

Unclassified

English - Or. English

21 November 2022

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Cancels & replaces the same document of 8 November 2022

Working Party No. 2 on Competition and Regulation

Competition in Energy Markets – Note by Brazil

28 November 2022

This document reproduces a written contribution from Brazil submitted for Item 3 of the 74th OECD Working Party 2 meeting on 28 November 2022.

More documents related to this discussion can be found at
www.oecd.org/competition/competition-in-energy-markets.htm

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Brazil¹

1. Merger Control in Brazil

1. On 30 November 2011, a new law came into force: the Brazilian Antitrust Law (Law 12529/2011)².
2. The new law structured the Brazilian Competition Defense System and promoted significant institutional changes to antitrust policy enforcement. Before, the bodies responsible for launching anti-competitive conduct and merger cases were the Secretariat of Economic Law (SDE) of the Ministry of Justice and the Secretariat for Economic Monitoring of the Ministry of Finance (SEAE), respectively. Then, the bodies would submit the cases for hearing by CADE, which at the time consisted of an Administrative Tribunal only.
3. As of the enactment of Law 12529/2011, the SDE was extinct, and the SEAE's role changed to promoting competition advocacy. The structure of CADE, in turn, changed to comprise three different bodies: the Tribunal of CADE, the Office of the Superintendent General, and the Department of Economic Studies.
4. In this new institutional setup, anti-competitive conduct probing and merger reviews became a duty of the Office of the Superintendent General, which also functions as the first instance. The Tribunal of CADE became the second degree of jurisdiction—the highest court in the administrative field.
5. Additionally, another significant change the new law brought relates to merger control. Before, the antitrust authority conducted ex-post reviews of mergers and acquisitions. That means merging companies had up to 15 business days after consummating a deal to submit documentation regarding the transaction, and SEAE would review it.
6. When the new law came into force, Brazil started to handle merger control based on international best practices. In other words, mergers and acquisitions reaching the thresholds for mandatory notification started to be reviewed and adjudicated before consummation.
7. As aforementioned, in Brazil, Law 12529/2011 rules CADE's merger control. Moreover, CADE Resolution no. 33/2022³ regulates mandatory notification (which includes filling in a notification template) and establishes a fast-track procedure for merger review. In addition, in 2016, CADE updated its Guide for Horizontal Merger Review.
8. The resolution and guide have a soft law role for horizontal merger cases and suggest the adoption of concentration ratio analyses through the calculation of the Herfindahl-Hirschman Index and its delta (ΔHHI) to assess whether the merged firm would be able to exercise market power. Once the analysis indicates this possibility, the authority assesses its likelihood.

¹ This paper was written by Felipe Mundim, Coordinator-General of Antitrust Analysis of the Office of the Superintendent General of CADE. It was translated from Portuguese into English by Arianne Mesquita, Ariel Menezes and Bruna Assunção, in-house translators at CADE's International Unit.

² http://www.planalto.gov.br/ccivil_03/_ato2011-2014/2011/lei/112529.htm.

³ <https://www.in.gov.br/web/dou/-/resolucao-cade-n-33-de-14-de-abril-de-2022-394063356>.

9. A merger or acquisition undergoes the fast-track procedure when the merging companies have a market share below 20% or result in a delta HHI of fewer than 200 points. As for transactions that result in vertical integration, the authority uses the fast-track procedure to review those with a market share below 30% in any relevant market.

10. The Office of the Superintendent General is responsible for probing into mergers. CADE has a time limit of 240 days to issue a final decision on a merger or acquisition (extendable for up to 60 days upon request of the firms involved in the transaction; or to 90 days upon a decision of the Tribunal justifying the time extension). Should the authority not observe this term, the transaction is cleared tacitly and unconditionally.

11. The merging parties notify the Office of the Superintendent General of the merger through a form. In specific cases—and in the interest of the applicants—they can meet with the Office of the Superintendent General to discuss the main aspects of the transaction before making an official notification. The authority only accepts merger notifications provided the submitted information is complete. Otherwise, the notification form must be amended; only a single amendment is allowed.

12. Once the Office of the Superintendent General is notified and verifies the completeness of the provided information, it issues a notice that announces the transaction. This notice includes the name of the applicants, the nature of the transaction, the name of at least one legal representative of each party, and the economic sectors involved. After the public notice is issued, interested third parties have 15 days to intervene in the proceeding by claiming their businesses can be affected by the transaction. Their motion must be founded by documentation proving the allegations. This term may be extended for 15 days—if strictly necessary—for documents and opinions to be submitted.

13. During the investigation of mergers, the Office of the Superintendent General makes a statement of complexity whenever the analysis requires considerable time and resources—such as complex discussions on the merits of a case accompanied by serious competition concerns—or there is the possibility of adopting a remedy or both.

14. At the end of the probing phase, as the first instance jurisdiction, the Office of the Superintendent General issues an opinion on the matter. Should the body's opinion be for unconditional clearance of the deal, the interested third party has up to 15 days to submit an appeal against the decision to the Tribunal of CADE. During this period, the Tribunal can also request the case for adjudication on its own motion. After the 15-day term, in the absence of any appeals or requests, the proceeding is dismissed (resulting in unconditional clearance). Conversely, if the body's opinion is for conditional clearance or blockage of the transaction, the case is necessarily submitted to the Tribunal. At the Tribunal, it will randomly assign one of its commissioners as the rapporteur of the case, whose office will conduct additional investigations. The same procedure of choosing a rapporteur and carrying out further investigations applies when the Tribunal requests the case for adjudication or a third party appeals the decision within the 15-day term.

2. Merger cases in the energy sector

15. Regarding mergers in the energy sector, CADE has defined four markets: the generation, transmission, distribution, and sale of electric power.

16. We can see the relevant product market of electric power generation as (i) a broader market, considering it as a whole; and (ii) a stricter market, divided according to each source of energy that composes the energy mix (hydroelectric, thermal, wind, and solar energies). Similarly, there are two relevant geographic markets: (i) the national one,

including all the regional subsystems part of the National Interconnected System (SIN); and (ii) the regional one, split into different subsystems according to the classification of the National Electric System Operator (ONS). They are (a) the Southeast/Central-Western subsystem, (b) the South subsystem, (c) the Northeast subsystem, and (d) the North subsystem.

17. In markets of electricity transmission and distribution, we find two different scenarios: (i) competition in the market, characterised by a natural monopoly due to technical specificities and high fixed costs for the same area of operation; (ii) competition for the market, i.e. competition between companies and economic groups in public auctions for the provision of these services.

18. Lastly, the market for the sale of electricity is subdivided into two categories according to the purchase regime. First, the regulated contracting environment (ACR), comprising players that generate, distribute, and sell electric power, who usually participate in auctions conducted by ANEEL, the Brazilian electric energy agency, in the scope of the Chamber of Electric Energy Commercialization (CCEE). Second, there is the free contracting environment, comprised of players that generate, distribute, sell, import, and export electric power and their free consumers. The second regime allows energy suppliers to freely define prices and quantities to be sold. As to the geographic dimension, CADE has adopted the national reach for both regimes.

19. From 2018 to 2022⁴, CADE received notification of 271 mergers involving the energy sector. Table 1 below details the number of transactions and their average review time per year.

Table 1. Mergers in the electric power sector between 2018 and 2022

| | 2018 | 2019 | 2020 | 2021 | 2022 |
|--------------------------|------|------|------|------|------|
| Number of mergers | 38 | 44 | 46 | 80 | 63 |
| Average time | 14.9 | 17.0 | 17.0 | 18.9 | 20.1 |

Source: CADE

20. From the data, we observe the number of transactions in the sector has significantly increased during the period. In 2021, CADE reviewed more than twice as many mergers as in 2018. According to the trend observed in the first nine months of the year, we expect 2022 to have even more reviews than the previous year.

21. During this period, CADE analysed all transactions in the energy industry under the fast-track procedure; for this reason, their review was swifter. From the 271 reviewed mergers, the Tribunal of CADE analysed two of them.

22. In Merger no. 08700.000108/2019-35 (Applicants: Oliveira Energia Geração e Serviços Ltda.; Atem Distribuidora de Petróleo S.A; and Amazonas Distribuidora de Energia S.A.), the Office of the Superintendent General recommended the unconditional clearance of the deal. However, the Tribunal requested to review this decision. After reviewing the case, by unanimity, the Tribunal cleared the deal without conditions, confirming the ruling of the Office of the Superintendent General.

23. As for Merger no. 08700.004428/2020-06 (Applicants: Biopalma da Amazônia S.A. Reflorestamento, Indústria e Comércio; and Brasil Bio Fuels S.A.), the Tribunal reviewed the case after an interested third party appealed the decision of the Office of the

⁴ By 30 September 2022.

Superintendent General to clear the merger unconditionally. The Tribunal considered the appeal but, in addressing the merits of the issue, ratified the ruling to approve the deal entirely.

24. Similarly, in 2018, in the context of Merger no. 08700.005793/2018-13 (Applicants: Oliveira Energia Geração e Serviços Ltda.; Atem Distribuidora de Petróleo S.A; and Boa Vista Energia S.A.), an interested third party appealed against the Office of the Superintendent General's decision for unconditional clearance of the transaction. Nevertheless, on this occasion, the Tribunal chose not to examine the appeal as it failed to meet the requirements. Hence, it did not re-examine the merits of the decision (i.e. the effects of the merger).

3. Mergers in the natural gas sector

25. From 2018 to 2022⁵, the number of transactions in the natural gas sector was considerably lower than in the electric power sector in the same period: only 77 mergers. Table 2 below shows the number of transactions and their average review time per year.

Table 2. Mergers in the natural gas sector between 2018 and 2022

| | 2018 | 2019 | 2020 | 2021 | 2022 |
|--------------------------|------|------|------|------|------|
| Number of mergers | 7 | 19 | 12 | 23 | 16 |
| Average time | 11.3 | 16.5 | 12.9 | 31.4 | 21.1 |

Source: CADE

26. Although there were fewer notified transactions in the natural gas sector, CADE reviewed two of them through its ordinary procedure, as they demanded in-depth analysis.

27. Merger no. 08700.000361/2021-11 (Applicants: Petrorecôncavo S.A. and Petróleo Brasileiro S.A.) constituted a horizontal overlap between the petroleum and natural gas production markets and a vertical integration between the markets of onshore petroleum and natural gas production (upstream) and supply of onshore rigs (downstream). The Office of the Superintendent General noticed a market share lower than 20% in the market with horizontal overlap. In turn, the markets affected by vertical integration had a market share lower than 30%. Hence, the Office of the Superintendent General decided to clear the deal entirely.

28. The second transaction reviewed by the authority under its ordinary procedure was Merger no. 08700.004540/2021-10 (Applicants: Compass Gás e Energia S.A. and Petróleo Brasileiro S.A.), which stemmed from a cease and desist agreement between CADE and Petrobras. Request for Cease and Desist Agreement no. 08700.003136/2019-12 established Petrobras should divest its natural gas transport and distribution companies. In return, CADE undertook to suspend proceedings to probe into the alleged abuse of dominance in the natural gas market.

29. In this case, the Office of the Superintendent General analysed the markets of (1) natural gas distribution, (2) natural gas trading for captive consumers and (3) natural gas trading for free consumers.

30. The natural gas distribution market constitutes the activity of delivering end consumers natural gas through a pipeline system that stems from natural gas pipelines. In

⁵ By 30 September 2022.

turn, the natural gas trade market consists of the intermediation of the business conducted between consumers and production, transmission, and distribution companies, which also covers the services of measuring sales and turnover.

31. The Brazilian trade associations for the glass industry (ABIVIDRO), large industrial energy consumers and free consumers (ABRACE), and natural gas pipeline transport companies (ATGAS) filed appeals against the decision of the Office of the Superintendent General to clear the merger unconditionally. In addition to these third parties, the Brazilian regulatory agency for petroleum, natural gas, and fuels (ANP) also appealed the decision.

32. The Tribunal analysed the four appeals, and on their merits, the majority decision ratified the position of the Office of the Superintendent General.

4. Conclusion

33. Sections 2 and 3 presented information on CADE's preventive action of merger control for the energy and natural gas sectors. It is worth noting that, in addition to this, CADE also carries out its repressive function of punishing abuse of dominance. The Request for Cease and Desist Agreement no. 08700.003136/2019-12, signed with the incumbent, established the company should stop the probed practices and divest natural gas transport and distribution assets. In return, CADE stayed three of its probes:

- Administrative Proceeding no. 08700.002600/2014-30, launched to investigate abuse of dominance in discriminatory trade conditions (discounts) that favoured a state distributor of pipeline gas integrated to the Petrobras network;
- Administrative Enquiry no. 08700.007130/2015-82, launched from a complaint filed by the trade association for pipelined gas distribution companies (Abegás) against Petrobras; the investigation looked into practices relating to the natural gas market; and
- Administrative Enquiry no. 08700.003335/2018-31, initiated to probe into Petrobras' natural gas supply business in the energy sector.

34. In addition to CADE's preventive and repressive actions, two important laws have been enacted for the energy and natural gas sectors. First, Law 14300/2022 (the Solar Energy Law⁶), a landmark piece of legislation on distributed generation, i.e. a type of electrical generation characterised by the proximity between energy generators and consumers. Second, Law 14134/2021 (the New Gas Law⁷) forwarded the natural gas industry by promoting the de-verticalization of the industry's non-competitive links.

35. According to data from the 2022 yearbook of statistics on electric power⁸, Brazil produced 656.1 Terawatt hours (TWh) in 2021. The three principal energy sources in the country are hydroelectric power, natural gas, and wind power, with 55.3%, 13.2%, and 11% of the energy mix in Brazil.

36. Hence, CADE's performance and its dialogue with sectoral agencies (ANEEL and ANP), in addition to the recently enacted laws, have improved the business environment and legal certainty in the country by opening these sectors. Finally, it is important to note

⁶ http://www.planalto.gov.br/ccivil_03/_ato2019-2022/2022/lei/L14300.htm.

⁷ http://www.planalto.gov.br/ccivil_03/_ato2019-2022/2021/lei/L14134.htm.

⁸ <http://shinyepe.brazilsouth.cloudapp.azure.com:3838/anuario-livro>

the increased use of solar energy in 2021: an energy source that, regardless of representing only 2.6% of Brazil's energy mix, grew 55.6% over the last year.