JOINT COMMENTS OF THE AMERICAN BAR ASSOCIATION SECTION OF ANTITRUST LAW AND SECTION OF INTERNATIONAL LAW ON CADE'S RESOLUTION N. 49, DATED JULY 23, 2008

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The views stated in this submission are presented jointly on behalf of these Sections only. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and therefore may not be construed as representing the policy of the American Bar Association.

The Section of Antitrust Law and the Section of International Law (together, the "Sections") of the American Bar Association appreciate the opportunity to provide comments to the Administrative Council for Economic Defense (*Conselho Administrativo de Defesa Econômica* – "CADE") with respect to Resolution n. 49, which CADE approved on July 23, 2008 ("Resolution 49/2008").[1] Resolution 49/2008 modifies the system for the notification of agreements that are required to be submitted to CADE, the Economic Law Office of the Ministry of Justice ("SDE"), and the Secretariat for Economic Monitoring of the Ministry of Finance ("SEAE") (collectively, "the Brazilian Competition Authorities") for approval under Brazilian Competition Law[2].by providing a new notification form, instructions how to fill in this form, and definitions of certain terms used in the form. Resolution 49/2008 also provides that all notifications shall be filed electronically via the Internet with the use of a software program to be developed by the Secretary of SDE.

The membership of the Sections includes over 22,000 lawyers, economists and other professionals from over 45 countries, although most are based in the United States. The Sections hope and intend that these comments, drafted from the perspective of the Sections and grounded in the historical development of the U.S. antitrust law practice regarding similar issues, will assist CADE in its consideration and implementation of Resolution 49/2008. These comments also draw upon the experience of many members of the Sections with competition law in Europe and other jurisdictions, including Brazil and elsewhere in Latin America. The Sections' comments reflect their members'

[1] Resolution 49/2008 amends Attachment I of CADE's Resolution n. 15 of August 1998.
[2] Law n. 8844, dated June 11, 1994.

experience in this area, as well as their knowledge of the Recommended Practices for Merger Notification Procedures[3] adopted by the International Competition Network[4] ("ICN"), which approximately half of the ICN members with merger notification systems have implemented. The Sections hope these comments will assist Brazil in enhancing the effectiveness of its competition law regime.

Introduction

The Sections applaud CADE's efforts to streamline the merger notification and review process, and recognize that Brazilian Competition Authorities have implemented several measures in the last few years that have improved the merger review system and have brought it into closer conformity with international best practices. These measures include the institution of a "fast track" or "summary" procedure for the review of mergers that do not raise competitive concerns, a change in the interpretation of the revenue threshold for the notification of mergers, and the adoption of a joint merger review procedure by SDE and SEAE. The Organization for Economic Cooperation and Development ("OECD") has recognized these measures as significant improvements in the Brazilian merger review system.[5]

The implementation of an electronic notification system further simplifies the merger review process, as it will facilitate the provision and storage of information and documents. Resolution 49/2008 also provides definitions for several terms used in the form, which enhances the clarity and guidance for notifying parties that must prepare the notification form.

Nevertheless, the new system appears to lack flexibility in the submission of information and documents to the Brazilian Competition Authorities, which could reverse some of the progress made in improving the process. The new measures also require notifying parties to submit a significant amount of information that is not mandatory

[3] International Competition Network, Recommended Practices for Merger Notification Procedures, available at http://www.internationalcompetitionnetwork.org/media/archive0611/mnprecpractices.pdf.

[4] The International Competition Network seeks to provide competition authorities with a specialized yet informal venue for addressing practical competition concerns. The ICN is the only international body devoted exclusively to competition law enforcement. The ICN develops recommendations, or "best practices", by consensus, but it is left to the individual competition authorities to decide whether and how to implement the recommendations, either through unilateral, bilateral or multilateral arrangements, as appropriate.

[5] OECD, *Competition Law and Policy in Brazil: A Peer Review*, 2005, p. 101.

under the current system and does not seem to be relevant to the review of the majority of the transactions by the Brazilian Competition Authorities. By generally increasing the volume and complexity of the information requested, the new system may impose unnecessary burdens on notifying parties in many instances.

The Sections' comments focus on two themes: 1) the importance of maintaining flexibility in a merger notification regime, and 2) the need to balance a competition authority's legitimate interest in assessing the competitive effects of a transaction against keeping the burdens imposed upon parties throughout the merger notification process fair and manageable.

The Sections recognize that different jurisdictions employ various methods to avoid imposing undue burdens upon parties in preparing initial merger filings. The European Union uses a detailed form ("Form CO") that seeks extensive information about the markets in which merging firms operate, but administers it in a flexible manner. In many cases, Commission staff allow the parties to provide less information than Form CO literally requires. The United States antitrust authorities follow a different approach. Under the Hart-Scott-Rodino Act ("HSR"), they use a standard form that is relatively easy to complete that applies to all transactions. The HSR form requires fairly basic information, including a description of the transaction, the parties' most recent filings with the U.S. Securities and Exchange Commission, lists of certain subsidiaries and affiliates, and North American Industrial Classification System (NAICS) code data (data reported to the U.S. Census Bureau). The form also requires the submission of documents prepared by or for certain designated decision-makers that discuss the proposed transaction with respect to competition, competitors, the affected markets, market shares, and opportunities for growth. The agencies also have the authority to request extensive additional information if they consider it necessary.

The Sections suggest that the Brazilian Competition Authorities review the new merger notification system in light of the approaches followed by other jurisdictions, as well as best practices recommended by the OECD and by the ICN. International best practices guidelines and recommendations highlight the importance of affording flexibility in the content and form of initial notifications, as well as the need to limit the type and amount of mandatory information. The ICN's Recommended Practices for Merger Notification Procedures state that initial notification requirements should be limited to the information needed to 1) verify that the transaction exceeds jurisdictional

thresholds, 2) determine whether the transaction raises competitive issues meriting further investigation, and 3) take steps necessary to complete the review of transactions that do not merit further investigation. These measures are intended to avoid imposing unnecessary burdens on parties to transactions that do not present material competitive concerns.[6]

The ICN recognizes that no single set of initial notification requirements will be optimal for all transactions, because the duty to notify applies to transactions covering a wide range of possible competitive effects. Therefore, the ICN recommends that jurisdictions adopt mechanisms that allow flexibility in the content of the initial notification and additional information requirements during the initial phase of the review. The ICN further suggests that, whichever mechanisms are used to provide flexibility in the initial review, competition agencies should seek to limit the information sought from parties to transactions that do not appear to present material competitive concerns.

Importance of flexibility

The Sections suggest that the Brazilian Competition Authorities' merger notification regime could benefit from greater flexibility in a few respects, building upon the reforms that have been introduced in recent years. First, Article 3 of Resolution 49/2008 provides that the documents to the transaction shall be submitted within two days from the date of the electronic submission of the related notification; otherwise the transaction shall be considered untimely filed. Such a strict time frame imposes an undue burden at the time of the initial notification and is inconsistent with the current practice of the Brazilian Competition Authorities, which usually allows for the later submission of such documents whenever necessary and justified. For these reasons, the Sections respectfully suggest that CADE consider expressly recognizing that discretion exists to grant notifying parties additional time to gather and submit all the mandatory documents, especially in the context of international transactions, where the magnitude or logistics of compliance, including the need to translate lengthy documents, warrants an exception to the two-day rule.

[6] *See* items V, A and B of ICN's Recommended Practices For Merger Notification Procedures, 2002 (with 2003/2004's amendments). Likewise, the OECD suggests that merger laws should "avoid imposing unnecessary costs and burdens on merging parties and third parties." OECD, Recommendations & Best Practices – Recommendation of the Council on Merger Review, 2005.

Second, Item 3 of the Annex to Resolution 49/2008 provides that the electronic filing form cannot be submitted if all mandatory fields are not completed. Hard copy notifications submitted in this format also will be deemed incomplete. However, Item 8 provides that if such information is not available at the date of the submission, the parties shall indicate "information not available" in the respective blanks and provide an estimated date when such information shall be submitted. The Sections commend the flexibility introduced by Item 8, but note that the filing parties may be at risk of not completing their filing in a timely manner. CADE may wish to clarify which information parties may submit after the filing deadline without exposing themselves to the risk that their notification will be considered incomplete and rejected. In this sense, CADE may also determine the additional time that notifying parties shall have to complete the form.

Balancing the Authorities' Need for Information Against the Burden Imposed on the Parties: Amount and Level of Detail of Information Required

The new notification form requires that notifying parties provide a significant amount of information for any transaction notified to the Brazilian Competition Authorities. Both CADE's current practice and the new notification system permit parties to make a more abbreviated submission if a transaction qualifies as a "summary proceeding." Such transactions include:[7]

(1) the purchase of franchisees by their franchisors,

(2) cooperative joint ventures created to enter a new market,

(3) corporate restructuring within a single business group that entails no change in control,

(4) acquisition of a Brazilian firm by a foreign firm that has no (or insignificant) business interests in Brazil,

(5) acquisition of a foreign firm that has no (or insignificant) business interests in Brazil by a Brazilian firm,

[7] *See* Joint Ordinance by SDE and SEAE n. 01, dated February 18, 2003, as amended by Joint Ordinance by SDE and SEAE n. 8, dated February 2, 2004.

(6) replacement of an economic agent where the acquiring firm did not previously participate substantially in the target market or in vertically–related markets,

(7) acquisition of a firm with a market share small enough to be unquestionably irrelevant with respect to competition,

(8) any transaction in which only one of the parties or its economic group meets the revenue threshold, and

(9) transactions not covered by the previous categories that are considered simple enough by SDE and SEAE not to require an in depth analysis.

Parties to transactions that qualify for a fast-track procedure do not need to provide any item marked by an asterisk on the notification form (e.g., disclosure of production capacity, alternative suppliers of competitive products, entry conditions). While this procedure reduces the burden of filing in appropriate situations, the Sections believe the notification form includes several mandatory items that should rather be provisional, and required only if the Authorities have continuing questions after undertaking an initial assessment of the transaction. These items include:

(i) Indicating if any officers or board members of the parties to the transaction serve as board members or officers of any "vertically related" companies (Item I.5). This requirement seems overbroad, especially if included as part of an initial filing requirement.

(ii) Listing all commercial establishments of the Involved Parties in Brazil, including their federal tax registration number and complete address (Item I.6, chart 6).

(iii) Listing the associations, unions and other organizations of which the Involved Parties are members in Brazil (Item I.7, chart 7).

(iv) Providing certain information on the entities that hold a "controlling" interest in the Involved Parties, including detailed information regarding such entities' activities and products and services, as well as information regarding the activities and the main products or services of the controlling entities that

were interrupted in the last three calendar years (Items I.14-A and I.14-B, charts 14 and 15).

The Sections have previously commented that any control test should be limited to objective criteria.[8] In this case, CADE's definition of control does not appear to be based on any objective criteria (e.g., 50% or more equity interest). Instead, CADE defines control as "the power to guide, directly or indirectly, internally or externally, by de facto or de jure means, individually or jointly, the economic activities and their business policy."

(v) Supplying certain information on entities controlled by the entities holding a controlling interest in the Involved Parties, including detailed information regarding such entities' activities and products and services, as well as information regarding the activities and the main products or services of such entities that were interrupted in the last three calendar years (Items I.15-A and I.15-B, charts 17 and 18).

(vi) Providing information on pre-existing contractual relations between the Involved Parties (Item II.6, chart 23), as well as other contracts and ancillary agreements executed or under negotiation by the parties, including with third parties, such as non-competition, exclusivity agreements, cooperation, supply and others (Item II.7, chart 24).

(vii) Listing assets for each company involved in the transaction (Item II.8, chart 25). The Sections recommend that parties only be required to describe the general nature of any assets to be acquired where the transaction involves an acquisition of assets.

(viii) Listing all associations, unions, and all public or private entities that hold information on the involved sectors that may be useful to the analysis (Item II.12).

[8] *See, e.*g., Joint Submission of the American Bar Association's Sections of Antitrust Law, Intellectual Property Law and International Law on the Proposed Anti-Monopoly Law of the People's Republic of China, May 19, 2005, available at http://www.abanet.org/antitrust/at-comments/2005/05-05/commentsprc2005wapp.pdf.

(ix) Listing the documents provided in response to Item II.15, along with a brief description of the contents of each one (Item II.15, chart 30). The Sections recommend that since CADE will receive a copy of any documents listed on Chart 30, it is not necessary to provide a description of their contents.

(x) Estimating the market shares of the parties and their main competitors in terms of sales volume (Item IV-1; chart 41).

(xi) Providing detailed information on the main customers of the parties to the transaction (Item IV.7, chart 47).

(xii) Providing detailed information on the main suppliers of the parties to the transaction (Item IV.8, chart 48).

The Sections also recommend modifying the scope of several other mandatory items on the notification form in order to achieve a more appropriate balance between the Authorities' need for information and the burden imposed upon the filing parties at the initial stage:

(i) Information describing the scope of any veto rights or other forms of control held by shareholders with a greater than 5% interest in the company(ies) affected by the transaction. The Sections agree that the disclosure of shareholders' interests is relevant to any initial assessment of any potential competitive overlaps, but submit that it is not necessary for parties to provide descriptions of "any veto rights" or "other forms of control" as part of an preliminary notification (Item I.9-A, chart 9).

(ii) Description of the rationale for the transaction and post-transaction plans (Item II.13). We suggest that this request should be subsumed within (xi) below, which covers "documents related to the transaction". Another alternative would be to request that parties provide any press releases issued in connection with any public announcement of the transaction.

(iii) Copies of "all documents related to the transaction," including (a) acts and contracts related to the transaction; (b) in case of bid, the offer proposed; (c) letter of intent; (d) shareholders agreement and any other agreements that

include stipulations regarding the administration of the companies that are being created or whose shareholding structure or decision-making systems are being altered as a consequence of the transaction; and (d) information provided to the Board of Directors or to banks regarding the transaction (Item II.15). The Sections agree that such information may be relevant to any initial competitive assessment of a transaction, but suggest that CADE modify this information request in a few respects to make the burden associated with providing such materials more manageable. First, the Sections suggest that the parties not be required to produce "all documents relating to the transaction." Such a request is overbroad and may sweep in a large volume of materials that are not relevant to any competitive assessment of the transaction, such as tax planning materials. The Sections instead recommend that the parties be obligated to produce "all documents which constitute the agreement" between parties to the transaction. Second, the Sections recommend that subpart (v) of this request, which requires the submission of all documents provided to boards of directors or banks involved in the transaction, should be limited to documents relevant to the assessment of the transaction's likely competitive effects in Brazil (e.g., materials prepared for the purpose of evaluating the transaction with respect to competition, market shares, markets, sales growth, or product expansion in Brazil). Finally, the Sections recommend that the parties be obligated to submit only materials that were provided to their boards of directors; requiring submission of documents shared with banks could sweep in a significant volume of additional materials that are not relevant to the competitive assessment of the transaction (e.g., materials regarding tax or human resources issues that the parties often disclose as part of any deal negotiations).

(iv) Description of the relevant market(s) affected by the proposed transaction and the relevant turnover data for each (Items III.3, III.4, III.5). For purposes of an initial filing, the Sections submit that the parties should only be obligated to describe and provide relevant sales data regarding the products and services offered by each party to the transaction. Parties should be able to provide such information on the bases of their products as normally described by them in their day-to-day operations. This information should be sufficient for purposes of identifying any overlaps between the parties.

The Sections further recommend that the Brazilian Competition Authorities reconsider whether parties in every case should be required to submit responses to all of the items requested in non-summary proceedings. Even for a transaction that does not qualify for fast-track treatment, responses to certain mandatory information requests might not be material to the Authorities' competitive assessment and could be quite burdensome to prepare. Under the new notification system, this fact is of no consequence, and a notification will not be deemed complete unless the filing party has provided responses to every information request – even those that are not relevant to the authorities' assessment. Consistent with the recommended best practices of organizations such as the ICN and the actual practice of other competition authorities such as the EU, the Sections recommend that Brazil's notification mechanism provide for greater flexibility in its notification system, such as by giving the Brazilian Competition Authorities' the discretion to absolve parties of their obligation to provide responses whenever these are unduly burdensome to prepare and may not be relevant to the competitive assessment of the transaction.

Competition authorities in other jurisdictions address these "flexibility" and "information burden" issues in a number of different ways. In the United States, parties to a transaction are required to provide a relatively limited amount of information as part of a pre-merger filing, but the competition authorities have the authority to request additional information after submission of the initial filing. The EU notification form is more similar to Brazil's, but Commission staff members have the authority to waive parties' obligations to provide certain information as appropriate in particular cases. The Sections hope that the Brazilian Competition Authorities find these comments helpful as they consider how to effectively manage the burden imposed on all notifying parties, while obtaining necessary competitive information in order to identify those transactions that merit further investigation.

Conclusion

The Sections welcome the efforts made by the Brazilian Competition Authorities to modernize the merger review procedures and expedite the review and approval of transactions that do not raise competition issues. In providing these comments, the Sections have sought ways in which CADE's new electronic filing form might become more consistent with international best practices, at the same time leading to a more efficient use of the resources devoted to merger review in Brazil. The Sections hope that

CADE and SDE find these comments useful as they make progress in implementing the new electronic merger filing form.