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**Cross-border Mergers – Contribution from Brazil**

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Please contact Ms Aura Garcia Pabon ([Aura.GARCIAPABON@oecd.org](mailto:Aura.GARCIAPABON@oecd.org)) and Mr Connor Hogg ([Connor.HOGG@oecd.org](mailto:Connor.HOGG@oecd.org)) if you have questions about this document.

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## *Cross-border Mergers*

### *- Contribution from Brazil<sup>1</sup> -*

#### 1. Introduction

1. Cross-border mergers represent a challenge to the Brazilian competition authority, since it must incorporate the territorial principle, in which the antitrust authority must enforce its jurisdiction inside its territory<sup>2</sup>, in the adjudication of cases regarding transactions among global companies whose location and performance go beyond Brazilian borders.
2. In addition to the necessary respect to the sovereignty of other nations, the antitrust authority must observe the effects of the transaction on the Brazilian market when deciding on a cross-border merger, without prejudice to international conventions and treaties. For instance, the Brazilian Competition Law<sup>3</sup> applies to practices committed or that can have effects in the Brazilian territory; however, it does not mention effects in other jurisdictions.
3. At the same time, it is impossible to ignore that cross-border mergers have cross-border effects, affecting economies of countries in which the companies involved have no installations. Due to this situation, competition authorities must adopt specific measures, related to the case at hand. Therefore, there is a need for international cooperation, either to share essential information to assess these cases, or to establish antitrust remedies to address the competition issues identified.
4. Even though the international cooperation is extremely important in cross-border mergers, it also faces big challenges. The competitive impact of these transactions tends to vary from country to country, as it is more relevant to some countries than others. Hence, the need for remedies and cooperation may also vary, since they demand a lot of time and resources, which is limited. In addition, the competence of competition authorities is different from a country to the other. At last, the sovereignty of the nation-states must always be respected.

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<sup>1</sup> This paper was written by Igor Rocha, Coordinator General of Antitrust Analysis, and Felipe Mundim, Assistant Superintendent of the Office of the Superintendent General of CADE. The English version is the work of in-house translators of the International Unit of CADE: it was translated into English by Karine Neumann Gonçalves and proofread by Izabel Cristina Medina Brum and Nathália Oliveira Silva.

<sup>2</sup> OCDE (2017). Working Party No. 3 on Co-operation and Enforcement Roundtable on the Extraterritorial Reach of Competition Remedies. Available at: <https://www.oecd-ilibrary.org/docserver/7fb40c66-en.pdf?expires=1726772122&id=id&accname=guest&checksum=E76EF7A82FAA4B7D7826EB51D12BABEF>. Retrieved on 12 October 2024.

<sup>3</sup> BRAZIL. Law 12529 of 30 November 2011. *Structures the Brazilian System of Competition Defence; establishes the prevention and suppression of antitrust violations; alters the Law 8137 of 27 December 1990, the Decree 3689 of 03 October 1941 - Code of Criminal Procedure, and Law 7347 of 24 July 1985; revokes provisions of Law 8884 of 11 June 1994, and Law 9781 of 19 January 1999; and sets forth other provisions.* Available at: [https://www.planalto.gov.br/ccivil\\_03/\\_ato2011-2014/2011/lei/112529.htm](https://www.planalto.gov.br/ccivil_03/_ato2011-2014/2011/lei/112529.htm). Retrieved on 12 October 2024.

5. Considering this complex scenario, which comprises objectives that are difficult to harmonise, the present article aims to present some perceptions based on the Brazilian experience in the analyses and decisions of cross-border mergers. Some of the difficulties experienced will be emphasised, but also the benefits obtained from the cooperation with other competition authorities.

6. Besides the introduction, this article also has a section on the process of notification and review of cross-border mergers in Brazil; international cooperation and establishment of remedies; and challenges and final remarks.

## 2. Notification and review of cross-border mergers in Brazil

7. The analysis of cross-border mergers comprises the need to harmonise the peculiarities of these cases with the Brazilian antitrust legislation. While the analysis of these transactions demands a special attention and measures that are not necessary for strictly domestic cases, the decision of the antitrust authority will mainly depend on possible impacts of the transaction related to the welfare of the inhabitants of the Brazilian territory. In addition, the Brazilian Law does not allow to take into consideration in the review the effects of the transaction in the welfare of other nations for the approval or dismissal of the merger<sup>4</sup>.

8. Thus, international cooperation has mostly an informative role in the Brazilian competition policy. Often, the Administrative Council for Economic Defense (CADE) tries to obtain information directly or indirectly on the course of the transaction in other jurisdictions. The parties involved in the merger must inform the list of countries where the transaction must be notified to their respective competition authority<sup>5</sup>. This information helps CADE to promptly contact other authorities to know more about their concerns, share knowledge, and eventually align the adoption of antitrust remedies that are useful for both parties.

9. Due to international cooperation, it is possible to coordinate the progress of the reviews with other authorities, especially if they are establishing remedies that may have an impact in Brazil and in CADE's final decision. On the other hand, the time limit for reviews of any merger is subject to what is established in the Brazilian Competition Law<sup>6</sup>; thus, international cooperation does not allow a time extension, and the time limit should not be interrupted due to cooperation with other antitrust authorities.

10. In general, CADE considers the notification to other jurisdictions an exogenous variable, that is, neither encourages nor puts any pressure on companies to make them notify the transaction in other jurisdictions. The companies are the ones responsible for the notifications. We further note that the magnitude and possible impacts of a transaction deeply vary according to the jurisdiction. A merger with significant effects on companies

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<sup>4</sup> As stated in Chapter II, on Territoriality: the Brazilian Competition Law "*Applies, without prejudice to the conventions and treaties of which Brazil is a signatory, to practices performed on the national territory, in full or in part, or that produce or may produce effects thereon*".

<sup>5</sup> According to the provisions of question 3, on filling in a notification template as provided for in CADE Resolution no. 33 of 14 April 2022, which regulates mandatory notifications for merger reviews.

<sup>6</sup> In Brazil, CADE has up to 240 days to issue a final decision on merger reviews. The time limit can be extended up to 90 days, upon a reasoned decision rendered by the Tribunal, specifying the reasons for the extension.

and consumers of some jurisdictions can be less relevant to others. Thus, in case the transaction is blocked in countries where the companies develop the core of their businesses, it is pointless to notify the same transaction in countries where the businesses of the parties involved are residual.

11. Regarding cross-border merger reviews, international cooperation is especially important for the definition of the relevant market in the product dimension. This is an efficient way of reducing information asymmetry between the authority and the companies. In fact, the products involved can have different applications, as well as close substitutes in different jurisdictions. Learning about other realities helps the authority test the situations presented and assess the competitive risks of the transaction under review more deeply.

12. As to the relevant geographic market dimension, even though the Brazilian Competition Law deals only with the impact of the transaction on the Brazilian market, it is possible to define relevant geographic markets with a supranational dimension. For that purpose, several variables are evaluated, such as products and services involved, areas in which the main suppliers operate, possible imports—availability, costs of transportation and transaction, compliance with national regulations—among others.

13. Even if the relevant markets are defined with a supranational dimension, only the effects of the transaction in the Brazilian territory are used for merger reviews. However, even if the impact of the transaction on the wellbeing of other nations does not affect CADE's final decision, it is possible to consider the effects of the transaction on the market structures of other countries, in case Brazilian markets are affected indirectly.

14. For instance, suppose that two European airline companies (AAA and BBB) offer flights between a big Brazilian city (such as São Paulo) and an important capital of a European country (such as Madrid). In addition, the companies offer connecting flights from Madrid to other Spanish cities. Also, suppose that a South American airline (CCC) offers the São Paulo-Madrid route; however, they do not offer flights to other Spanish cities (due to economic infeasibility or legal authorization). In this scenario, the South American company could sign a codeshare or interline agreement with the BBB company, so that the CCC company could offer flight tickets from São Paulo to other Spanish cities, considering the São Paulo-Madrid route that is operated by CCC, and the routes Madrid-other Spanish cities that are operated by BBB, as defined by a codeshare/interline agreement.

15. Now consider that the companies AAA and BBB have dominant positions in the relevant markets defined by the airline routes between Madrid and other Spanish cities. Thus, AAA and BBB created a duopoly. In case AAA and BBB decided to merge, there would be a monopoly of routes from Madrid to other Spanish cities. Notice that the direct effects of this transaction on the Spanish consumers would not be considered by the Brazilian antitrust authority in its review. However, possible indirect effects should be considered.

16. Since the AAA-BBB merged company would almost be a monopolist in the routes between Madrid and other Spanish cities, there could be an incentive to stop offering seats (via codeshare and interline) to the CCC company in these routes. Hence, the CCC company would be unable to offer the route São Paulo-other Spanish cities, even though it could still offer the route São Paulo-Madrid. Moreover, if a large number of CCC clients consider Madrid a connecting point (instead of their final destination in Spain), the direct route São Paulo-Madrid would become economically unfeasible when CCC start losing customers that search for other Spanish cities.

17. At first, this merger situation for the monopoly in Spain would not be a matter of CADE. Nevertheless, this change in the Spanish market structure could affect the Brazilian competition market indirectly, causing an impact in the review and decision to clear the transaction in Brazil.<sup>7</sup>

18. Additionally, the geographic dimension in the relevant market can also define whether a transaction should be of mandatory notification or not<sup>8</sup>, even if the parties involved have no installations in Brazil. In case CADE understands that the relevant market is global and verifies that the economic groups of the parties involved would profit from sales in a higher value than the thresholds established by the Brazilian Law (with exports, for instance), the transaction would have to be notified.

### 3. International cooperation and establishment of remedies

19. In general, since global companies perform and interact in several markets, they have access to information that is not promptly available or accessible to local authorities, which know mainly the markets under their jurisdictions. Companies involved in mergers and acquisitions can use this information gap to present contradictory arguments to different competition authorities, at their discretion.

20. In merger cases, the parties often claim they are not direct rivals, since their activities are mainly complementary or aimed at different niche markets, so the proposed transactions would not raise any competition concerns. A restrict analysis of the domestic scenario could support this argument, especially when the market is comprised of high value indivisible goods, such as the long-term big infrastructure projects. However, a further analysis on the operation of these companies in other countries could result in a different conclusion.

21. Consider the rail transport market. Based on their effective performance in certain countries, the companies could claim that they are specialised in some types of rolling stock, such as high-speed rail, metro, light rail transit (LRT), and tram, which are not substitute means of transportation, but mainly complementary. Considering only the projects effectively implemented in the country in question, each means of transportation could have been implemented by different companies, so they could not be effective rivals.

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<sup>7</sup> This example was inspired in the discussions of Merger no. 08700.004702/2023-81 – International Consolidated Airlines Group (IAG) and Air Europa holding, S.L. (Air Europa), and a third interested party, Tam Linhas Aéreas S.A. (Latam). With this transaction, the aim of IAG was to acquire Air Europa, which they had interline and/or codeshare agreements to distribute Latam's passengers from Madrid to other destinations in Europe, especially in Spain's countryside. Latam claimed that after clearing the transaction unconditionally, the petitioners could restrict the feed or availability of destinations for Latam from Madrid, harming its performance in the routes between Brazil and Spain (especially the route São Paulo-Madrid). The Office of the Superintendent General of CADE understood that in this case there was a low competition risk, since there was a small proportion of Latam's passengers that had other Spanish cities as their final destination. For other European cities, there are several hubs besides Madrid, so the Madrid-Barajas airport is not a necessary gateway. Latam filed an appeal to the Tribunal of CADE, but the case was moot, since the IAG withdrew the transaction.

<sup>8</sup> The Brazilian antitrust authority orders mandatory notifications to the following transactions: mergers, acquisitions involving controlling interest or equity interest, corporate and contractual joint ventures, as long as the companies involved overcome the levels established by law.

Nevertheless, observing other countries, it is possible to notice that these companies can also offer other solutions. That task is facilitated by the cooperation with other authorities.

22. Since this is an industry of long-term projects, which take years to be finished, and needs a single winning tender to make the company enter the country, a review based on market shares could be inappropriate. It is fundamental to know the operations of potential competitors in other countries, and also find out which tenders these companies have been part of recently, to evaluate the real level of rivalry among the companies operating in the market.

23. Even though some information is public, accessing some more detailed and confidential information would only happen in case the authority obtained the waiver request from petitioners and the collaboration from authorities from other jurisdictions, not the one where the transaction was notified. In addition, authorities can share their perspectives and exchange experiences. This collaboration tends to be a win-win situation for the authorities, since useful information that would be restricted to certain jurisdictions is shared among the competition authorities.

24. A simple example can illustrate the benefits of international cooperation in cross-border mergers. Parties XXX and YYY in a merger process notify the transaction to a jurisdiction, claiming they are not effective rivals since they operate in different segments. However, some time before, party XXX notified another jurisdiction about the intention to acquire their competitor, ZZZ. In the market test of this acquisition attempt of ZZZ by XXX, party YYY entered as an interested third party, claiming that its interests could be affected by the transaction, since XXX is a direct rival. This information contradicts what the parties informed in the merger notification between XXX and YYY.

25. Such situations often happen. The cooperation through exchange of information among authorities can be enough to test crucial hypotheses for the approval or dismissal of the proposed transaction.

26. International cooperation has become really useful for cross-border mergers, especially in complex cases. Nonetheless, the relevance of this instrument can be less evident due to regulations related to confidentiality. Waivers granted by the parties involved and most of the information obtained from other authorities are restricted, not available in the public versions of legal opinions and votes of CADE. So, most of the antitrust community is not aware of the real importance that cooperation with other authorities had in resolving the case.

27. The time spent with international cooperation should also be considered. Sometimes the case is quite simple in a jurisdiction, and the cooperation becomes unnecessary. Particularly, if the authority has limited human resources, spending time with international cooperation for simple cases could mean fewer resources for more relevant cases. Finding the optimum point of cooperation is a challenge for competition authorities.

28. Cross-border mergers also affect the way remedies are established and even the need for them. It is possible that remedies implemented in other jurisdictions be enough to also address competition problems in the Brazilian market, especially if those jurisdictions concentrate the core of the parties' activities. In this context, it may be relevant to align the decision with other jurisdictions (always respecting the time limit established in the Brazilian law).

29. However, in many cases, CADE needs to establish remedies related to the national market, since the market realities vary considerably among jurisdictions. In addition, it is worth noting that the legal mandate and the competence of competition authorities differs according to the country.

30. CADE is a competition authority in the strict sense; it is not responsible for sectoral regulations, consumer protection, or industrial and commercial policies. Thus, CADE considers only the competition aspects when negotiating remedies, that is, economic efficiency and consumer welfare. This situation is different in jurisdictions in which the authorities have other responsibilities as well. So, the remedies of a foreign authority could be incompatible with remedies that can be adopted in Brazil.

31. Therefore, even though remedies established by other authorities can be used in Brazil, the legal limits of CADE's competence, which are restricted to the competition defence, should always be respected. In general, when there is cooperation with other authorities, CADE's performance limits are exposed, so they know that certain alternative remedies cannot be applied in Brazil. On the other hand, traditional remedies, such as divestiture and commitments to avoid competition discrimination, could always be aligned when strictly related to competition aspects.

32. At last, another important aspect that should be considered is the decision-making centre location of the companies involved in cross border mergers. If the centre is located in other jurisdictions, the enforcement of the local authority can face limitations.

33. Suppose that a local authority is reviewing a merger between companies FFF and GGG, which have their headquarters in another jurisdiction. This jurisdiction decides to clear the deal unconditionally. However, the local authority understands the merger will bring deleterious effects to competition in the national market. In case the local authority blocks the merger, the companies FFF and GGG cannot unify their transactions formally – they will still be two distinct legal persons, with different structures – but will ultimately be under control of the same economic group.

34. In this scenario, how could we avoid the unification or coordination of commercial strategies of companies FFF and GGG in the national market?

35. For the reasons aforementioned, the merely blockage could represent an inefficient solution. Alternatively, the authority can clear the transaction subject to a carve-out that dissolves a horizontal overlap in the national territory.

36. A more complicated situation would occur if companies FFF and GGG lacked installations in the national market, serving it only through exports. In this situation, the blocking associated to the restriction of imports of goods of the combined entity 'FFF-GGG' would restrict the supply, reducing competition in the national market.

37. Such example illustrates the issues that authorities may have to deal with when they face cross-border mergers, especially when the enforcement is limited because their country is not the same where the parties involved have their installations. There might be a coordinated operation of the competition authorities, so that the review of the transaction in each jurisdiction also considers the effects on the other jurisdictions. Nonetheless, this solution would request non-trivial legislative changes, in addition to harmonising them with other principles and objectives of each nation, such as sovereignty and development of the domestic market.

#### 4. Challenges and final remarks

38. CADE Resolution no. 33<sup>9</sup>, of 14 April 2022, regulates merger notifications. This resolution establishes that parties should inform the list of other jurisdictions where the transactions were or will be notified. CADE requests this information because it believes that cooperation among competition authorities from different countries can be necessary to ensure an accurate and coordinated review of the transaction. However, the authority does not directly encourage the parties to notify the transaction to other jurisdictions, since this decision depends on the legal obligations of each country.

39. Moreover, sometimes the parties notify the transactions to different jurisdictions at different moments. The divergence in notification periods can cause a misalignment among antitrust authorities, which would need to coordinate their reviews in distinct stages, resulting in some information asymmetry.

40. Cross-border mergers present challenges mainly when the restrictions or remedies need to be implemented in several jurisdictions. When authorities diverge on which remedies would be necessary or efficient, their establishment and negotiation can be affected.

41. The dimension of the Brazilian economy can be considered an advantage in certain situations, since its larger than other Latin American markets. This is a privilege to CADE concerning merger reviews with a regional scope. Conversely, cross-border mergers may present challenges, especially when economies that are bigger than Brazil's are involved.

42. Aiming to overcome these inherent challenges of cross-border merger reviews, CADE understands that the best practice is the international cooperation. In the Brazilian experience, the cooperation with other agencies can occur based on formal documents or through informal interactions. Basically, CADE adopts two kinds of formal documents: (1) Memorandum of Understanding (MoU), providing exchange of information when there is no confidential information; (2) Waivers of confidentiality, when those under the jurisdiction waive their confidentiality, allowing exchange of confidential information with other agencies.

43. According to the authority, the waiver of confidentiality is mandatory when it involves exchange of confidential information. When there is no confidential information, the MoU would not be an essential document to cooperate, however, in some countries it is a mandatory document to allow international cooperation.

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<sup>9</sup> CADE. CADE Resolution no. 33, of 14 April 2022. Regulates the notification of mergers referred to in Article 88 of Law 12529 of November 30, 2011; provides for summary proceeding for the review of mergers and acquisitions; consolidates Resolutions no. 02/2012, 09/2014, and 16/2016. Available in Portuguese at: [https://sei.cade.gov.br/sei/modulos/pesquisa/md\\_pesq\\_documento\\_consulta\\_externa.php?11fcbFkN81DNKUdhz4iilnq15\\_uKxXOK06JWeBzhMdu1o7VqyXeq9tKSSC3I\\_YlnBX8Qjt099g7spbtEu5Ayy1J7fZ6z5AK-E7JynVgVAYniczU5wqJ6a4at3XodqUOL](https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_documento_consulta_externa.php?11fcbFkN81DNKUdhz4iilnq15_uKxXOK06JWeBzhMdu1o7VqyXeq9tKSSC3I_YlnBX8Qjt099g7spbtEu5Ayy1J7fZ6z5AK-E7JynVgVAYniczU5wqJ6a4at3XodqUOL)>. Retrieved on 15 October 2024.

44. Currently, CADE has 21 bilateral MoUs<sup>10</sup>. In addition, the agency has agreements and representatives in multilateral bodies, such as OECD, ICN, UNCTAD, MERCOSUR, BRICS, World Bank, and BID<sup>11</sup>.

45. In order to improve international cooperation in cross-border mergers, CADE understands that it would be helpful to use safe platforms to share information among the antitrust authorities, harmonise notification periods and procedures to facilitate the simultaneous review among different jurisdictions, and strengthen bilateral and multilateral agreements, allowing more exchange of information among the agencies.

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<sup>10</sup> Argentina, Canada, Chile, China, Costa Rica, Ecuador, European Union, India, Italy, Japan, Mexico, Mozambique, Paraguay, Peru, Portugal, Russia, South Korea, and United States.

<sup>11</sup> The list of international agreements is available at: <<https://www.gov.br/cade/pt-br/aceso-a-informacao/transparencia-e-prestacao-de-contas/acordos-cooperacao-tecnica/acordos-internacionais>>.