

# Competition Law in Brazil

Gustavo Mathias Alves Pinto\*

## I. INTRODUCTION

With the stabilization of the Brazilian currency, and the privatization and opening up of the market that began in the 1990s, it became vital to develop an antitrust policy that the new market reality: companies needed clear and stable rules. In this context, *Law 8,884*, was promulgated on June 11, 1994 to establish antitrust regulation in Brazil.

The 12 years since *Law 8,884* came into force cannot be compared with the 116 years during which the United States has been governed by the *Sherman Act*.<sup>1</sup> Nonetheless, Brazilian law has become a point of reference in Latin American antitrust law, influencing the creation of similar laws in other countries. The recent establishment of antitrust laws in El Salvador and Honduras illustrates this trend.<sup>2</sup>

“Brazilian law has become a point of reference in Latin American antitrust law, influencing the creation of similar laws in other countries.”

The most obvious difference between the Brazilian and American antitrust systems is the length of the laws. In the United States the *Sherman Act*, based in the common law tradition, initially consolidated and systemized antitrust law in just two sections. However, in Brazil, the antitrust law is based on the civil law tradition and contains 93 articles. The Brazilian law is expansive because it establishes the entire structure of the Brazilian antitrust system. *Law 8,884* provides both preventative and restrictive measures available to the authorities including provisions for possible penalties, among other items. These points will each be discussed in the sections below.

## II. AGENCIES WITHIN THE SYSTEM

Within the executive branch, the agencies currently responsible for applying antitrust law are the Administrative Council of Economic Defense<sup>3</sup> (commonly called “ACED”) and the Secretariat of Economic Law<sup>4</sup> (commonly called “SEL”). In addition, the Finance Ministry’s Secretariat for Economic Monitoring<sup>5</sup> (commonly called “SFEM”) also participates in the antitrust system. The SFEM is responsible for preparing economic opinions regarding the cases analyzed. These agencies are normally referred to as the Brazilian Antitrust System.



### A. Secretariat of Economic Law

The Secretariat of Economic Law is an agency of the Justice Department. Its authority is established by *Law 8,078*<sup>6</sup> of September 11, 1990, and *Law 8,884*.<sup>7</sup> The purpose of the SEL is to formulate, implement, and supervise the policies governing the protection and defense of the economy within the antitrust and consumer realms. Within the SEL, the Department of Economic Protection and Defense is responsible for implementing procedural measures, in accordance with *Law 8,884*, that specifically address matters pertaining to the prevention and restraint of infractions against the economic order.

To this end, the SEL initiates and conducts administrative proceedings to determine anticompetitive behaviors and potentially refers cases to the ACED for a decision. It also issues opinions regarding the competition aspects of the monopolistic acts to be analyzed by the ACED.

When there is an accusation or formal complaint, the SEL, will open an administrative proceeding or a preliminary investigation if it believes it to be necessary. These are essentially investigative and discovery proceedings in which the SEL gathers documents, researches the alleged behavior and characterizes facts. It prepares its reports on this basis, suggesting to the ACED that the matter be closed or that there be a finding of an infraction. This report may also grant approval, approval with restrictions, prohibition of a merger or acquisition, or any other form of horizontal or vertical integration between companies.

As an agency that receives complaints and opens investigations *ex-officio*, the SEL functions similarly to the United States Department of Justice<sup>8</sup> and Federal Trade Commission,<sup>9</sup> since these agencies also investigate cases and later submit them to a decision-making body.

## B. Secretariat for Economic Monitoring

The Secretariat for Economic Monitoring (“SFEM”), which is an agency of the Finance Ministry, was created by *Provisional Measure 813* of January 1, 1995. Its responsibilities include issuing opinions about the economic aspects of business combinations and conducting administrative proceedings that investigate infractions against the economy.

The SFEM assists the SEL, by sending reports that focus mainly on the economic aspects of each case. With respect to mergers and acquisitions, the SFEM must, by law, issue an opinion; however, with respect to the analysis of anticompetitive conduct, it has the option of issuing opinions, a determination which is made, at its discretion, on a case-by-case basis.<sup>10</sup>

“The ACED’s purpose is to guide, monitor, and detect abuses of economic power. It has an oversight role in preventing those abuses. As an adjudicative body, ACED decides whether companies have violated antitrust laws.”

## C. Administrative Council of Economic Defense

The Administrative Council of Economic Defense (“ACED”) was created in 1962 and in 1994, became an independent agency tied to the Ministry of Justice. *Law 8,884* increased ACED’s powers, transforming it from a marginal actor into the main agency charged with promoting and maintaining an environment of free competition. Its responsibilities are enumerated in *Law 8,884* of June 11, 1994. The ACED’s purpose is to guide, monitor, and detect abuses of economic power. It has an oversight role in preventing those abuses. As an adjudicative body, ACED decides whether companies have violated antitrust laws. It also decides the legitimacy of corporate activities such as mergers, acquisitions, or any other forms of horizontal or vertical integration—that could restrict or eliminate competition. The ACED is formed by a plenary body comprised of a chairperson and six council members, all appointed by the president of Brazil. Appointments are two-year terms with the option of renewal and reappointment. They can only be removed under extraordinary circumstances outlined in Article 5. This gives the members of the ACED autonomy, which is fundamental in assuring that their actions are impartial and nonpolitical.

A fundamental difference between the Brazilian and American antitrust systems is the fact that the ACED is an administrative hearing body. While its decisions are final at the administrative level, they can be appealed to the courts and may be overturned. This system stands in stark contrast to the Ameri-

can one, in which the FTC and DOJ submit the cases directly to the courts.

## III. PREVENTATIVE ROLE OF THE ADMINISTRATIVE COUNCIL OF ECONOMIC DEFENSE



The preventative role of the ACED, also called the “control of structures,” consists of analyzing business combinations including mergers, acquisitions, association among businesses, and other types of corporate groupings. This role is promulgated in Article 54 *et seq.* of *Law 8,884*.

Simple business mergers are not anti-trust violations, but rather private legal transactions among companies. However, Article 54 of *Law 8,884* directs the ACED to analyze the effects of these transactions, especially in cases where such transactions might harm or restrict free competition. A proposed business combination must be submitted for review to the ACED when one of the participating companies holds 20% or more of the market, or when it has (alone or as part of the group to which belongs) sales equal to or greater than 400 million reais (R\$) a year. In other words, Brazilian antitrust law presumes a possibility of harm or restricting free competition in a situation when there is an economic concentration of more than 20% of the market for the goods or service in question, or when one of the companies has at least 400 million reais (R\$) of gross sales.<sup>11</sup>

If the transaction is considered anti-competitive, the ACED may impose obligations on the companies as a condition for approval. It can also require the complete or partial disposal of the assets involved (machinery, factories, trademarks, etc.).

The proposed business combination must be submitted in advance or within 15 business days after the transaction is realized. Resolution 15 of the ACED<sup>12</sup> defines the time of realization of the transaction as being “from the first binding document signed by the requesting parties, except when the change in the competitive relationship among the requesting parties or at least one of them and a third-party occurs at a different time.” Late presentation of a business combination subjects the parties involved to a monetary fine imposed by the ACED.

This element constitutes a significant difference between the American and Brazilian systems for controlling business

**“In the United States, companies that wish to form a business combination must obtain authorization from the antitrust authorities *before* carrying out the transaction; in the Brazilian system, companies can carry out the transaction prior to approval from the antitrust authorities.”**

combinations. In the United States, companies that wish to form a business combination must obtain authorization from the antitrust authorities *before* carrying out the transaction; in the Brazilian system, companies can carry out the transaction prior to approval from the antitrust authorities.<sup>13</sup> This leads to a series of practical difficulties, such as signing agreements that provide that the transaction can be reversed so long as the antitrust authority has not issued a decision, or even a decree that the transaction must be undone. This was the outcome of the recent multimillion dollar transaction involving the Swiss multinational Nestlé and the Brazilian company Garoto.<sup>14</sup>

Once notified of the business combination, the SFEM has 30 days to issue its technical opinion, after which the SEL has 30 additional days to issue its opinion. The proceeding is then sent to the ACED, which must decide whether or not to approve the transaction within 60 days. However, those deadlines may be suspended for requests of information, which can lengthen the fact-finding period. In an effort to decrease the amount of time allowed for fact-finding and deciding antitrust cases, in February 2002, the Brazilian antitrust agencies established a simplified summary procedure for addressing antitrust claims. This summary procedure sought to reduce the time for approving cases that do not raise antitrust concerns by simplifying the proceedings and allocating more time to complex cases.

Notwithstanding the procedural differences between the systems, a major similarity between the Brazilian and American structures is the definition of the “relevant market.” In the United States, in accordance with the *Horizontal Merger Guidelines of the FTC/DOJ*, from 1992, the “relevant market” for the antitrust analysis is defined as,

“a product or group of products and a geographic area in which it is produced or sold such that a hypothetical profit-maximizing firm, not subject to price regulation, that was the only present and future producer or seller of those products in that area likely would impose at least a ‘small but significant and nontransitory’ increase in price, assuming the terms of sale of all other products are held constant. . . .”<sup>15</sup>

Under Brazilian law, all references to dominant positions (market power) are made in relation to a relevant market, how-

ever, the statute did not define this. For a long time, the definition cited above from the American system was used. The concept was finally institutionalized in *Resolution 15* of the ACED. *Resolution 15* states: “the relevant market of the product includes all of the products/services considered to be possible substitutes by the consumer, due to their characteristics, price and use.”<sup>16</sup>

In its geographic dimension, the relevant market “includes the area in which the companies offer and procure products/services in competitive conditions sufficiently homogenous in terms of prices, consumer preferences, characteristics of the products/services.”<sup>17</sup> Companies that can begin supplying if there is a small but substantial increase in prices are considered to be part of the market; however, the “obstacles to the entry of products offered by companies outside of this area” must be identified.<sup>18</sup> This illustrates that a great deal of similarity exists between the concepts used in the two systems.<sup>19</sup>



#### **IV. RESTRAINING ROLE OF THE ADMINISTRATIVE COUNCIL OF ECONOMIC DEFENSE**

The restraining role, also called “control of conduct” consists of the analysis of anticompetitive conduct. This anticompetitive conduct is described in Article 20 *et seq.* of *Law 8,884*. In its restraining role, the ACED restrains practices that are considered violations, such as cartels, tie-in sales, and predatory pricing, among others. It is important to note that Brazilian law takes the position that the existence of concentrated market structures (monopolies, oligopolies), are not illegal from an antitrust perspective. Instead, in these structures there is a greater probability of exercising market power and, therefore, a greater potential threat of anticompetitive conducts. For this reason, markets must be monitored more closely by the agencies responsible for preserving free competition. Many of the situations occur in regulated markets, where questions of national security, the environment, and regional integration, among others, are present to check anti-competitive influences. Other concentrated mar-

ket structures, however, occur in unregulated markets, which increases the importance of the antitrust agencies' responsibility.

Brazilian law uses the term "dominant position" to denote substantially the same concept as market power. Dominant position is defined as the control of a fundamental portion of a relevant market, which is presumed to exist when a company has 20% or more market share.

The dominant position can also be exercised jointly, in which case the law provides that the market share to be considered will be calculated in relation to the group of companies involved in a particular case.<sup>20</sup> Whenever a company uses its economic power in an abusive manner, or otherwise, uses its right to economic freedom with a view to constraining the rights of others in order to create or increase its dominant position in the market, such conduct is anti-competitive. Among the main penalties provided for in *Law 8,884* are fines of from 1% to 30% of the company's sales; a fine against the administrator or responsible party of up to 50% of the fine applied to the company; a prohibition against contracting with official financial institutions; and a prohibition against participating in open federal, state, and municipal government tenders.<sup>21</sup>

Finally, the last notable difference between the two systems is the application of the *per se* rule and the rule of reason. Since the end of the last century, the American judiciary has evaluated certain company practices. Defenders of this judicial intervention argued that the restrictions against competition were "reasonable" and, in some cases, even constituted a way of guaranteeing competition itself. The *Sherman Act* has prohibited practices that restrain trade since 1890, and throughout history an intense debate has taken place regarding the meaning proscribed to such restrictions. On one side, there were those who held that it is the judiciary's responsibility to analyze, case by case, the effects of the practices so as to condemn them only in cases in which they are harmful or unreasonable. On the other side, it was argued that any restraint on trade should be prohibited *per se* (whether reasonable or not) in the name of legal certainty. The latter opinion initially prevailed. In *United States v. Trans-Missouri Freight Ass'n*, the United States Supreme Court held that an unlawful price fixing agreement between



competitors existed, despite the defense's argument that the prices established were reasonable.<sup>22</sup> In his opinion, Justice Peckham noted: "If only that kind of contract which is in unreasonable restraint of trade be within the meaning of the statute, and declared therein to be illegal, it is at once apparent that the subject of what is a reasonable rate is attended with great uncertainty."<sup>23</sup>

In cases decided at the beginning of the century, the American judiciary began to allow certain defense arguments based on the reasonableness of the restraint effects—a criteria of analysis that became known as the "rule of reason." However, the belief that certain categories of practices would be presumptively illegal, which is to say, should be considered *per se* illicit (for example, horizontal price fixing agreements are generally considered to be *per se* illegal) continued. Market behavior analyzed under the *per se* rule did not need to undergo a more detailed analysis because

**"Whenever a company uses its economic power in an abusive manner, or otherwise, uses its right to economic freedom with a view to constraining the rights of others in order to create or increase its dominant position in the market, such conduct is anti-competitive."**

the cost of this proceeding would exceed its benefits. Therefore, a *per se* analysis allows a faster case resolution and can serve as a guide for avoiding acts often classified as restraints on trade.

The Brazilian antitrust system is compatible with the reasonableness approach, both in judging conduct and in the evaluation of business combinations. In relation to

conduct, the law defines illegality by its effects: any acts, regardless of form, will be considered violations if they actually or potentially produce net effects contrary to competition. Thus, one can say that the illicitness of conduct in Brazilian antitrust law, identified by the notion of abuse of a dominant position, is characterized: a) by the existence of effects that are restraints on trade, and b) by the absence of positive effects that more than offset the restraining effects.<sup>24</sup>

With regard to business combinations, the law expressly provides that the approval of acts that are potentially prejudicial to competition or that result in the domination of relevant markets are conditioned on the analysis of the efficiencies generated, which must outweigh the anticompetitive potential in order to be approved.

## V. CONCLUSION

This article provides a brief overview of antitrust law in Brazil, comparing it with American law. In this regard, one can observe the structure of the Brazilian antitrust law system and the functions of each agency, giving special attention to the ACED, which has the adjudicative role in the system.

Although American and Brazilian laws are based on different systems—common law and civil law, respectively—there are similarities between the two antitrust law systems. Both have agencies responsible for investigating cases and then submitting them to a decision-making body. The principal difference is that, while in the United States the decision-making body is the judiciary, in Brazil the ACED is an administrative hearing board, whose decisions are reviewable by the courts.

Regarding the control of structures, besides both working with the same premise of activity (structure-conduct-performance), Brazilian law works with a practically analogous definition of the relevant market. The difference in this case is at the

moment of control. In the United States is done *a priori*, while in Brazil it is *a posteriori*.

The control of conduct also has similarities. Brazilian law was influenced by the Chicago School in this regard, requiring the existence of a dominant position (market power) be proved in conduct, and also that the viability of the exercise of this market power be demonstrated. The main difference between the countries' controls of conduct, is the fact that the Brazilian system does not allow for the *per se* interpretation, even in hardcore cartel cases, whereas the American system does allow for the *per se* interpretation.

Finally, it is worth emphasizing that one of the main differences between the two systems, the *a priori* or *a posteriori* control of business combinations, may end soon. Legislative Bill 5,877 of 2005, currently under review by the Brazilian Congress, would establish an *a priori* control of structures. If passed into law, the Brazilian system will become even closer to the American one. **BLB**

## ENDNOTES: *Gustavo Mathias Alves Pinto*

\* Mr. Pinto has a double degree from the Law School of the University of São Paulo and Business School of the Getulio Vargas Foundation. He is the former Chief of Division of the Secretariat of Economic Law of the Department of Justice. Mr. Pinto is currently obtaining his LLM at Harvard Law School.

<sup>1</sup> 15 U.S.C. § 1-7.

<sup>2</sup> Brazilian antitrust authorities were invited to help directly in drafting El Salvador's antitrust law.

<sup>3</sup> Hereinafter ACED.

<sup>4</sup> Hereinafter SEL.

<sup>5</sup> Hereinafter SFEM.

<sup>6</sup> Law No. 8.078, September, 11, 1990, Official Gazette of the Executive, September, 12, 1990 (Brazil), available at <http://www.planalto.gov.br/ccivil/leis/L8078.htm>.

<sup>7</sup> Law No. 8.884, June 11, 1994, Official Gazette of the Executive, June 13, 1994, (Brazil) available at <http://www.cade.gov.br/apresentacao/cade.asp>.

<sup>8</sup> Hereinafter DOJ.

<sup>9</sup> Hereinafter FTC.

<sup>10</sup> Law No. 8,884, Art. 35-A, §1°.

<sup>11</sup> Law No. 8,884, Art. 54, §3°.

<sup>12</sup> Resolution No. 15, August 19, 1998, Official Gazette of the Executive, August 28, 1998 (Brazil) (Resolution 15 describes the formalities and procedures of the ACED in regard to the matters dealt with in Article 54 of Law 8,884 of June 11, 1994), available at <http://www.cade.gov.br/internacional/Resol-15-1998.pdf>.

<sup>13</sup> The Legislative Bill proposal No. 5,877/2005 was sent to Congress in 2005. This bill proposes the prior analysis of mergers and acquisitions and improvements to the notification criteria. It was proposed that the Brazilian antitrust agencies issue their decision regarding mergers and acquisitions that meet the criteria for notification before their consummation. In this way, the parties involved have an incentive to cooperate as much as possible in making the analysis proceed quickly. At the same time, the options for solving competition problems that might come up are greatly expanded. The Legislative Bill proposal is available at [http://www2.camara.gov.br/proposicoes/loadFrame.html?link=http://www.camara.gov.br/internet/sileg/prop\\_lista.asp?fMode=1&btnPesquisar=OK&Ano=2005&Numero=5877&sigla=PL](http://www2.camara.gov.br/proposicoes/loadFrame.html?link=http://www.camara.gov.br/internet/sileg/prop_lista.asp?fMode=1&btnPesquisar=OK&Ano=2005&Numero=5877&sigla=PL).

<sup>14</sup> Antitrust case No. 08012.001697/2002-89, Council Member Thompson Almeida Andrade, (Brazil) available at <http://www.cade.gov.br/jurisprudencia/arquivosPDF/parecer-AC-2002-08012-001697-nestel-garoto-dallari.pdf>.

<sup>15</sup> 1992 Horizontal Merger Guidelines, U.S. Department of Justice and Federal Trade Commission, available at <http://www.ftc.gov/bc/docs/horizmer.htm>.

<sup>16</sup> Resolution No. 15, August 19, 1998, Official Gazette of the Executive, August 28, 1998 (Brazil) (Resolution 15 describes the formalities and procedures of the ACED in regard to the matters dealt with in Article 54 of Law 8,884 of June 11, 1994), available at <http://www.cade.gov.br/internacional/Resol-15-1998.pdf>.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> The National Oil Agency in Brazil expressly states in one of its antitrust guidelines that the American definition of relevant market has been amply incorporated in the Brazilian Legislation and Jurisprudence, available at [http://www.anp.gov.br/doc/gas/analise\\_antitruste.pdf](http://www.anp.gov.br/doc/gas/analise_antitruste.pdf).

<sup>20</sup> This parameter, however, generates only a presumption and is not absolute (*iuris tantum*). Nothing stops it from being argued and proved that, despite having a market share greater than 20%, other variables make it so that the company cannot exercise market power (and, therefore, not have a dominant position). In this regard, other factors will be taken into consideration, such as the level of barriers to entry in the market in question. Therefore, the legal effect of the presumption is to invert the burden of proof—the interested party must prove the opposite of the legal presumption. See Law No. 8,884, Art. 54, §1° *et seq.*

<sup>21</sup> One of the largest fines imposed by the ACED was 24 million reais (5% of the gross sales of White Martins do Brasil Ltda.), which was imposed in the case of Messer Griseim do Brasil Ltda. vs. White Martins do Brasil Ltda.; Administrative Procedure number 08000.022579/1997-05; Reporting council member: Celso Fernandes Campilongo. Decision available at the website: <http://www.cade.gov.br/jurisprudencia/autor.asp?ca=11> (last accessed on 10/15/2007).

<sup>22</sup> See *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 331 (1897).

<sup>23</sup> *Id.*

<sup>24</sup> Although there has been no *per se* ruling in Brazilian antitrust law to the present, in one hard core cartel case the theory was at least discussed, with one member of the ACED supporting a *per se* ruling. The case was Secretariat of Economic Law ("ex officio") v. Sindicato da Indústria de Mineração de Pedra Britada do Estado de São Paulo; Basalto Pedreira e Pavimentação Ltda.; Constran S/A - Construção e Comércio; Embu S.A. Engenharia e Comércio; Geocal Mineração Ltda; Holcim S.A.; Itapiseria Mineração Ltda; Iudice Mineração Ltda; Lafarge Brasil S.A.; Indústria e Comércio de Extração de Areia Khouri Ltda; Mendes Júnior Engenharia S/A; Mineradora Pedrix Ltda; Panorama Industrial de Granitos S.A; Paupedra-Pedreiras; Pavimentações e Construções Ltda; Pedreira Cachoeira S/A; Pedreira Dutra Ltda; Pedreira Mariutti Ltda; Pedreira Santa Isabel Ltda; Pedreiras São Matheus-Lageado S.A.; Pedreira Sargon Ltda; Reago Indústria e Comércio S.A.; Sarpav Mineradora Ltda./Minerpav Mineradora; Administrative Proceeding number 08012.002127/2002-14; Reporting council member: Luiz Carlos Thadeu Delorme Prado. Decision available on the website: <http://www.cade.gov.br/jurisprudencia/autor.asp?ca=1> (last accessed on 10/15/2007).