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Efficiencies in Merger Control – Note by Brazil

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1. Introduction

1. Mergers may generate several efficiencies for the companies involved in the transaction, such as reduction of production costs, improvement of technology, or increase in productivity, among others. In some cases, these efficiencies can also benefit consumers and competition by improving the quality or contributing to price reduction of the final product, for example.

2. However, the same merger can also harm competition by eliminating competition, strengthening dominant position, and abusing market power. The efficiencies generated may be sufficient, in theory, to offset the anticompetitive effects of the transaction. In these cases, mergers must be approved by the antitrust authority.

3. This is why most of the antitrust authorities include an efficiency analysis stage in their merger review process, especially in more complex cases with higher probability of competitive harm. In these cases, the transaction will generate anticompetitive effects, the agency must evaluate whether the benefits generated will, at least, be equal to the competitive harm caused. When the net effect is non-negative, the transaction may be approved without restrictions.

4. This contribution aims to explore and develop the concept of efficiency in merger control and its general application and use under the Brazilian antitrust law. It begins with an analysis of how the Brazilian antitrust law and merger review guidelines address the issue. The document then demonstrates how the Administrative Council for Economic Defense (CADE) has assessed efficiencies in mergers. Finally, the article presents some interesting cases in which efficiencies were considered for unconditional approval of the transaction or in the design of remedies, followed by final remarks.

2. The Brazilian context – Legal framework

5. Law 12529/2011, which created the Brazilian Competition Defense System, establishes in Article 88, Paragraph 5, that mergers resulting in harm to competition should not be approved. According to the Law, the transaction must be rejected if it results in the elimination of competition in a substantial part of the relevant market, reinforce a dominant position, or lead to the dominance of a relevant market for goods or services. However, the following paragraph provides exceptions:

“(6) Mergers referred to in Paragraph 5 may be authorised provided they comply with the strictly necessary to achieve the following objectives:

I - simultaneously or alternately:

Increase the productivity or competition;

Improve the quality of goods or services;

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*Promote technological or economic efficiency and development; and
II – costumers are expected to derive substantial benefits from the merger.”*

6. Thus, the Brazilian antitrust authority must evaluate if the efficiencies generated by the merger are at least equivalent to the harm caused by the transaction in analysis and whether these efficiencies will be passed on to consumers.

7. The criteria that define how these efficiencies must be considered are defined and detailed in CADE’s Guide for Horizontal Merger Review ² and in the Guide for Non-Horizontal Merger Reviews³:

1. **Efficiencies must be likely and verifiable:** To be accepted, efficiencies must be likely and verifiable. The guidelines acknowledge that quantifying efficiencies is not always easy because it involves a projection with a high degree of uncertainty. However, in cases where there is a risk of antitrust harm, CADE must not accept speculative and highly uncertain efficiencies under the risk of creating negative effects to consumers and society. Therefore, it is expected that parties present quantification of efficiencies. In cases where this is impossible, CADE might be able to consider alternative methodologies.
2. **Efficiencies must be passed on to consumers:** For an efficiency to be considered as offsetting potential negative effects on overall welfare, it is not enough for it simply result in cost reductions, profit increases or other benefits retained solely by the merging firms. Companies must prove that a relevant part of the benefits obtained are passed on to consumers. The merger guidelines state that “neither monetary gains arising from increased market shares nor any merger involving a mere transfer of resources between players are considered by CADE as efficiencies”.
3. **Efficiencies must be merger specific:** Only efficiencies that are specific to the transaction – that is, those that could not be achieved by any means other than through the merger – will be counted as relevant efficiencies.
4. **Efficiencies must be achieved in up to 2 years:** Both the horizontal and non-horizontal merger guidelines determine that efficiencies are not considered specific to the transaction if they can be achieved in less than two years through plausible alternatives that impose fewer restrictions on competition.

8. In Brazil, information on efficiencies is not required in the merger notification, but only if the merger review shows significant competition concerns. In these cases, CADE considers the transaction as complex and requests the parties to present evidence of efficiencies. The authority then analyses these efficiencies based on the criteria outlined above and evaluates if they are sufficient to clear the transaction without restrictions. The agency does not have to discuss efficiencies if the merging parties do not present them. Usually, the parties wait for CADE to request the efficiencies of the merger but, in some cases, usually the more complex ones, the parties might present them when they notify the merger.

² CADE. **Guide for Horizontal Merger Review**. Brasília, 2016. Available at: <<https://cdn.cade.gov.br/Portal/centrais-de-conteudo/publicacoes/guias-do-cade/Guide-for-Horizontal-Merger-Review.pdf>>.

³ CADE. **Guide for Non-Horizontal Merger Reviews**. Brasília, 2024. Available at: <<https://cdn.cade.gov.br/Portal/centrais-de-conteudo/publicacoes/guias-do-cade/V+%20Guide%20in%20English%20-%20Final%20version%202.pdf>>.

3. Merger Efficiency Analysis by CADE

9. The criteria for efficiency claims described in the guidelines are rigorous and difficult to be fulfilled by the parties, especially the obligation to pass on the efficiencies to consumers.

10. From 2012 to 2024, the Brazilian antitrust authority reviewed 823 ordinary merger cases and in 81 one of them, Cade conducted some form of efficiency analysis.

11. In most cases, the parties present efficiencies after the Office of the Superintendent General at CADE (SG) declared the transaction complex. In a few cases, even when the transaction was not deemed complex, parties voluntarily submitted efficiency claims in the merger notification.

12. In most cases (59 proceedings), CADE rejected the efficiencies for not meeting all the requirements listed in the Brazilian antitrust resolutions and guidelines: being merger-specific, likely, verifiable, achievable within two years, and transferable to consumers.

13. In fact, according to the data gathered for this article, no transaction was approved unconditionally solely based on the efficiencies presented. However, in some situations, CADE acknowledged that the transaction could benefit competition, which was relevant to clear the merger without restrictions, such as in the Vessel Sharing Agreements (VSA) case and the RAN sharing agreement between Telefônica and Tim. In other cases, the analysis of transaction efficiencies played an important role in the design of the antitrust remedies applied, like in the merger between BM&FBovespa S.A. and CETIP S.A., as well in the sale of Oi's assets to Tim, Claro, and Telefônica. These examples will be analysed in more detail below.

14. Therefore, even if efficiencies have not been used as the only criteria to unconditionally approve a merger, they have played an important role in CADE's decision making process in specific cases.

4. Case analyses

4.1. Vessel Sharing Agreement (VSA)

15. Vessel Sharing Agreement (VSA) is an agreement between shipping companies for cargo space sharing to optimise routes and space while reducing costs.

16. According to the study on shipping containers market (*Mercado de transporte marítimo de contêineres - 2018*)⁴ issued by CADE's Department of Economic Studies (DEE), this industry has high fixed costs for shipping and, therefore, to guarantee scale gains, companies have been choosing bigger and more advanced vessels. However, while bigger vessels optimise transportation costs, empty cargo space reduce efficiency gains of these companies. Therefore, VSAs are a solution to reduce the risk of idle vessels, since several companies start to operate in the same routes.

17. The companies offer a specific number of vessels to operate in a certain route and each company has the right to use a part of the other company's ship (proportional to the

⁴ CADE. *Mercado de transporte marítimo de contêineres – 2018*. Brasília, 2018. Available in Portuguese at: < <https://cdn.cade.gov.br/Portal/centrais-de-conteudo/publicacoes/estudos-economicos/cadernos-do-cade/mercado-de-transporte-maritimo-de-conteineres-2018.pdf>>.

number of vessels each company contributed with in the agreement). Thus, each trip is carried out with a vessel of one of the companies carrying the cargo of their own clients and the other shipowners' clients.

18. There is no monetary exchange among the parties of the agreement. As a rule, the shipowners transport containers in the same vessel, but they do not share clients, sales, or marketing information. Therefore, they continue to operate separately in the market.

19. CADE considers VSAs a type of associative contract that must be notified to the antitrust authority if they last for 2 or more years, according to the criteria established in CADE's Resolution no. 17/2016⁵⁶. From 2017 to 2023, 14 VSAs were submitted to CADE for analysis. Although they were all cleared without restrictions, the Office of the Superintendent General at CADE (SG) conducted a thorough market analysis in most of these cases, verifying possible anticompetitive risks and efficiencies generated in each transaction.

20. Arrangements between competitors always draw the attention of antitrust authorities, since they can facilitate violations and end up harming competition. In the case of VSAs, there is also a concern on the joint definition of services, which could lead to the exchange of competitively sensitive information.

21. In fact, in this type of agreement, some competitively relevant variables are defined by the companies involved, such as the frequency of the services, ports, and terminals of scale, the number, capacity, and quality of the vessels used, among other information that are shared as a result of the agreement. This exchange of information may facilitate cartel practices among these companies in the markets in which they supposedly operate as separate entities.

22. In addition to the risks mentioned, there is also the possibility of self-preferencing of some terminals that will be included in the routes due to pre-existent vertical integrations between shipowners and terminals.

23. Despite the risks, CADE considers that VSAs create relevant efficiencies in the market. According to the SG, VSAs generate significant economic efficiencies in most of the cases analysed due to the optimisation of space in the vessels, reduction of idle capacity, competitive freight prices, increase in the supply of services and variety of routes. Also, because of VSAs, market players can operate in several geographic areas, even if they do not have enough demand to operate individually in those places.

24. Regarding the transfer of efficiencies to consumers, even if the SG has not conducted tests to verify their existence, all transactions analysed by CADE from 2017 to 2023 were related to time extensions for pre-existent agreements. Thus, in some cases, the

⁵ CADE. Resolution no. 17, 18 September 2016. Regulates the notification of mergers according to Law 12529 of 30 November 2011, Article 90, Item 4, and revokes CADE's Resolution no. 10 of 29 October 2014. Available in Portuguese at: https://cdn.cade.gov.br/Portal/centrais-de-conteudo/publicacoes/normas-e-legislacao/resolucoes/Resolu%C3%A7%C3%A3o%20n%C2%BA%2017_18-10-2016.pdf

⁶ Resolution no. 17 determines that any agreements (associative contracts) that last for 2 or more years to establish a joint business must be notified to CADE as long as they fulfil all of the following requirements:

- I. the document establishes the sharing of risks and revenue; and
- II. the parties must be competitors in the relevant market of the agreement.

antitrust authority noticed that prices dropped and an increase in the cargo volume of goods transported after the VSA, which could confirm the efficiencies of these agreements.

25. Even if the SG has considered other factors in the analyses of VSAs, such as rivalry and contract clauses that prevent competitors' potential exercise of market power and idle capacity, the efficiencies generated by the agreements were considered relevant in many cases. The SG specifically mentioned the efficiencies generated by the transaction in 11⁷ of the 12 ordinary merger cases reviewed, indicating that this is one of the factors taken into consideration for approval without restrictions.

4.2. RAN Sharing Agreement - Telefônica and Tim⁸

26. Another case that deserves attention is the RAN sharing agreement between Telefônica Brasil S.A. and TIM S.A., two Brazilian mobile network operators, approved without restrictions on 10 June 2020 by CADE. Similarly, to the VSA cases, the transaction is considered a type of contract subject to mandatory notification.

27. RAN sharing refers to the sharing of specific resources among mobile network operators to reduce costs and optimise services. It is not only an agreement for the supply of inputs or access to infrastructure, but for the creation of a horizontal relationship between competitors to share costs and risks of the same network.

28. In the case at issue, the agreement referred to the sharing of a network (wholesale mobile network access market) between Telefônica and Tim for the implementation and provision of services involving 2G, 3G, and 4G technologies. The agreements were exclusively operational and did not include acquisition of assets. Also, the two companies continued to operate separately and compete in the mobile voice and data services.

29. The geographical scope of the transaction was very clear: for 2G networks, each party had to offer the service for both companies' clients in approximately 2.7 thousand municipalities, which resulted in the deactivation of overlapping sites. In the case of 3G and 4G networks, the contract established the network sharing in municipalities with less than 30 thousand inhabitants with the creation of a single system in places where one or both companies operated. Hence, since the companies could operate in places where they did not have their own network, the sharing would allow the expansion of coverage. Their objective was to expand the companies' 4G coverage and to consolidate the existing 3G and 4G networks.

30. RAN sharing agreements are common among mobile network companies, they aim to reduce operation costs and facilitate the development of new technologies. Also, in cases of countries with wide geographical areas, it allows companies to offer services in rural or difficult access areas, with lower subscriber density. Therefore, they enable cost reductions while increasing coverage.

⁷ Merger Case no. 08700.007341/2021-63 CMA and Marsk; Merger Case no. 08700.002610/2021-03 CMA, Cosco, and others; Merger Case no. 08700.005648/2020-49 MSC and HLAG; Merger Case no. 08700.002724/2020-64 – Maersk and MSC; Merger Case no. 08700.005570/2019-29 – Hapag-Lloyd and MSC; Merger Case no. 08700.002668/2019-24 – HLAG and MSC; Merger Case no. 08700.006750/2017-66 – Mercosul Line Navegação e Log-in; Merger Case no. 08700.002699/2017-13 – HSDG and Aliança; Merger Case no. 08700.005266/2017-10 – Hapag Lloyd and MSC; Merger Case no. 08700.003408/2017-12 – Aliança and HSDG; Merger Case no. 08700.001606/2017-33 – CMA and HSDG.

⁸ ADMINISTRATIVE COUNCIL FOR ECONOMIC DEFENSE (CADE). Merger Case no. 08700.006163/2019-39. Telefonica Brasil S.A. and TIM S.A.

31. However, agreements among competitors may create antitrust issues. The OECD, in the report titled “Wireless Market Structures and Network Sharing” (OCDE, 2014)⁹, pointed out that RAN sharing agreements can harm competition, namely (1) unilateral effects; (2) coordinated effects; and (3) exchange of competitively sensitive information.

32. On unilateral effects, the OECD highlights the risk of price increase, reduction in quality of the services provided, and reduction in idle capacity, which can lower incentives for RAN sharing agreements with other competitors.

33. On coordinated effects, the OECD mentions that the expansion of RAN sharing agreements between competitors can increase the incentives for tacit collusion, especially the refusal to share networks with other competitors. Finally, these types of agreements can increase the risk of exchange of competitively sensitive information, which can lead to a reduction of competition in the market.

34. In face of the risk of anticompetitive practices as a result of the agreement, the SG analysed if the benefits generated by the transaction could mitigate possible risks.

35. The SG agreed with the applicants that the RAN sharing agreements analysed could reduce the implementation costs of new equipment, lower risks related to the expansion of the operation, optimise space in densely populated areas, and the radio frequency spectrum of the two companies. However, CADE still had to analyse if these efficiencies, even if likely, could be transferred to consumers, as required by Law 12529, Article 88, and stated in CADE’s guidelines.

36. After analysing the market, CADE concluded that, in theory, the reduction of operational costs could be passed on to consumers by reducing relative prices. Even if this reduction was only hypothetical, the SG stated in an opinion¹⁰ that “the mobile communication services market is experiencing a relative reduction in prices to consumers. Now, for the same price, the consumer can purchase more services, especially bigger data plans, unlimited app usage and basic plans for voice calls to anywhere in Brazil.” Therefore, the reduction in relative prices could be an indication of efficiency transfer to consumers.

37. Even if it was not possible to conclude that the price reduction was due exclusively from RAN sharing agreements, the SG found that the transaction under analysis could generate important efficiency gains. Also, it could be inferred that these benefits could be passed on to consumers, because of both the lower prices and the access to newer and more efficient technologies, such as the expansion of the 4G network.

38. Finally, the SG stated that the transaction could be approved without restrictions due to the benefits passed on to consumers. In the decision, the department concluded that, even if RAN sharing agreements result in competition concerns, some characteristics of the transaction between TIM and Telefônica would mitigate these concerns. Thus, although the efficiency analysis was not decisive for the judgment, and the SG stated that the contract clauses can mitigate competition risks, it was important for the conclusion that the merger could be approved without restrictions. It should be highlighted that a significant part of the analysis of efficiencies was the understanding that these benefits could be passed on to consumers.

⁹ OECD (2014), “Wireless Market Structures and Network Sharing”, OECD Digital Economy Papers, no. 243, OECD Publishing, Paris, <https://doi.org/10.1787/5jxt46dzl9r2-en>.

¹⁰ Opinion no. **8/2020/CGAA4/SGA1/SG**.

4.3. BVMF and CETIP¹¹

39. In 2016, CADE analysed the corporate restructuring that resulted in the merger between BM&FBOVESPA S.A. (BVMF) and CETIP S.A. (CETIP). The BVMF was a market infrastructure operator for organised markets including stock exchanges, commodities and futures, and OTC trading platforms. It offered a wide range of products and services, such as custody, registration, trading, and post-trading, including Central Counterparty (CCP) services, securities, financial instruments, investment fund shares, and derivatives traded on exchange and over-the-counter (OTC) markets, among others.

40. CETIP was a market infrastructure operator for organized over-the-counter (OTC) markets offering services such as custody, registration, trading, and post-trading of securities, financial instruments, investment fund shares, and derivatives traded on exchange and over-the-counter (OTC) markets without CCP, among other services.

41. The horizontal overlap between the activities of the applicants was small and most of the services provided by BVMF and by CETIP were, in some measure, related. Therefore, the transaction consisted of a conglomerate merger, with the objective of expanding the portfolio of products and services.

42. According to the applicants, the merger could create efficiencies related to cost reduction in services, safer and more efficient allocation of capital, as well as improvement of risk management standards. In addition, it would increase capital efficiency to market share owners through the expansion of over-the-counter (OTC) products with Central Counterparty (CCP).

43. Regarding the efficiencies of the merger, the applicants presented to CADE two expert opinions on the topic. The first opinion was elaborated by a consultancy agency, which presented quantitative efficiencies, while the second opinion, written by a professor specialised in the subject, explored the qualitative aspects of the merger.

44. The SG considered that the quantitative efficiencies presented were not speculative, insofar as redundant structures would be optimised. Also, the agency decided to partially accept the criterion of the specificity of the benefits. The decision was taken since it was not possible to verify if certain price reductions were originated solely from the transaction. Finally, CADE found that the synergies presented resulted only from fixed costs. This was the biggest obstacle for the agency's acceptance of the synergies, since there were few incentives to pass them on to consumers. However, the SG stated that the transaction would generate some efficiencies that could benefit consumers, although it was not possible to specify when they would be passed on, an important aspect to identify the potential positive impacts of the transaction.

45. The SG stated that the lack of certainty that the positive impacts of the merger would be achieved in less than 2 years made it impossible to accept the efficiency argument in its entirety as a counterbalance for the competition concerns of the merger. However, it was clear that there were several operational and cost efficiencies for users, which deserved to be taken into consideration. This opinion was supported by many clients consulted on the matter who confirmed that the transaction could generate such efficiencies.

46. On one hand, CADE found that the merger could harm competition by (1) creating monopoly in some OTC segments in which there was competition, even if incipient, between the parties; (2) eliminating potential competition among the parties, especially in

¹¹ ADMINISTRATIVE COUNCIL FOR ECONOMIC DEFENSE (CADE). Merger Case no. 08700.004860/2016-11. BM&FBOVESPA S.A. and CETIP S.A.

OTC markets; and (3) potentially increasing entry barriers in the affected markets due to its vertical structure, as well as the possibility of establishing its central securities depository (CSD) as essential facility.

47. On the other hand, the set of efficiencies demonstrated by the Applicants and confirmed by third parties consulted revealed that, although they are not sufficient to fully mitigate the negative effects outlined, they seemed to render a potential rejection of the transaction disproportionate, given that it would, in fact, result in certain benefits to the market. The competitive harms identified were mainly related to market foreclosure and an increase of entry barriers, which can be mitigated with remedies and is less drastic than a blockage.

48. Therefore, the SG understood that the approval of the transaction would require the adoption of remedies to address such issues, while preserving the positive effects (efficiencies) that the merger could bring to the market and all users. The negotiation of the antitrust remedy took place within CADE's Tribunal, after the case was referred to this body following the SG's decision to challenge the merger, with a recommendation that the Tribunal assess the possibility of remedies to address the identified competition concerns.

49. The ruling body of CADE came to the same conclusion as the SG and highlighted the problem related to the central depository segment, since it could be considered an essential facility.

50. Although, in theory, it was possible to enter the segments of trading and post-trading in a timely, likely and sufficient manner, the entry in the central depository segment was more difficult. As a result, taking into consideration that the applicants had the monopoly of this service in Brazil, any player that may want to enter the Brazilian market for on-exchange and/or over-the-counter (OTC) markets would, necessarily, have to acquire the central depository services of the merger's resulting company, that would also be their competitor.

51. Therefore, to mitigate the potential anticompetitive effects of an increase on the already high barriers to entry in these markets, the parties should commit to allowing third parties to contract the use of their central depository infrastructure, should third parties wish to do so. Among other commitments, the parties were required to offer objective clear and public conditions regarding the requirements that a potential user of their infrastructure would need to meet—whether in terms of documentation, capital, risk management, or other factors necessary to comply with applicable sectoral regulations and the requirements of the service provider itself.

52. The aim, therefore, was to find an effective way to ensure third-party access to the Applicants' infrastructure under fair, transparent, and, above all, non-discriminatory conditions. The Applicants submitted a proposed Merger Control Agreement (ACC) addressing these points and an arbitral mechanism was agreed upon as a solution for any disputes that might arise during negotiations.

53. In sum, the agreement mitigated competitive harms and preserved the efficiencies the transaction could generate.

54. Five years after the signing of the merger agreement, the Department of Economic Studies of CADE (DEE) conducted an ex-post¹² analysis of the merger. The results revealed a decrease in the trading average fees applied by B3 (the company resulting from

¹² Available in Portuguese 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.

the merger of BM&FBOVESPA S.A. and CETIP S.A.). Moreover, robustness testing showed similar results, and, for some estimations, the effects of the merger were statistically equal to zero. Thus, no adverse competitive effects (related to higher in trading fees) were observed as a result of the merger. The imposition of remedies was mentioned, along with other factors, as the reason for the lower fees.

4.4. Oi – Claro, Tim, and Telefônica¹³

55. In December 2020, Oi sold its mobile network operation (Oi Móvel) due to a judicial recovery process to pay its debt. The asset was acquired by *Claro*, TIM, and Telefônica, the main competitors of the company in the mobile network sector, for approximately BRL 16.5 billion. However, the transaction had to be approved by the Brazilian Telecommunications Agency (ANATEL) and CADE.

56. Oi's exit from the mobile voice and data services, as well as from the wholesale mobile network access, would result in the reduction from four to three players in the Brazilian market, which leads to a high market concentration in the mobile network segment in the country.

57. The parties argued that there were efficiencies related to the transaction in four distinct areas: economies of scale, spectral efficiency, infrastructure optimisation, and expansion of coverage.

58. The alleged economies of scale derived from the transaction were nevertheless presented generically and superficially, not allowing for a detailed evaluation and, therefore, for them to be considered in the analysis. Regarding the spectral efficiency gains, the evidence gathered throughout the investigation, including technical literature on mobile network operations, supported – at least in theoretical terms – the Applicants claim regarding potential capacity increases and efficiency gains resulting from the aggregation of radio frequency spectrum bands. However, the estimates presented by the parties were based on internal premises and were not informed to the Brazilian antitrust authority. Thus, although CADE recognised that the transaction had the potential to generate spectral efficiency gains, the alleged efficiencies did not fulfil the verifiable criterion established in the authority's regulations and guidelines.

59. Regarding infrastructure optimisation resulting from the reduction of overlapping sites and the expansion of coverage—especially 4G coverage—the claimed efficiency gains were considered more aligned with the criteria defined in the authority's regulations and guidelines. The proxy used to perform the estimations—the number of sites/base stations—was publicly available information so, subject to verification.

60. Additionally, the elimination of overlapping sites and the expansion of the 4G coverage using existing structures could be considered allocative efficiencies of the transaction. In fact, without the transaction, both operators would need to maintain separate network infrastructures to assist customer base (made up by Oi and the acquirer's clients).

61. Finally, it was necessary to assess whether the efficiencies obtained through infrastructure optimisation and coverage expansion would be likely passed on to consumers in a significant way. The degree to which such efficiencies would be passed on—measured by improvements in coverage quality and overall service to consumers—depended on the acquiring companies' incentives to compete for customers, including efforts to retain the customer base acquired from Oi. In the absence of such competition the transference of

¹³ ADMINISTRATIVE COUNCIL FOR ECONOMIC DEFENSE (CADE). Merger Case no. 08700.000726/2021-08. Claro S.A., Telefônica Brasil S.A., TIM S.A., and Oi S.A.

efficiencies could be slower or even require higher prices than those practiced previously by Oi.

62. For these reasons, the antitrust remedy designed by CADE and negotiated with the parties also aimed to discourage parties from eventual strategies that could lessen competition and to ensure that such efficiencies were indeed passed on to consumers.

63. Although CADE's general preference for structural remedies, the authority expressed concern that the sale of the entire business might be disproportionate in relation to the competitive risks posed by the transaction, as it could excessively limit the potential efficiencies of the merger.

64. Thus, an agreement with behavioural remedies was negotiated to mitigate the identified anticompetitive harms – particularly the possibility of coordinated effects and market foreclosure resulting from the transaction. The agreement also determined the divestiture of a part of the antennas and radio communication equipment related to the personal mobile service (SMP) provided by Oi and acquired by the applicants.

65. In short, the agreement established six commitments to be fulfilled by the companies: public procurements for the sale of up to 50% of the base station sites (ERBs) acquired from Oi; RAN sharing provision; radiofrequency provision; national roaming; provision of a set of standards for Mobile Virtual Network Operations (MVNO); and a monitoring/mediation trustee. With these measures, CADE considered it would be possible to promote competition and discourage potential accommodation strategies by the buyers, ensuring that the claimed efficiencies would be passed on to consumers.

5. Conclusion

66. It is widely recognised that mergers can generate significant efficiencies, especially for the parties involved in the transaction, improving their performance in the market. In some situations, these efficiencies may also benefit competition and consumers. Thus, it is the role of antitrust authorities to assess whether the efficiencies generated are at least of the same magnitude as any anticompetitive effects identified in the merger review.

67. Although most jurisdictions follow the same analysis process — evaluating the net effects of a merger by weighing anticompetitive harms against efficiencies — there is an overall perception that efficiencies are rarely decisive in decisions.

68. In the Brazilian experience, CADE has rejected efficiency claims in most cases for failure to meet all the criteria listed in the Brazilian antitrust resolutions and guidelines: to be merger specific, likely, verifiable, achievable within two years, and transferable to consumers.

69. In fact, according to the research conducted for this article, no merger has been cleared unconditionally solely based on the efficiencies presented. However, in some cases, CADE has acknowledged the transaction could generate benefits for consumers and competition, which was relevant to clear the merger without restrictions or to design the antitrust remedies applied in a conditional approval.