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Working Party No. 3 on Co-operation and Enforcement**Roundtable on the Extraterritorial Reach of Competition Remedies - Note by Brazil****4-5 December 2017**

This document reproduces a written contribution from Brazil submitted for Item 5 at the 126th Meeting of the Working Party No 3 on Co-operation and Enforcement on 4-5 December 2017.

More documentation related to this discussion can be found at

www.oecd.org/daf/competition/extraterritorial-reach-of-competition-remedies.htm

Please contact Ms. Despina Pachnou if you have any questions regarding this document
[phone number: +33 1 45 24 95 25 -- E-mail address: despina.pachnou@oecd.org]

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Brazil*

1. Introduction

1. Competition authorities around the world have experienced, in the last decade, new challenges linked to the intense and rapid globalization phenomenon and its significant changes in the outlook of the world economy. This fast process of globalization is reflected in the intensifying interdependence among markets and economies, in a way that the behavior of market participants in a specific region of the globe might have negative impacts within the territory of another jurisdiction. This panorama is presented in an OECD's report¹, which also draws attention to the increasingly cross-border dimension of antitrust cases.

2. In light of this scenario, this report considers the challenges that the Administrative Council for Economic Defense - CADE faces when designing competition remedies with a foreign nature and the experience obtained in the analysis of specific cases. As extraterritoriality has been considered foremost in merger cases, this contribution will focus on these transactions. In this sense, after this brief introduction (section 1) this report presents CADE's legal framework concerning the application of extraterritorial remedies (section 2); information about the process that enables the Brazilian Competition Authority to engage in international cooperation (section 3); an overview of some cases judged by CADE, which were subject to the application of extraterritorial remedies (section 4); and concludes with some final remarks (section 5).

2. Brazilian legal framework for merger control

3. According to Article 2 of the Brazilian Competition Law², the competition legislation "*applies, without prejudice to the conventions and treaties of which Brazil is a signatory, to practices performed, in full or in part, on the national territory, or that produce or may produce effects thereon*". In that sense, CADE is entitled by law with competence, within the administrative level, over practices whose effects can cause harm, at least potentially, in the Brazilian market. In these terms, the effects doctrine is adopted.

4. When it comes to merger control, according to Article 88 of Law No 12.529/2011, adjusted by the Interministerial Ordinance 994³, CADE must be notified whenever at least one of the groups involved in the operation registered, in the year prior

* This written contribution was prepared by Noemy Melo Colin, Head of the International Unit, and Fábio Lopes de Sousa, Advisor at the International Unit. For more information about the paper, the authors can be contacted at noemy.melo@cade.gov.br or fabio.lopes@cade.gov.br

¹ OECD (2012), Improving International Co-Operation in Cartel Investigations, <http://www.oecd.org/daf/competition/ImprovingInternationalCooperationInCartelInvestigations2012.pdf>.

² Law 12,529/2011 is available at <http://en.cade.gov.br/topics/legislation/laws/law-no-12529-2011-english-version-from-18-05-2012.pdf/view>.

³ Interministerial Ordinance no. 994 is available at <http://www.cade.gov.br/assuntos/normas-e-legislacao/portarias/portaria-994.pdf/view>.

to the transaction, gross annual turnover or total trading volume in Brazil equivalent to or above BRL 750 million, and at least another group involved in the transaction registered gross annual turnover or total trading volume in Brazil, in the year prior to the transaction, equivalent to or above BRL 75 million.

5. In addition, CADE adopts a pre-merger analysis regime, which allows the Brazilian competition authority to examine mergers and possible remedies at the same time as most competition agencies around the world. The law also establishes a specific deadline for CADE to render a decision on a merger case. If this time lapses without a decision, the merger will be considered automatically approved.

3. International cooperation procedures

6. The analysis of antitrust cases and the remedies designed in extraterritorial cases benefits significantly from the mutual understanding between competition agencies and international cooperation. As an example, the number of cases involving foreign cooperation reached almost a third of non-fasttrack cases notified in 2015⁴.

7. International cooperation occurs through both formal and informal proceedings. One example of formal proceedings is the signature of agreements and protocols with different antitrust agencies. So far, CADE has signed cooperation agreements with competition authorities from 15 foreign jurisdictions⁵. The Brazilian Competition Authority is also a party to MOUs with BRICS, the Inter American Bank for Development, Mercosur and the World Bank⁶.

8. These documents allow for cooperation between agencies in the form of notifications with respect to the enforcement activities that may affect the other agency's interests, consultations, technical cooperation, exchange of information (subject to the laws of each jurisdiction protecting confidential information), regular meetings and the grant of negative or positive comity considerations.

9. In this regard, it is noteworthy that some of the agreements CADE has signed with foreign antitrust authorities contain explicit provisions regarding the avoidance of conflicts, the consideration of the other agency's interests and coordination of enforcement activities⁷. Furthermore, we can say that - at least formally - CADE takes into account the laws and policies of foreign jurisdictions when assessing remedies with extraterritorial reach.

10. Nevertheless, in the daily practice, most of the cooperation activities occur through so-called "pick-up the phone" cooperation. By means of informal contacts with its counterparts, CADE can hold informal discussions, by e-mail or telephone, and coordinate the timing of the analyses and remedies design and implementation. The

⁴ <http://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=723273&siteid=193&rdir=1>.

⁵ Including Argentina, Canada, Chile, China, Colombia, European Union, France, Japan, Mexico, Peru, Portugal, Russia, United States, South Africa and South Korea.

⁶ The complete list of international agreements signed by CADE is available at: http://en.cade.gov.br/topics/topics/bilateral_cooperation/legislation/bilateral-cooperation.

⁷ In this sense, see the agreements signed with Argentina, Canada, Chile, Colombia, Japan, South Africa and the United States.

participation in international fora, such as ICN and the OECD, is also important in fostering CADE's dialogue with its counterparts and maintaining the agency's work remains relevant and up to date.

11. CADE is internationally recognized for cooperating with its counterparts in the design and implementation of remedies in transnational mergers. The following section will focus on CADE's experience in the analysis of merger cases with an extraterritorial character.

4. Extraterritorial remedies in merger review process

12. In recent years, from the total "complex mergers" notifications received, 10% concerned cases notified in multiple jurisdictions⁸. In most of these cases, CADE was able to coordinate actions in what concerns the timing of the analyses, and the design and implementation of remedies.

13. In recent years, CADE has been successful in coordinating international remedies with extraterritorial reach. This includes the merger of Holcim Lafarge, in 2015, where CADE accepted a package remedy negotiated with other international jurisdictions including the selling of assets located in Brazil⁹. Another interesting case, was the Ball's acquisition of its rival Rexam in which CADE was the first antitrust authority to clear the merger with conditions¹⁰.

14. From the various success cases of international cooperation, the above cases were chosen because they illustrate CADE's experience and challenges in analyzing cross-border mergers, its strategy to assure the enforcement of extraterritorial remedies and to avoid conflicting orders with other jurisdictions which may also be analyzing the case.

4.1. Veyance - Continental

15. CADE's decision concerning the acquisition of Veyance by Continental is a good example of its ability to coordinate the design of remedies among different jurisdictions. The merger, notified in Brazil in 20 May 2014, concerned the control acquisition of the US rubber and plastic maker Veyance Technologies, Inc ("Veyance") by the German Auto parts maker Continental Aktiengesellschaft ("Continental")¹¹.

16. According to CADE's Tribunal, the merger raised anti-competitive concerns in the markets for heavyweight steel cord conveyor belts and in the market for air springs, used as parts of the suspension system of heavy load vehicles. In both sectors, the operation represented the merger between the leader company and its third major competitor. With the conclusion of the operation, the merged companies would have more than 50% of market share and the main players in both markets would be reduced from three to two.

⁸ In this sense, see the Brazilian Recent Experience on cross-border Merger remedies OECD meetings, 28-31 October 2013.

⁹<http://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=627813&siteid=193&rdir=1>.

¹⁰<http://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=753693&siteid=193&rdir=1>.

¹¹ Merger file no. 08700.004185/2014-50.

17. The merger was notified in 11 jurisdictions and in COMESA. On 29 January 2015, while CADE was still negotiating the remedies, the operation was already cleared in Austria, Australia, China, South Africa, German and the United Kingdom. In the United States, Canada, and Mexico the clearance was conditioned to the signing of a Merger Control Agreement to address the anti-competitive concerns identified in the pneumatic springs Market and in hose market for the later authority. The case was still lacking a decision from the Chilean competition authority.

18. In order to address the concerns raised by the merger, the parties agreed to sign a Merger Control Agreement (ACC for its acronym in Portuguese) in which they compromise to divest an air spring plant located in Mexico and a conveyor belt plant in Brazil. In including the divestiture of the plant located in Mexico, the agreement substantially reflected the obligations assumed with the DOJ in the United States, as a requirement for the conclusion of the operation in that country.

19. The leading Counselor for the merger analysis explained that the coordination of the remedy in this specific case was extremely important. The adequate remedy for Brazil required the sale of the same plant that was part of the agreement signed in the United States because the supply of pneumatic springs in Brazil is basically done through imports, which have been progressively concentrated in Mexico.

20. The ACC also stated that the divestment would only be considered consummated if CADE and the DOJ jointly approved the buyer. The clause is particularly important to assure the enforcement of the remedy and to avoid potentially conflicting orders since the asset was located abroad. In addition to the coordinated remedies, the ACC provided specific measures to attend Brazil's particular antitrust concerns. In this sense, the agreement signed with CADE included the divestment of intangible assets, such as brands, customer contracts, software, etc.

21. Although the parties were able to sell the assets located in Mexico quite easily, they struggled to sell the assets located in Brazil, which reveals a particularly challenging aspect of negotiating remedies. Due to the financial crisis Brazil was passing through, the parties were finding it difficult to find a buyer for the asset located in Brazil.

22. After this episode and in order to avoid situations where the companies cannot comply with the remedy imposed, CADE has increasingly adopted a clause known as "upfront buyer requirement", where the authority impose the companies not close their transactions until a potential buyer is identified and approved by the agency and a sales agreement is signed.¹²

4.2. Dow - Dupont

23. The Dow Dupont merger¹³ was another representative case of international cooperation in the control of mergers with transnational effects in which CADE was able to design a coordinated remedy with the rest of the world regarding common problems as well as specific remedies to the reality of the Brazilian market.

24. The "merger of equals" between the agrochemical companies was notified at CADE on 13 October 2016. The merger has also been notified in a dozen jurisdictions, including Australia, Canadá, Chile, China, EU, South Africa and the USA. Most of them

¹² <http://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=786586&siteid=193&rdir=1>

¹³ Merger file no. 08700.005937/2016-61.

expressed their concerns with the merger since the joint concentration of the applicants attended important levels in some specific markets, due to overlapping activities. In Brazil, the Superintendence identified specific antitrust concerns in the corn seed market.

25. CADE's tribunal cleared the merger subject to an ACC with a remedy package that included the sale of Dupont Worldwide insecticide and herbicide business, Dow's corn business assets and the worldwide business of copolymers of acid and ionomers. The great majority of the remedies were structural with some behavioral remedies applied in a temporary and complementary fashion.

26. It is noteworthy that some of the commitments made in the ACC concern assets that were not directly related to the concerns identified in Brazil, but were included because of the global nature of the remedies. Furthermore, the remedies enabled positive non-price effects in the benefit of consumers, since the commitment to divest some intangible assets in research and development in the markets affected by the merger maintained the incentives for innovation.

27. It is also important to highlight that the coordination of the remedies involved not only the timing of the analysis, the sharing of impressions and the designing of the remedies but also their implementation. In this regard, CADE conditioned the approval of the merger to the joint approval of the global buyer. The Brazilian Competition Authority also expressed its willingness to accept a common monitoring trustee.

5. Final remarks

28. CADE has continuously adopted a cooperative attitude towards the coordination of remedies in cross-border mergers. CADE's recent experience in cross-broader mergers shows the open attitude of the agency towards coordinating analysis and remedies design. This is especially true concerning the scope of the divestiture package offered abroad, in order to assure an effective divestiture, despite the specific concerns related to the Brazilian market.

29. The close contact with foreign Competition Authorities assures a faster and more effective decision. If the extraterritorial remedies applied at the beginning of CADE's international coordination experience were sometimes difficult to comply or monitor, it is no longer the case. The ability of the institution to learn from its mistakes improves CADE's enforcement capacity and the ability to coordinate international cooperation of cross-border merger cases.