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Global Forum on Competition**COMPETITION LAW AND STATE-OWNED ENTERPRISES****Contribution from Brazil**

- Session V -

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Please contact Ms. Lynn Robertson [E-mail: Lynn.Robertson@oecd.org], if you have any questions regarding this document.

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Competition Law and State-Owned Enterprises

- Contribution from Brazil* -

Summary

This article aims to provide an overview of the competition law applicability regarding State-Owned Enterprises (SOEs) in Brazil. In general, there are no exceptions or immunities to SOEs or private companies with State participation under the current Brazilian Competition System, as the law establishes objective criteria for merger control and anti-competitive practices analysis without advantages to this type of companies.

The Brazilian Constitution establishes that the abuse of economic power related to dominance of markets, elimination of competition and arbitrary increase of profits, shall be repressed by the law, without exceptions or immunities for SOEs. In this sense, the Brazilian Competition Law (No. 12.529/2011) is applicable to all legal entities, public or private.

CADE has analyzed dozens of mergers involving SOEs without adopting a differentiated regime. CADE also adopted the regular regime when ruling about anti-competitive practices by SOEs and their subsidiaries; there was no preferred treatment to SOEs and CADE has applied sanctions, behavioral obligations, besides established Cease and Desist Agreements with the companies involved.

1. Introduction

1. The Brazilian Competition System has its roots on the Brazilian Constitution, that establishes minimal parameters for the economic order, including being founded on free enterprising and having free competition as one of the basic principles.
2. In relation to the activities of State-Owned Enterprises (SOEs) and private enterprises, the Brazilian Constitution ensures the free exercise of any economic activity to everyone, regardless of authorization from governmental agencies, except in the cases set forth by law.
3. The direct exploitation of an economic activity by the State shall only be allowed whenever needed to the national security or to a relevant collective interest, as defined by law.
4. Moreover, the Brazilian Constitution provides that the relationship of public companies with the State and the society shall be regulated by law, which was established by the SOEs Law (Law No. 13.303/2016). The purpose of this law was to regulate public and government- controlled companies by redesigning their governance model. Thus, the

* This written contribution was prepared by Ms. Polyanna Vilanova, Commissioner at CADE, Ms. Carolina Saito, Chief of Staff, Mr. Fernando Amorim, Technical Assistant, and Mr. Rubens Cantanhede, Intern.

enactment of this law did not have a direct impact on the Brazilian Competition System, since its purpose was not to influence the structure of the markets, but rather to impact public companies at a governance level.

5. Free competition is one of the basic principles for the economic order. In that sense, the Brazilian Constitution established that the Law shall repress the abuse of economic power that aims at the dominance of markets, the elimination of competition and the arbitrary increase of profits.

6. Following this general framework, the Brazilian Competition Law (No. 12.529/2011), complemented by the agency's Internal Statute, established three main functions to the Brazilian Competition Authority (CADE – Administrative Council for Economic Defense).

7. The first one regards the preventive function. Since 2012, Brazil has adopted a pre-merger notification system. The second one is the repressive function, by which CADE investigates and rules about anti-competitive practices, such as cartels and abuse of dominance. The Brazilian agency also has an educational function to instruct the public about competition matters, by giving opinions during the creation of new rules that may impact the institutional environment of some markets; encouraging academic studies and researches on competition; carrying out and supporting courses, lectures, seminars and events related to competition; and other activities.

8. In general, the current Competition System in Brazil does not provide any immunity and does not allow exceptions to SOEs or private companies with State participation. Both in merger control and anti-competitive practices analysis, Brazilian law provides objective criteria for an institutional framework without direct State distortions in the competitive markets. This neutrality in the treatment of SOEs can be seen in some recent cases.

2. Merger control

9. After the pre-merger notification system, CADE has analyzed dozens of mergers involving SOEs¹. For instance, it is possible to mention the cases related to companies of the Petrobras Group², which focus its activities in the following markets: the oil exploration

¹ Merger Control Cases No. 08700.005775/2013-19 (OGX Petróleo e Gás S.A. and Petróleo Brasileiro S.A.); No. nº 08700.009924/2013-19 (Videolar S.A., Sr. Lirio Albino Parisotto, Petróleo Brasileiro S.A. - Petrobras and Innova S.A.); No. 08700.000137/2015-73 (GNL Gemini Comercialização e Logística de Gás Ltda and Companhia de Gás de Minas Gerais); No. 08700.002792/2016-47 (Banco Bradesco S.A.; Banco do Brasil S.A.; Caixa Econômica Federal and Itaú Unibanco S.A.); No. 08012.001015/2004-08 (Petróleo Brasileiro S.A, White Martins Gases Industriais Ltda and Petróleo Gás S.A.); No. 08700.004163/2017-32 (Grupo Petromex, S.A de C.V and Petróleo Brasileiro S.A.); No. 08700.002155/2017-51 (Companhia Ultragaz S.A. and Liquigás Distribuidora S.A.). All of the public documents linked to these cases can be found at CADE's Electronic Information System by searching the case number. The tool is available at: https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_processo_pesquisar.php?acao_externa=protocolo_pesquisar&acao_origem_externa=protocolo_pesquisar&id_orgao_acesso_externo=0.

² This is because Petrobras has established a divestment program aimed at reorganizing the company's finances, given the recent crisis the company was going through at the time, which

and production, refining, natural gas, electric energy, logistics, trade, distribution, petrochemicals, fertilizers, and biofuel segments. There are some other mergers related to the financial system, public banks, and State gas and energy companies.

10. In none of these mergers, the Brazilian Competition Authority has adopted a differentiated regime. According to the Brazilian Competition Law, independently of the nature of the company deal, the transactions that meet the legal requirements³³ shall be notified to CADE. In addition, in any case the SOEs received waivers exempting the transaction notification or approving the operation without remedies just because they were SOEs.

11. In certain cases analyzed, the merging parties invoked matters of public interest in an attempt to obtain the approval for the transaction. However, CADE rejected those arguments as being capable to justify the clearance.

12. One recent example is a case⁴, ruled in 2018, involving the takeover of two Petrobras' subsidiaries – PSUAPE and CITEPE – by a Mexican group – Petrotemex. Petrobras' subsidiaries activities are focused in the production of *Purified Terephthalic Acid* (PTA) and *Polyethulene Terephthalate Resin* (PET).

13. By means of CITEPE's acquisition, Petrotemex would become a monopolist in the production of PTA. For this reason, according to CADE's analysis, the transaction raised competitive concerns due to the foreclosure of the PTA market.

14. During the analysis of the merger, the companies claimed that there was a matter of public interest involved in preserving the SOE's financial structure, since CADE was dealing with one of the biggest companies in Brazil, which destined part of its dividends to the National Treasury and, thus, benefitted the consumers altogether.

15. However, CADE concluded that the transaction did not result in sufficient efficiencies to compensate the negative effects. Thus, the approval of the transaction was subject to remedies, by means of an agreement signed between CADE and the parties to solve the competitive concerns.

16. Some arguments regarding public interest and efficiencies were raised in another merger ruled also in 2018, regarding the proposed acquisition by Ultragaz of 100% of the shareholders' equity capital of Liquigás – also a Petrobras' subsidiary –; a company specialized in the production and sale of *Liquefied Petroleum Gas* (LPG)⁵. Since both companies were the leaders of the market with high market power, the transaction would result in competitive concerns regarding unilateral and coordinated effects. The merging parties claimed that the acquisition would help Petrobras' financial situation, representing a public interest matter, and would result in synergies and efficiency gains.

included the sale of its subsidiaries, especially since Petrobras was not financially able to maintain or expand them.

³ According to the Brazilian Competition Law, mergers, acquisitions, incorporation, joint ventures, associative contracts or consortia, shall be of mandatory notification to CADE if they produce effects in Brazil and meet the double turnover threshold (turnover or volume of sales in Brazil in the year prior to the transaction, by one of the parties' economic group involved in the transaction, equal to or in excess of 750 million reais, and by another party's group equal to or in excess of 75 million reais).

⁴ Case No. 08700.004163/2017-32.

⁵ Case No. 08700.002155/2017-51.

17. Ultragas and Liquigás have, respectively, the largest and second largest domestic marketshare of LPG. In a post-merger scenario, the new company would hold more than 40% of sales in many of the Brazilian States, reducing the main national players in the market from four to three. In that sense, CADE concluded that the competitive concerns were very negative and that the remedies later proposed by the merging parties were not enough to mitigate these concerns. Thus, the transaction was rejected.

3. Anti-competitive practices

18. Similarly, when it comes to the repressive function, the Brazilian Competition Law clearly states that it is applicable to all legal entities, of public or private law, as well as to any associations of entities or individuals. In other words, it is applicable to SOEs even when acting under a legal monopoly regime.

19. In the last five years, CADE has issued several decisions regarding anti-competitive practices by SOEs and their subsidiaries, applying sanctions, signing Cease and Desist Agreements and imposing behavioral obligations. However, having SOEs as defendants did not influence CADE's analysis.

20. One case that had an interesting discussion was the one regarding a cartel between Liquefied Petroleum Gas (LPG) distributors in municipalities in the state of Rio Grande do Sul⁶. In this proceeding, the defendants argued that the anticompetitive coordination was encouraged by the antitrust immunity supported by the sectoral regulations. CADE rejected this argument, concluding that the regulation was cancelled between 1996 and 1997 and there was a clear command for companies to compete, but they preferred to maintain the cartel.

21. Another interesting case that indicates the lack of preferred treatment to SOEs in Brazil is the petition filed by oil companies in 2018⁷. During a shortage crisis, some companies, including Petrobras, filed a petition at CADE requesting the competition authority to analyze if their joint activities during this period would indicate a collusion practice. CADE concluded that there was no indication of collusion, but requested the companies to provide all information about these activities when requested, besides providing a final report listing the pieces of information exchanged and the results obtained with the joint activity.

4. Final remarks

22. The Brazilian Competition System does not provide any specific exemptions or advantages for SOEs over private enterprises in competitive markets. Anti-competitive practices carried out by SOEs are regulated in the same way as it would be if they were practiced by private entities. In addition, the legal requirements for the notification of transactions are applicable to every company and the merger analysis does not apply any differentiated regime whether the merging parties are private or SOEs.

⁶ Case No. 08000.009354/1997-82.

⁷ Case No. 08700.003483/2018-56.