion about the case and then send the case files to the President of the Administrative Tribunal.
- **Council's review.** Once the case records are submitted to the President of the Administrative Tribunal he must assign the file to a Reporting Commissioner through a raffle process, who can send the case files to the Attorney General for opinion within 20 days. The defendant will also have 15 days to present final arguments before the case is decided. Within 15 days of receipt of the final arguments, the Reporting Commissioner will list the case for final judgement. The Council does not have a deadline to make its determination, although there is a statute of limitations (*see Question 16, Statutes of limitation*).

21. How much information is made publicly available concerning investigations into potentially restrictive agreement or practices? Is any information made automatically confidential and is confidentiality available on request?

Publicity

Details of the investigation are made public at the end of the preliminary investigations. Any sensitive information about the parties is kept confidential at their request (*see Question 5, Publicity*).

Automatic confidentiality

See *Question 5, Automatic confidentiality*.

Confidentiality on request

See *Question 5, Confidentiality on request*.

22. What are the powers (if any) that the relevant regulator has to investigate potentially restrictive agreements or practices?

In relation to both restrictive agreements and practices, the General Superintendence has a wide range of investigative powers, including the right to request information, documents and data from the undertakings involved in the potentially restrictive agreement or practice, and from third parties.

23. Can the regulator reach settlements with the parties without reaching an infringement decision? If so, what are the circumstances in which settlements can be reached and the applicable procedure?

In relation to both restrictive agreements and practices, the regulator can reach settlements without reaching an infringement decision. Regulators can accept formal commitments from the parties to suspend the restrictive agreement or practice during the investigative process.

The parties can offer to sign a cease and desist order at any stage of the investigation. The Council must approve a cease and desist order for it to be legally effective.

Since May 2007, parties under investigation for cartel membership can suspend the investigation against them by signing a cease and desist order, and contributing to a Fund for the Defence of Diffuse Rights.

Penalties and enforcement

24. What are the regulator's enforcement powers in relation to a prohibited restrictive agreement or practice?

Orders

The Council can order termination of the restrictive clauses in an agreement.

Fines

The Council can impose daily fines of between BRL5,320.5 to BRL106,410 for non-compliance with a decision regarding a restrictive agreement.

Prohibited restrictive practices and informal agreements are subject to the same penalties as abuses of market power (*see Question 34*).

Cartel participants can also be prosecuted under criminal law and subject to two to five years' imprisonment and/or fines (*see Question 13*).

Personal liability

If an agreement is voluntarily notified to the authorities, no penalty can be imposed. If the agreement is not voluntarily notified, the parties to the agreement and their directors can be liable to civil and criminal penalties.

Individuals involved in restrictive practices are subject to the same penalties as those involved in abuses of market power (*see Question 34*).

Individuals who take part in cartels can also be prosecuted under criminal law, leading to two to five years' imprisonment, and fines (*see Question 13, Criminal provisions*).

Immunity/leniency

It is possible to enter into a leniency agreement with the anti-trust authorities. A leniency agreement grants full or partial administrative immunity and can also include administrative fines.

The new Anti-trust law modified the leniency agreement programme to eliminate exposure of leniency participants to prosecution under criminal laws other than the Economic Crimes Law (*8, 137 of December 1990*). This includes criminal conspiracy, bid rigging and decriminalised non-cartel conducts from the Economic Crimes Law, such as unilateral conducts involving price discrimination and alleged abuse of market power.

Impact on agreements

Restrictive clauses can be declared void and severed from the rest of an agreement, which remains valid. Usually, parties are required to amend an agreement to exclude restrictive clauses. If the purpose of the agreement is restrictive, the Council can order the entire agreement to be terminated.

If a restrictive practice or informal agreement is prohibited, the whole practice or agreement must be terminated, and the parties will be subject to the same penalties as those that apply for abuse of market power, especially if that agreement was not voluntarily filed (*see Question 34*).

Third party damages claims and appeals

25. Can third parties claim damages for losses suffered as a result of a prohibited restrictive agreement or practice? If so, what special procedures or rules (if any) apply? Are class actions possible?

Third party damages

Third parties can claim damages through the courts for losses suffered as a result of a prohibited restrictive agreement or practice.

Special procedures/rules

Civil procedure law and the civil law code provide special procedures and rules for starting private litigation. Evidence gathered during an investigation concerning a prohibited agreement or practice can be used in the private litigation.

Class actions

Private class actions are not possible. Public class actions are possible and must be started under the consumer and/or criminal laws by the Federal Prosecutors' Office.

26. Is there a right of appeal against any decision of the regulator? If so, which decisions, to which body and within which time limits? Are rights of appeal available to third parties, or only to the parties to the agreement or practice?

Rights of appeal and procedure

All decisions by the Council are subject to judicial review (*see Question 10, Rights of appeal and procedure*).

Third party rights of appeal

Rights of appeal are available only to the parties to the agreement or practice.

MONOPOLIES AND ABUSES OF MARKET POWER

Scope of rules

27. Are monopolies and abuses of market power regulated under administrative and/or criminal law? If so, what are the substantive provisions and regulatory authority?

Under Law no. 12.529/11, inquiries into abuses of market power are carried out by the General Superintendence of the Council.

28. How is dominance/market power determined?

Dominance is presumed if a single company, or a group of companies under common control, holds a market share of 20% or more (*Law no. 12.529/11*).

29. Are there any broad categories of behaviour that may constitute abusive conduct?

Law no. 12.529/11 provides an extensive but not exhaustive list of practices that can constitute abusive conduct, such as:

- Price-fixing.
- Market allocation.
- Tied-in sales.
- Price discrimination.
- Predatory pricing.

These practices are not considered illegal in themselves. However, they are illegal if they effectively harm competition and provide no compensatory efficiencies to undertakings and consumers.

The practice of exclusivity is not explicitly mentioned by the new Anti-trust Law, but it can still be the object of investigation and punishment under Article 36, as the above list of anti-competitive practices is merely illustrative.

Exemptions and exclusions

30. Are there any exemptions or exclusions?

There are no formal exclusions or exemptions. Past Council decisions may provide informal guidance.

Notification

31. Is it necessary (or, if not necessary, possible/advisable) to notify the conduct to obtain clearance or (formal or informal) guidance from the regulator? If so, what is the applicable procedure?

Practices cannot be notified to obtain clearance (except for mergers) and no formal or informal guidance can be obtained.

Investigations

32. What (if any) procedural differences are there between investigations into monopolies and abuses of market power and investigations into restrictive agreements and practices?

Investigations are started when there is sufficient evidence that abusive practices occurred and produced anti-competitive effects on a relevant market.

Regulators can start investigations on their own initiative or following a complaint by a third party. After its investigations, the General Superintendence can propose that the Council prosecute the parties for the breach, or end the administrative process without prosecution. However, the Council makes the final decision on the matter.

Regulators can accept formal commitments from the parties during the investigative process and suspend the investigation without making an infringement decision. The parties can offer to sign a cease and desist order at any stage of the investigation. The Council must approve the order for it to be legally effective.

The rights of third parties and the publicity during the procedure are the same as those concerning restrictive agreement investigations (*see Questions 19 and 21*).

33. What are the regulator's powers of investigation?

The General Superintendence has a wide range of investigative powers, including the right to:

- Request information, documents and data from the respondent and third parties.
- Carry out inspections at undertakings' premises.
- Request judicial authorisation to use the federal police to:
  - record telephone conversations or telecommunications;
  - seize objects, documents and electronic files from the respondent's office and plants, by means of dawn raids.

Penalties and enforcement

34. What are the penalties for abuse of market power and what orders can the regulator make?

Currently, the penalties for abuse of market power are:

- For undertakings, an administrative fine of between 0.1% and 20% over the gross sales of the company, group or conglomerate in the last fiscal year before the establishment of the administrative proceeding, in the field of the business activity in which the violation occurred. The fine must not be less than the advantage obtained from the underlying violation, if assessable. If fines are not paid, the administrative decision is executed by the courts so that it can be enforced.
- For each manager directly or indirectly liable for their undertaking's breach, an additional personal administrative fine of between 1% and 20% of the fine imposed on the undertaking. If fines are not paid, the administrative decision is executed by the courts so that it can be enforced.
- For other individuals and public or private legal entities where it is not feasible to use a turnover fine (or their associates, including temporary ones, with or without legal identity, that do not engage in business activities), administrative fines vary from BRL50,000 to BRL2 billion. If fines are not paid, the administrative decision is executed by the courts so that it can be enforced.

In addition, the Council can impose the following penalties:

- An order that a summary of the decision be published in a newspaper.
- A prohibition on parties participating in government procurement bids for a certain period of time.
- A restriction on parties receiving financing from public entities.
- Divestment orders, such as orders for the sale of assets and dissolution of the undertaking.

Continuation of prohibited practices is punished with daily fines of between BRL5,320.50 and BRL106,410.

Third party damages claims

35. Can third parties claim damages for losses suffered as a result of abuse of market power? If so, what special procedures or rules (if any) apply? Are class actions possible?

Third party damages

For third party claims, see *Question 25, Third party damages*.

Special procedures/rules

For third party claims, see *Question 25, Special procedures/rules*.

Class actions

Only public class actions are possible. They must be started by the Federal Attorney-General's Office under consumer protection and criminal laws.

EU LAW

36. Are there any differences between the powers of the national regulatory authority(ies) and courts in relation to cases dealt with under Article 101 and/or Article 102 of the TFEU, and those dealt with only under national law?

Not applicable.

JOINT VENTURES

37. How are joint ventures analysed under competition law?

Joint ventures of all types are subject to the same regulation as mergers and acquisitions (*see Questions 1 to 12*). No changes occurred under the new Anti-trust Law, except regarding concentrations formed to participate in public bids that no longer have to be filed with the anti-trust authorities.

THE REGULATORY AUTHORITIES

Administrative Council for Economic Defence (Conselho Administrativo de Defesa Econômica) (CADE) (Council)

Head. Vinícius Marques de Carvalho (as of May 2012)

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Outline structure. The Council's main body is the Board of Commissioners or Administrative Tribunal, which consists of six commissioners and a chairman. It has a General Superintendence who is responsible for representing the Council in court and for following all internal procedures. It also has a Department of Economic Studies.

Responsibilities. The Council makes final decisions concerning reviews of:

- Mergers and acquisitions.
- Restrictive agreements and practices.
- Monopolies and abuses of market power.
- Joint ventures.

Its decisions are made by a simple majority vote of the Board of Commissioners.

Under the new Anti-trust Law, the General Superintendence of the Council is responsible for issuing legal opinion about these subjects and is also responsible for investigating monopolies and abuse of market power.

Procedure for obtaining documents. The Council's website contains information on its procedures and rules as well as information on current and past inquiries. Some reports are available on the website. The Council also publishes other important documents on its website, including issued statements and hypothetical remedy statements. Reports issued before 1999 are not available on the website but can be obtained by post from the above address.

General Superintendence

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Secretariat of Economic Monitoring (*Secretaria de Acompanhamento Econômico*) (SEAE)

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Outline structure. The SEAE is composed of the Secretary and six sector-specific divisions.

Responsibilities. The SEAE has the role of promoting the anti-trust concept to the Brazilian authorities and to society in general.

Procedure for obtaining documents. The SEAE publishes its economic opinions on its website. The website also provides access to the SEAE's procedural rules and guidance.

INTER-AGENCY CO-OPERATION

38. Does the regulatory authority in your jurisdiction co-operate with regulatory authorities in other jurisdictions in relation to infringements of competition law? If so, what is the legal basis for and extent of co-operation (in particular, in relation to the exchange of information)?

In practice, Brazilian authorities co-operate with authorities in other jurisdictions to improve anti-trust and competition control. However, the exchange of information in specific cases is limited to publicly available information. The exchange of confidential information is illegal.

PROPOSALS FOR REFORM

39. Are there any proposals for reform of competition law?

New Anti-trust Law

Brazil's new Anti-trust law entered into force on 29 May 2012. This has introduced significant changes, including:

- Changes to the structure of the regulatory authorities (*see Question 1, Regulatory authority*).
- An introduction of a system of pre-merger review (*see Question 3, Timing*).

- The introduction exemption for mergers effected to participate in public bidding processes from notification (*see Question 2, Triggering events*).
- Changes to the fines that can be imposed by the Council in cases of abuse of market power (*see Question 34*).

Statistics relating to the new Anti-trust Law

In 2012, the Council decided 955 cases. Of this total, 825 were mergers of which 102 were filed under the new Anti-trust Law. Among these cases, 13 administrative proceedings were also decided. The remaining 117 refer to preliminary investigations and other types of case (such as preliminary injunctions and motions for clarification).

No official statistics have been released for 2013 yet. However, based on public sessions it is possible to affirm that the Council has decided:

- 26 concentration acts.
- 11 administrative proceedings.
- 11 preliminary investigations.

The General Superintendence has also cleared at least 42 mergers and dismissed one, without any restrictions between January and February 2013.

What to expect

Since the new law came into effect, the Council focused on issuing some very important regulations. In addition to its Internal Regulations (*Resolution No. 1/2012*), the Council issued:

- Rules regarding the new filing forms.
- A definition of "economic group" and guidelines regarding transactions involving minority interest (*Resolution No. 2/2012*).
- A tentative list of business activities (*Resolution No. 3/2012*).
- Recommendations related to the presentation of economic studies (*Resolution No. 4/2012*).
- Rules regarding the procedure for cease and desist agreements (*Resolution No. 5/2012*).

The Council is also expected to pass further regulations and guidelines, for example, the filing of associative contracts is expected to be regulated soon.

A further objective is to retain knowledge, focus on strategic planning by prioritising sectors of economy that require more attention and strengthen the production of market studies. The Council plans to produce specific studies about the effects of the specific market of mergers that have been cleared in the past. The intention is to understand the impact of previous decisions and allow the Council to improve in the future.

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