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Ex-Post Assessment of Merger Remedies – Contribution from Brazil

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Ex-Post Assessment of Merger Remedies

- Contribution from Brazil¹ -

1. Merger Remedies

1. Antitrust remedies are applied as conditions to eliminate the potentially harmful effects of a merger or acquisition (M&A). Remedies aim to prevent a transaction from resulting in diminishing competition in a significant part of the relevant market, in increasing the likelihood of coordination among competitors, in creating or strengthening a dominant position, or even in controlling a relevant market of goods or services, as per articles 36 and 88, Paragraph 1 of Law 12529/2011. Thus, if the transaction is not fully cleared, imposing remedies is necessary for its clearance. However, Article 88 also provides that if applying remedies to M&A that harm competition is unfeasible, the Tribunal of CADE must decide to block the said transactions.

2. CADE is experienced in adopting different types of remedies, either unilaterally imposed or negotiated with the firms involved. Therefore, it reveals some aspects likely to hinder the procedures related to imposed conditions and to result in competition effects that are below expectations.

3. In 2018, the Brazilian authority published the Guide to Antitrust Remedies² due to the relevance of the topic for the most appropriate decisions within competition policy. It highlights the principles that should serve as guidelines for determining, applying and monitoring antitrust remedies. This guide, as well as the other CADE's Guidelines³, is aimed at ensuring the transparency of the agency's actions and decisions in recent years. It is a reference to its civil servants, petitioners, interested third parties, and to society.

4. Moreover, the Brazilian antitrust authority has made efforts to monitor the effectiveness of its decisions, especially through *ex post* assessments of merger remedies, which may also include transactions that the Tribunal conditionally cleared.

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² Available at: <https://cdn.cade.gov.br/Portal/centrais-de-conteudo/publicacoes/guias-do-cade/guia-remedios.pdf>

³ Guide for Horizontal Merger Review (2016), Guidelines: Cease and Desist Agreement for cartel cases (2016) and Guide for Cartel Penalties (2023). Access: <https://www.gov.br/cade/pt-br/centrais-de-conteudo/publicacoes-institucionais/guias-do-cade>

2. *Ex post* Assessment of Merger Remedies

2.1. *Ex post* assessment of merger: the Sadia-Perdigão Case⁴

5. CADE's first publication on competition effects deriving from a merger concerned the Sadia-Perdigão case. The transaction resulted in the creation of the BRF Brasil Foods, in the Brazilian market of frozen food. The methodology of the study is the "differences in differences" (Diff in Diff, or DiD), which is based on a monthly fed database that comprises prices, quantity sold, and the package weight of 3 products: pepperoni pizza, bolognese lasagne, and four-cheese lasagne.

6. From January 2008 to December 2013, there was a monthly data collection about 3 products which raised concerns during the analysis of the operations. Considering the average price of the food parcel as the control group, the results show a price reduction of 12.19% after CADE's clearance and another reduction of, approximately, 3.92% after the entrance of Seara. As for the lasagne, there was a price reduction of approximately 3.92% for both products after the clearance by the antitrust authority and another of 2.96% after the entrance of the competing company, Seara. The study also considered the weighted average price of the food parcel as another alternative to the control group. The post-merger effect in the pepperoni pizza prices remains with a reduction of 12.19% and there were greater impacts on the prices of the lasagne, that is, a reduction of 4.88% compared to the estimation with the average price of the food parcel.

7. Hence, there was a price reduction of the products analysed due to the consolidation and the entrance of Seara into the market. Although it was not the main goal of the study, the analysis of the Sadia-Perdigão case can be considered an *ex-post* assessment of merger remedies, as the transaction was cleared subject to remedies such as prohibiting Perdigão from trading pizzas and lasagne on their own behalf for a five-year term. Thus, the applied remedy may have resulted in the price reduction of the products examined until December 2013.

2.2. *Ex post* Mergers Evaluation: Evidence from the Brazilian Airline Industry⁵

8. The second *ex post* merger evaluation conducted by CADE is dedicated to the effects of two mergers cleared by the authority: (i) GOL and Webjet; and (ii) Azul and Trip, on the average airfare of domestic routes. The study estimates difference in differences (DID) models considering fare prices and seats sold, from July 2010 to December 2019, as dependent variables. The results indicate a reduction of about 8% in GOL's fare on routes in which GOL and Webjet operated before the merger (overlap routes) and an increase of approximately 38% in the number of seats sold by GOL in those same routes after the merger. Conversely, in the merger case of Azul and Trip, there is not a statistically

⁴ SEVERINO, Lilian S. M.; RESENDE, Guilherme M.; BISPO, Felipe C. (2019). *Ex post* assessment of merger: the Sadia-Perdigão case CADE. Working paper no. 003/2019. Available at: <https://cdn.cade.gov.br/Portal/centrais-de-conteudo/publicacoes/estudos-economicos/documentos-de-trabalho/2019/documento-de-trabalho-n03-2019-avaliacao-ex-post-de-ato-de-concentracao-o-caso-sadia-perdigao.pdf>

⁵ SEVERINO, Lilian S. M.; RESENDE, Guilherme M.; LIMA, Ricardo C. A. (2021). *Ex post* mergers evaluation: Evidence from the Brazilian airline industry. CADE. Working Paper no. 003/2021. Available at: https://cdn.cade.gov.br/Portal/centrais-de-conteudo/publicacoes/estudos-economicos/documentos-de-trabalho/2021/Documento-de-Trabalho_Ex-post-mergers-evaluation-Evidence-from-the-Brazilian-airline-industry-versao-final.pdf

significant effect on the fare, but an increase of nearly 27% in the number of seats sold by Azul on overlap routes after the transaction.

9. These results present relevant implications. First, there were no anticompetitive effects resulting from these mergers in the Brazilian airline sector, which is aligned with international studies in the field that presented similar results. For example, the ones conducted by Carlton et al. (2019)⁶ during the analysis of three legacy mergers in the United States (namely Delta-Northwest, The United-Continental, and The American-US Airways). Secondly, these two mergers were cleared by the Brazilian authority subject to conditions related to the efficiency of the Santos Dumont airport, in the city of Rio de Janeiro. Thus, it is possible to state that Cade achieved its purpose of protecting competition for the benefit of consumers through price reductions and the increase of seats sold.

2.3. *Ex post*-Merger Evaluation: The BVMF-CETIP⁷ Case

10. The third study assessed the competitive effects of a merger cleared on 22 March 2017 among BM&FBOVESPA S.A. Bolsa de Valores, Mercadorias e Futuros (BVMF) and CETIP S.A. Mercados Organizados, which originated the B3 S.A. Brasil, Bolsa, Balcão¹. The transaction involves the administrative sector of the over-the-counter market (OTC), stock market, commodity exchange, and futures markets.

11. Due to concerns related to potential competition, the clearance was subject to the signing of a cease-and-desist agreement (ACC) to promote the access of eventual competitors to post negotiation services, especially the central depository ones, considered as an essential facility.

12. There was the development of a quarterly database to study the *ex-post* assessments of the stock exchange import tariffs charged by Brazilian floor brokers, between 2012 and 2021, affected by the decision of CADE. Moreover, the database included a group for comparison, which comprised stock exchanges worldwide.

13. The results obtained through the diff-in-diff methodology show decreases in the negotiation average tariffs practised by B3, the Brazilian stock and commodities exchange, after the abovementioned agreement. Moreover, robustness testing showed similar results, and, for some estimations, the effects of the merger were statistically equal to zero. Thus, there were no adverse competitive effects (related to the increase in the negotiation of tariffs) because of the merger.

3. Other Studies on Antitrust Remedies

14. There are also studies dedicated to finding out the extent to which CADE adheres to remedies in accordance with its Guide to Antitrust Remedies (2018). They include attempts to identify impediments to fully comply with these remedies. In this case, it does

⁶ CARLTON, Dennis et al. (2019). Are legacy airline mergers pro- or anti-competitive? Evidence from recent U.S. airline mergers. *International Journal of Industrial Organization*, v. 62, p. 58–95, 2019. Available at: <https://doi.org/10.1016/j.ijindorg.2017.12.002>

⁷ PORDEUS, Lucas; RESENDE, Guilherme M. (2022). *Ex post* merger evaluation: The BVMF-CETIP case. CADE. Working Paper no. 005/2022. Available at: https://cdn.cade.gov.br/Portal/centrais-de-conteudo/publicacoes/estudos-economicos/documentos-de-trabalho/2022/DOC_005-2022_Avaliacao-ex-post-de-AC_O-caso-BVMF-CETIP_vf.pdf

not refer to assessing the effects, but the processes of determining and applying these remedies.

15. The first study “*CADE's antitrust remedies: A case law review*”⁸ analysed mergers and acquisitions conditionally cleared by CADE between 2014 and 2019 addressing the following aspects: (i) the type of remedies; (ii) competitive harm resulting from a horizontal overlap or vertical integration, portfolio power, among others; (iii) trustees; (iv) up-front buyer remedies; (v) market tests; and (vi) deadlines. Hence, there were improvements regarding the appliance of antitrust remedies at CADE in the last few years. Although the Guide to Antitrust Remedies was only launched in 2018, CADE had already adopted most of the recommendations, mainly on structural remedies, up-front buyers, trustees, and market tests. On the other hand, some of them were under-utilised, for example, market tests and structural remedies. Finally, there was an increased percentage regarding the application of behavioural remedies that require caution in accordance with the Guide.

16. The second study “*Monitoring antitrust remedies: a review of CADES's case law*”⁹ assessed the developments in the monitoring activities of CADE related to antitrust remedies between 2016 and 2021. The final considerations highlight that the evolution of patterns in merger control agreements (ACC), the antitrust remedies that require simplified monitoring systems, and the possibility to use trustees, represent notable progress in the effectiveness of antitrust remedies.

17. However, there were failures in identifying some remedies like the absence of a monitoring plan by the trustee that would specify, for example, which information should be available and who would oversee it. This failure in defining remedies may weaken the monitoring activity. Finally, the study highlights the relevance of *ex post* assessment of merger remedies as feedback tools for the antitrust authority, which may influence the definition of remedies in future merger reviews.

4. Final Considerations

18. CADE has not yet established a periodical *ex post* antitrust remedies evaluation. However, the DEE/CADE has developed initiatives to foster the production of these works by its members, either exclusively, or through partnerships with external researchers.

19. The DEE team is expected to develop studies on competition issues in parallel to consulting activities in analysing merger and acquisition processes or investigating anticompetitive practices. In this context, the department developed studies on applying and monitoring antitrust remedies *vis-à-vis* the recommendations of the Guide for Antitrust Remedies of CADE.

⁸ ATTAYDE, Maria C. de S. L.; SAKOWSKI, Patricia A. M. (2020). CADE's antitrust remedies: a case law review. CADE. Working Paper no. 002/2020. Available at: <https://cdn.cade.gov.br/Portal/centrais-de-conteudo/publicacoes/estudos-economicos/documentos-de-trabalho/2020/documento-de-trabalho-n02-2020-remedios-antitruste-no-cade-uma-analise-da-jurisprudencia.pdf>

⁹ ATTAYDE, Maria C. de S. L. (2023). Monitoring antitrust remedies: a review of CADES's case law CADE. Working Paper no. 003/2023. Available at: https://cdn.cade.gov.br/Portal/centrais-de-conteudo/publicacoes/estudos-economicos/documentos-de-trabalho/2023/DT_003-Monitoramento-remedios-antitruste.pdf

20. Data availability is a determining factor in the definition of the case analysed. It results in a preference for merger reviews in regulated markets in which regulatory agencies provide public data.

21. All of them are available as working papers at CADE's website and disseminated by its communications unit. Moreover, they may be the subject of seminars promoted by the Department of Economic Studies for both the internal and the public with the participation of professionals who work in competition, researchers, and students.

22. Thus, CADE understands the relevance of studies on ex post assessment of merger remedies involving its whole team in either research or wide dissemination promotion.

23. Still, there are some challenges to disseminating the competition debate and culture through sharing these studies with the internal and external public to provide them with feedback to determine and monitor antitrust remedies in future cases.

24. In this sense, the Brazilian antitrust authority aims to establish a programme encouraging regular production of more studies by internal and external researchers.

25. Increases in the developments of studies of this nature result in the need to surpass difficulties in gathering enough data for the conduction of quantitative research, widening the scope of the markets in analysis beyond regulated markets in which there is greater data availability. It is also advisable to diversify the focus of the assessments to beyond free prices and quantities, which also may be done through qualitative research on the effects of remedies in M&A.

26. Finally, the main challenge is the need to foster knowledge to a wider public, so that it feels encouraged to develop new studies on the promotion of a competition culture. In this context, although these studies did not aim at motivating reviews of decisions already made by the antitrust authority in the analysed cases, they may serve this purpose sometimes. They intend to provide feedback on CADE's performance, increase transparency and develop a new methodology for examining competition concerns.