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LATIN AMERICAN AND CARIBBEAN COMPETITION FORUM

Session II: Merger Control in Latin America and the Caribbean - Recent Developments and Trends

-- Contributions from Brazil --

4-5 April 2017, Managua, Nicaragua

The attached document from Brazil (CADE) is circulated to the Latin American and Caribbean Competition Forum FOR DISCUSSION under Session II at its forthcoming meeting to be held on 4-5 April 2017 in Nicaragua.

Contact: Ms. Lynn Robertson, Global Relations Co-ordinator, OECD Competition Division [Tel: +33 1 45 24 18 77, Email: Lynn.ROBERTSON@oecd.org]

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LATIN AMERICAN AND CARIBBEAN COMPETITION FORUM



15th Latin American and Caribbean Competition Forum
4-5 APRIL 2017, Managua, Nicaragua

Session II: Merger Control in Latin America and the Caribbean - Recent Developments and Trends

-- CONTRIBUTION FROM BRAZIL (CADE) --

1. Introduction

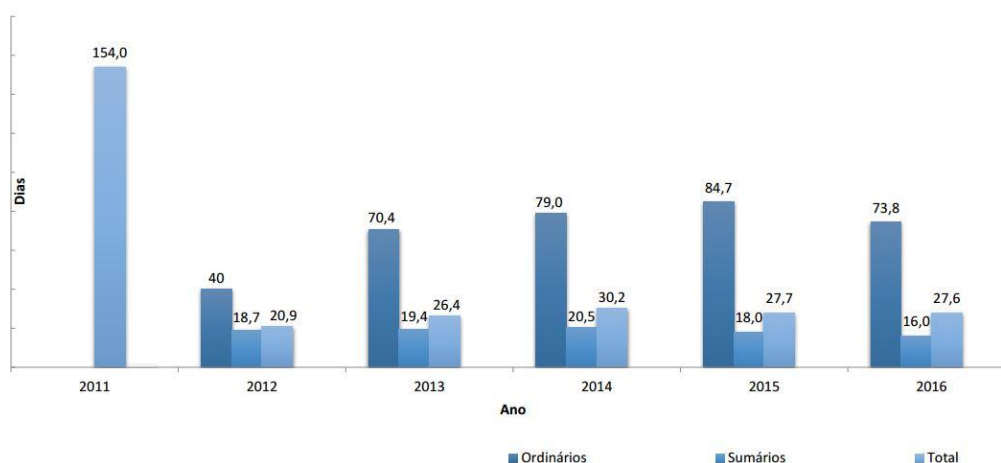
1. This paper will draw an overview of the Brazilian merger control in the past years, in particular 2016. First, it will set out some statistics and provide updates on recent guidelines issued by the Administrative Council for Economic Defense (CADE). Then, it will analyze the main cases from 2016, including recent experiences in the field of gun jumping. The paper concludes highlighting the success of the implementation of a pre-merger control regime in Brazil, recently adopted with the Brazilian New Competition Act (Law nº 12.529 from 30 November 2011).

2. Statistics

2. In 2016, CADE received 384 merger notifications, in which 92% were cleared without restrictions.¹ From this total, six cases were approved with restrictions: five of them by settlement and one with the unilateral imposition of certain conditions by CADE. These numbers follow a similar trend *vis-à-vis* prior years, except to the percentage of complex cases since they represented 23% of total in 2016, while prior years had lower percentages (14% in 2015, 17% in 2014, 11% in 2013 and 12% in 2012). For these numbers, complex cases are the ones analyzed through an ordinary filing proceeding, as opposed to a “fast-track” proceeding with a simplified notification form. No cases were blocked in 2016; although one case was withdraw by merging parties due to competition concerns in Brazil and abroad (Halliburton/BakerHugues).

¹ Detailed information from 2016 is available at: <http://www.cade.gov.br/noticias/cade-apresenta-balanco-de-suas-atividades-em-2016/apresentacao-balanco-2016.pdf>.

3. The time average for merger review remains very low, which indicates an efficient review procedure. In 2016, average time was 27 days for review considering both fast-track and ordinary proceedings. When consider separately, the statistics reveal that fast-track cases were analyzed in a 16 days average, while ordinary cases in 74 days average. These numbers include time review from both the General Superintendence and the Tribunal. They are also consistent with statistics from prior years:



Source: CADE

4. The Brazilian legislation establishes a maximum time of 240 days, with one possible 90 days extension, to complete the merger review. There is no “stop-the-clock” system.

3. Guidelines

5. CADE has also invested in guidelines to increase transparency and shed light in its understanding in matters related to competition enforcement. Concerning merger review, CADE issued two recent guidelines: on Horizontal Mergers and Gun Jumping. In addition, a third guideline is currently in the pipeline and it will address Merger Remedies issues.

6. Concerning gun jumping, the penalties for this infringement may include the nullity of the transaction and fines, which ranges from BRL 60,000 to BRL 60 million. In order to better orientate merging parties for complying with the referred legal provisions, CADE published the *Guidelines for Analysis of Previous Consummation of Merger Transactions*² in May 2015. The document set some parameters in which merging companies may rely upon while negotiating and evaluating merger transactions, preventing adverse merger transaction costs and facilitating the lawful integration of their economic activities. The document is divided into three sections, as follows: i) definition of gun jumping and examples of activities which can lead to this practice, as exchange of information between companies involved in merger transactions, definition of contractual terms, among other actions that might take place before and during the transaction; ii) guidelines for companies, providing specific procedures that companies should adopt to mitigate the risk of incurring in gun jumping; and iii) penalties for non-compliance with the law.

² The Guidelines for Analysis of Previous Consummation of Merger Transactions is available at: <http://en.cade.gov.br/topics/publications/guidelines/guideline-gun-jumping.pdf>.

7. As for the Guidelines on Horizontal Merger, CADE published a new Guideline in April 2016, which replaced the former one from 2001. It is aligned with the new competition legislation and its pre-merger review system. Its main purpose is to provide transparency regarding CADE's evaluation of horizontal mergers, to guide CADE's staff to adopt the best competition practices available when evaluating mergers and acquisitions with horizontal effects, and to assist the economic agents to better understand the procedures and criteria employed by CADE when assessing mergers. Among other information, the Guidelines presents the general process used by CADE, which includes the following steps: definition of the relevant market; analysis of the horizontal concentration level; assessment of the probability of use of market power after the merger; valuation of the existing purchasing power in the market; and weighting of economic efficiencies inherent to the merger.

8. These steps are not mandatory, although they are used in the majority of cases to decide if the merger can be approved without restrictions, if remedies are necessary or if the operation cannot be authorized. Nevertheless, there are other complementary methods of analysis, such as simulations, contra factual analysis and maverick eliminations.³

9. The *Draft Guidelines on Merger Remedies* aims to present how CADE designs and implements remedies in transactions that raise competition concerns. Its final version is expected to be released in 2017. When published, it will ensure more transparency on both procedural and substance aspects of designing and implementing remedies in complex mergers, for instance, promoting the use of monitoring trustees.

4. Main Cases

4.1 Bradesco/HSBC

10. In August 2016, the Tribunal of CADE approved with restrictions the HSBC acquisition by Bradesco, conditioned by the terms of the Agreement on Merger Control (ACC, for its acronym in Portuguese).

11. The Tribunal decided that Bradesco should commit not to merge or acquire any financial institution that acts in Brazil for the following 30 months. In addition, the company should implement a policy and specific standard of competitive conduct through a compliance program executed by an external agent approved by CADE. Moreover, Bradesco compromised to incentive the transition of credit operations to other banks (except to other three major banks in Brazil), to improve the process of credit and salary portability, to implement actions that grant more transparency and a better quality of service to its clients and to train its internal staff to improve customer service. In this context, CADE observed that the banking sector in Brazil has a low level of rivalry, which is a reason of competition concern. The asymmetry in information and the low rivalry generate barriers to the entry in the market. Moreover, the market share of the parties after the merger exceeds 20%, and the Tribunal verified the possibility of use of market power.

12. The remedies intended to mitigate further concentration in the banking sector and to reduce the asymmetry of information in particular for consumers.⁴

³ Guidelines on Horizontal Mergers is available at: http://www.cade.gov.br/aceso-a-informacao/publicacoes-institucionais/guias_do_Cade/guia-para-analise-de-atos-de-concentracao-horizontal.pdf.

⁴ Merger Proceeding n° AC 08700.010790/2015-41.

4.2 *Hypermarcas/Reckit Benckinser*

13. In September 2016, CADE approved with restrictions Reckit's purchase of three preservative brands previously owned by Hypermarcas.

14. Through an ACC, Reckit engaged itself to sell in Brazil the brand K-Y, leader in the market of intimate lubricants, to an economic agent with capacity to rival the merged company. The parties suggested this remedy and the Tribunal considered it enough to eliminate the competition problems verified in the case.

15. The main competition concern was related to the intimate lubricant market, which has a correlation with the masculine preservatives sector. In this sense, the sale of the leading brand would eliminate the competitive problems seen in the market for intimate lubricants as well as in the condom market, as in the latter case, it was on a large scale the portfolio effects of a player with significant presence in both markets.⁵

4.3 *John Deere/Precision Planting*

16. The transaction was notified in 2016 and judged by CADE's Tribunal in February 2017. It was submitted to several competition authorities, including the ones from Austria, Brazil, Ukraine and United States.

17. Austria and Ukraine approved the merger in the beginning of 2016. However, in the United States, the Department of Justice required a civil investigation to verify the possible competitive effects of the transaction.

18. In Brazil, the General Superintendence identified competition concerns and sent the case for the Tribunal's review. However, the outcome of the case in the US could affect the transaction in Brazil, including possible remedies. Considering that the issue in the US jurisdiction would probably require more than 240 days – the time limit for merger analysis in Brazil, the concerned companies filed a petition expressing their desire to end the merger review proceeding.

19. This case highlights the importance of international cooperation in merger review, in particular for the effort to reach consistent remedies. This was an important element for CADE during its assessment as well exchanges with merging parties and other competition authorities. In fact, the global features of the transaction and the differences in jurisdictions can lead to different solutions. The companies, with CADE's consent, took the solution of withdrawing the transaction in Brazil as it allows a new merger notification and it preserves the possibility of coordinating possible remedies in the future.⁶

5. *Gun Jumping Experience*

20. In 2016, there were four cases of gun jumping in Brazil. Since the enactment of the new legislation in 2012, nine gun jumping cases have been reviewed by CADE. The high numbers may be explained by the lack of culture in the Brazilian business sector to notify merger transactions prior to its implementation. Nevertheless, there was at least one international case, which may serve as reference for possible sanctions in Brazil concerning this particular violation.

⁵ Merger Proceeding nº AC 08700.003462/2016-79.

⁶ Merger Proceeding nº AC 08700.000723/2016-07.

21. In January 2016, CADE decided that US based Cisco Systems Inc. and the France based Technicolor S/A did not wait for its green light to close a global transaction, which was also reviewed by other jurisdictions. The companies admitted the wrongdoing and agreed to the payment of BRL 30 million (approximately US\$ 10 million) for the practice of gun jumping. The merger was notified in Brazil, Canada, USA, Colombia, the Netherlands and Ukraine. In Brazil, CADE's General Superintendence considered the notification complete on 16 October 2015 and the parties consummated the transaction on 19 November 2015, before the conclusion of CADE's analysis. The companies informed about the beginning of their joint activities on 20 November 2015, by means of a press release published in their website: "Technicolor has completed the acquisition of Cisco Connected Devices. (...). The integration of the Cisco Connected Devices assets is starting immediately and the strategic collaboration agreement between Technicolor and Cisco is now moving into the implementation stage. The transaction has closed in all operating geographies, with the exception of Brazil where closing remains subject to local approvals, and Colombia where Cisco Connected Devices' operations have been carved-out pending a decision by the antitrust authority". These excerpts of the companies' press release was considered sufficient proof of gun jumping, as it is part of a rational choice, within a deliberate strategy of the parties to close the deal before CADE's approval.

22. It is an important precedent in Brazil, concerning in particular the so-called carve-out agreements. The carve-out agreement is a contractual term with the intention to isolate the effects of a global transaction in jurisdictions where the antitrust authority has not yet approved the transaction. In the Cisco/Technicolor case, the merging parties argued that this agreement was in force and it would be enough to keep the competitive conditions untouched in Brazil. However, CADE understood differently – in line with many other competition authorities worldwide – and sent a strong message to business community by saying that these agreements would not eliminate or mitigate penalties for gun jumping violations in Brazil, due to concerns about its effectiveness and complex monitoring.

23. Another interesting gun jumping case concerns the joint venture between Shimano and its main two distributors in Brazil. In August 2016, it was the first time that CADE nullified a contract as sanction for a gun jumping violation, in addition to a BRL 1.5 million fine. In practice, the decision suspended the exclusivity clause of the resale contract of Shimano's products by Blue Cycle – the joint venture created by the transaction – in Brazil.

6. Conclusions

24. The change in the Brazilian legislation focused on the pre-merger control as a more efficient way to assess competition issues and eventually impose remedies on the transaction. CADE's recent experience has been extremely successful in the implementation of the young pre-merger regime, including sanctions for gun jumping violations. It also confirms the need and the importance of international cooperation, as it fosters better assessments and enables consistent remedies when necessary.