

CHAPTER 10

Brazilian Recent Experience on Cross-Border Merger Remedies

*Virgínia de Melo Dantas & Julia Mendes de Carvalho**

§10.01 INTRODUCTION

A new Competition Law took effect in Brazil on 29 May 2012 (Law no. 12,529 of 30 November 2011). The new legislation brought significant changes to the structure of the governmental agencies charged with the enforcement of competition law in Brazil, specifically for merger control, unilateral conduct and antitrust sanctions within administrative level.

The most relevant change delivered by the new Law concerns the adoption of a pre-merger control regime in Brazil. This means that, in the previous law, the Administrative Council for Economic Defence¹ would usually analyse cases after their approval by other jurisdictions, considering that Brazilian System was set for post-merger review. With the institution of the pre-merger analysis, CADE follows the best international practices in the field of competition law enforcement, thus being able to examine mergers and possible remedies at the same moment that most competition agencies around the world do so.

CADE now has a specific deadline to render a decision on a merger case. If this time period elapses without a decision, the transaction will be considered automatically approved. Such time alignment conveyed a novelty for CADE in the field of International Cooperation for merger analysis. The Council is now able to discuss case analysis with its sister agencies around the world and even impose remedies in a coordinated manner. As the new law comes to its first anniversary, cooperation in

* The views hereby expressed are exclusively of the author and do not necessarily reflect those of the organizations involved.

1. CADE, for its acronym in Portuguese.

merger analysis has demonstrated to be not only feasible but also a very important tool when dealing with transnational firms.

In the first year alone, CADE has had two very successful cooperation cases in the analysis of transnational mergers. This might seem as a slim number if compared to the 262 mergers that were notified to the Council in that period. Nonetheless, CADE's new Law establishes a fast track procedure that guarantees a faster course of action to simpler cases, hence out of those 262 notified mergers, only 12 were sent to the Tribunal for second analysis and final decision – what leads to the significance of those two cases, which were amongst that slim number of 12. Both cases will be analysed later in this article.

One conclusion may be that CADE has had a 10% rate of transnational cases, considering the total of 'complex mergers' notified under the provisions of the new legislation. It is important to highlight that CADE has been able to keep close contact to its international counterparts in order to guarantee that the most efficient practices are used in its decision in a coordinated manner.

§10.02 FOMENTING COLLABORATION

With the new pre-merger control regime, CADE envisaged the opportunity to exchange views and coordinate measures with many competition authorities worldwide. This was done both before and after the enactment of the new law.

First, benchmarking and management research were developed in order to identify best practices. The main purpose was to structure an efficient pre-merger review regime, considering many inefficient aspects related to the former post-merger control system. As methodology to achieve this goal, surveys were sent to several competition authorities as well as international bodies with questions related to the management of pre-merger systems. Moreover, some key-countries were visited to further this benchmarking exercise, which were essential to the current design of CADE's General Superintendence, its lower body responsible for merger review, as well as anticompetitive practices in general.

Then, after the new law took effect, the collaboration with sister agencies continued in different ways.

With European counterparts, including DG Competition and other European national competition agencies, CADE efforts intended to cultivate old and create new relationships from the old continent. In sight of this innovation and trying to prepare for such, CADE has brought 12 European officials from different jurisdictions to discuss cooperation with its officials in a three-day Workshop that took place in May 2013, in Brasilia. The event brought participant jurisdictions closer to CADE by fostering international cooperation, particularly in the field of merger control, and by promoting trust and the exchange of ideas between Brazilian and European officials.

Close collaboration has also been developed with American counterparts. Both Federal Trade Commission and Department of Justice have been extremely important during merger investigations, in particular in sharing specific market experience and fast proceedings know-how.

In addition, CADE has welcomed and encouraged a series of Institutional visits from a variety of countries with the end of promoting collaboration and experience exchange between our officials. In the last year, CADE welcomed visits from: the Chinese Ministry of Commerce and the State Administration of Industry and Commerce, signing a Memorandum of Understanding with the last and negotiating one with the first; a Mercosur delegation, interested in fomenting competition protection in other countries of the group; officials from American Federal Trade Commission (FTC) and British Office of Fair Trading; and from neighbouring countries such as Ecuador, with whom a memorandum of understanding is being negotiated.

During those institutional visits, CADE's officials had a chance to understand foreign work and experiences. At the same time, visitors were introduced CADE's new facilities, to our personnel and most importantly to understand and trust our brand new legislation.

Aside from the initiatives mentioned above, CADE has established agreements with a variety of competition agencies in the world with the focus on fomenting cooperation and exchanging experiences in the field of Competition Defence. The complete list of CADE's agreements is available in CADE's website.

Finally, considering legislation changes, CADE prepared a bilingual (Portuguese/English) model of Waiver of Confidentiality based on OECD best practices and ICN models, in particular the American and European experiences. The model was created as a draft to be distributed to lawyers and companies when convenient during the investigations of transnational mergers. Shortly after the model waivers were produced, the two cases explained below used those waivers as base for the beginning of a close work between CADE and its sister agencies.

§10.03 CASE ANALYSES

Recently, CADE has analysed two international mergers with intense cooperation with DG-Competition. The first case concerned the acquisition of *Mach* of Luxembourg by *Syniverse* of the US. The merger has been recently approved by both CADE and DG-Comp subject to conditions.² The second case that also illustrates a 'new Era' of competition enforcement in Brazil, in particular for merger review concerned the proposed merger between the Swedish company *Munksjö AB* and the Finish *Ahlstrom Corporation*.³

[A] Purchase of Mach of Luxembourg by Syniverse of the US

The purchase of Mach of Luxembourg by Syniverse of the US represents the union of two main players in two highly concentrated markets. In Brazil, despite the possible competitive effects in those markets, investigation lead to doubts over the conditions

2. Merger file no. 08012.006437/2012-13.

3. Merger file no. 08700.009882/2012-35.

for entrance of new companies to those markets and the remaining rivalry due to the massive market power of the Company to be created.

During the first review phase, at CADE's General Superintendence, it was found that the transaction would result in high concentration in the Global System for Mobile (GSM) data clearing and Near Real Time Roaming Data Exchange (NRTRDE) markets, which are technology services provided to mobile telecommunication companies related to roaming. The companies are the two largest providers of these services in Europe and worldwide.

To remedy the competition concerns, Mach and Syniverse proposed the signing of a Merger Control Agreement ('ACC', for its acronym in Portuguese), through which they undertake certain obligations to remove any anticompetitive harms of the transaction. The exact content of the agreement is confidential, but in general the companies proposed to divest certain assets related to the GSM and NRTRDE business of Mach in the European Economic Area to a third company. The new company includes assets and employees needed to guarantee the success of the divestment business in both markets.

CADE's General Superintendence understood that the terms of the proposed ACC were enough to mitigate any competition concerns and sent the case for trial before CADE's Tribunal.⁴ The merger was approved by CADE's Tribunal on 22 May 2013 and by DG Competition on 29 May 2013. It was not by chance or coincidence that the cases were decided almost on the same day. In fact, CADE and DG-Comp had a permanent dialogue during the review of the transaction, based on a Waiver of Confidentiality given by the companies for this specific purpose.

The Waivers were produced by the companies based on a request from CADE and DG Competition and in accordance to the basic model provided by CADE. The dialogue between the two agencies was done mostly through conference calls held during the investigation. In those calls, Brazilian and European Officials were able to exchange confidential information on the case and ideas on how each agency analysed each specific piece of information. That partnership guaranteed that all technical information, such as relevant market definition, market power and entrance analysis, were aligned in both merger analysis and that there was not any detail left out of the investigation. Considering that the relevant market was worldwide, it was also important to cross reference and validate information given by the company to each agency. Finally, the agencies exchanged information on similar cases that had been analysed previously by each agency, as a way to speed the best analyses of the matter.

The close contact with DG-Competition certainly assured a faster and more effective decision from CADE. At the end of the day, it also had a positive outcome for the concerned companies, considering they had to wait for the 'green light' to implement their transaction.

4. General Superintendence's Official Opinion no. 125/2013.

**[B] Merger between the Swedish Company Munksjö AB⁵
and the Finish Ahlstrom Corporation**

The operation aimed the creation of a new company, to be called NewCo, after a series of operations involving the LP Business of Ahlstrom and Munksjo. By the end of a four-stage business transactions, NewCo would hold 100% of the LP and Munksjo shares.

The operation was notified to CADE on 19 November 2012 and to DG Competition on 31 October 2012. It was also notified to the Turkish Competition Authority, which cleared the merger without any restrictions.

On 25 April, 2013, CADE's General Superintendence sent the case to trial before CADE's Tribunal through its Official Opinion.⁶ The document affirmed that the operation produced horizontal overlapping in the following markets: pre-impregnated decorative paper (PRIP), bases for abrasive heavy paper, bases for abrasive light paper, and impregnated electrical technical impregnated by oil paper.

More specifically, CADE's General Superintendence concluded that the merger would result in high concentration in the PRIP market, which is used in indoors furniture as kitchens, bedrooms and offices, and in the heavy abrasive paper market (used to manufacture abrasive coating, and to polish materials operations in many industrial sectors), with no prospects of new entrants in the sector nor of sufficient firms able to compete in these markets. The world market for PRIP currently has only one player aside from the merging companies, which is Technocell. The geographic dimension of the relevant market for PRIP was defined as global, with the exclusion of China.

Given the competition concerns, the companies proposed remedies and the signature of a Merger Control Agreement ('ACC', for its acronym in Portuguese), through which *Ahlstrom* engaged itself to sell certain assets. In general terms, the proposal is a disinvestment of a PRIP producer plant located in Osnabruck, Germany, to a third party. That initiative should eliminate the horizontal overlapping and the buyer should act as a competitor to NewCo in that specific market.

CADE and DG-Comp also developed strong cooperation during the review of this case, which was as well assured by the signature of a Waiver of Confidentiality for this purpose. In total, the Brazilian and the European case handling teams held five conference calls for discussions of general aspects and constant update of each other's steps during their analysis.

CADE's decision took place at the same judgment session as the previous case, which is 22 May 2013, while DG-Comp issued its decision on 24 May 2013. The remedies imposed by both CADE and DG-Comp are similar. However, considering that structural remedies were to be implemented outside of Brazilian territory, a Brazilian subsidiary of Ahlstrom also signed the Merger Control Agreement in order to remain responsible for fulfilment of the agreement's provisions. This was important for enforcement purposes in Brazil.

5. Company that belongs to the investment fund EQT III, private equity (EQT).

6. General Superintendence's Official Opinion no. 109/2013 from 25 April 2013.

§10.04 CONCLUSION

CADE presents these two successful cases of cooperation and understands that in the globalized economy of nowadays, cooperation is a primordial tool to correctly handle transnational merger cases. There is a pressing need for competition authorities to coordinate analysis in a parallel manner so to improve antitrust enforcement considering the experience of other authorities and time constraints.

In this regard, CADE is trying to establish a continuous flow of information and experience exchange with its counterparts, thus encouraging cooperation. Also, considering the changes and improvements in the Brazilian System of Competition Defence and its legislation within the last year, it is important to ensure international recognition of our System as being safe and effective, thus inducing trust among similar organisms abroad.

As demonstrated in the cases above, International Cooperation between agencies made it possible that CADE and DG Competition reached analytical methodology of market comprehension for the operations that included confidential information from each agency, through the grant of Waivers of Confidentiality. The improvement in the analyses helped better evaluate operation effects on both cases and, most importantly, it assisted the agencies in the search for suitable remedies. Moreover, it also assured a faster outcome of decision, which is important for the involved companies, considering the need of prior approval to implement the transactions.

The new obstacle of Competition authorities within International Cooperation lies on monitoring the effectiveness of those decisions, especially on what concerns remedies proposed by the companies. It is important to secure that agreements are fulfilled in order to maintain the respect for competition agencies' work worldwide. One may notice that the companies did not have assets in Brazil, which could impose a problem of enforcement to CADE's decision in the case of lack of international cooperation.

In conclusion, we must point out that those experiences send a message to global business, including those taking part in the Brazilian market that competition agencies are communicating, in order to synchronize procedural calendars and coordinate remedies.