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Doing Business in Brazil with the New Competition Law Framework

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Doing Business in Brazil with the New Competition Law Framework

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This presentation intends to highlight some features of Brazilian antitrust policy by presenting a brief overview of our work, while focusing in what should be the main doubts and misunderstandings that may be left over in the minds of businesspeople and in the perspective of law firms.

CADE – The Administrative Council for Economic Defense – is the Brazilian competition agency formed by six commissioners and one president appointed by the President of Republic for a two-year term after the appreciation of the Senate. We count with the help of SDE (Secretary of Economic Rights) of Ministry of Justice that takes care of the investigation process and with SEAE (Secretary of Economic Issues) of Ministry of Finance, which provides an economic opinion. None of these opinions have a command over Cade’s decisions; these are independent and final at the administrative level. Parts can ever appeal to the Judiciary to review Cade’s decisions, as a constitutional right.

Let me point out some aspects of Brazilian environment. The nineties have been indeed a new time for Brazil as well as for many emergent economies: trade liberalization, deregulation and privatization have changed completely the economic environment and competition law became a requirement for the fair functioning of markets.

Talking very frankly, doing business in Brazil is not what it used to be in the old days, at least when we talk about competition policy. One kind of fear I presume you have is to be trapped in a kafkanian process of bureaucratic obscurity, delays and corruption.

Since 1996, when a new composition was appointed to Cade, we have been working very hard to build a new kind of institution based on transparency,

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2 Cade’s Commissioner. The opinions expressed are of my own and exclusive responsibility.
predictability, accountability and simplicity. These principles are our cornerstone and guides a process of reputation building.

You do not need to rely on my words, just take a look at the tables below that show how we improved productivity, how we got faster decisions and how we reduced the amount of paperwork.

In terms of the content of the Cade’s rule, you can see on the table below that our pattern of analysing mergers and acquisitions are very similar to what you are already used to.

Seven steps for merger and acquisition analysis

1) define the relevant markets (in geographic and product terms)
2) identify market participants
3) define market structure
4) identify conditions of entry
5) presumed anticompetitive effects
6) assign efficiencies
7) test the failing firm argument

Also, this is what the law says ....

[Article 54, chapter 1 (monitoring of acts and agreements)]

“Any acts that may limit or otherwise restrain open competition, or that result in the control of relevant markets for certain products or services, shall be submitted to CADE for review.

Par. 1º – CADE may authorize any acts referred to in the main section of this article, provided that they meet the following requirements:

I – they shall be cumulative or alternatively intended to:
(a) increase productivity;
(b) improve the quality of a product or service; or
(c) cause an increased efficiency, as well as foster the technological or economic development.

II – the resulting benefits shall be ratably allocated among their participants, on the one part, or consumers or end-users, on the other;

III – they shall not drive competition out of a substantial portion of the relevant market for a product or service; and

IV – only the acts strictly required to attain an envisaged objective shall be performed for that purpose.”

As it can be seen, the trade-off between reducing competition and enhancing efficiency is a legal guideline for our decision-process.

On the other hand, we understand that Brazilian economy is passing through a dramatic process of restructurering, and in this process mergers and acquisition perform an important role. As a consequence, the huge majority of the operations we analyse does not raise any competition issue. That is why they are approved as rapid as possible and without any kind of restriction. Only a few cases really raise antitrust concern, and the trend is to intervene only in the focal point of the antitrust problem, as we did in Kolynos-Colgate case and Mahle-Metal Leve case. In the former one, we identified the importance of Kolynos brand as the true barrier to enter the tooth paste market; using some simulations, we have shown how the transaction could block new entry, unless if an empty space could be created. As it was a 1996’s decision, we are already able to verify its results. The solution of suspending the main brand “Kolynos” for a period of four years really shook the market: six new other brands entered the market and prices fell 10% in a year.

In the later one, an acquisition of an autopart company by two former competitors, several relevant markets were identified, conditions of entry and efficiencies were verified, and the decision focused on the monopoly of devices for piston coverage generated by the operation. It was also considered that the market for these devices did not make part of Mahle’s core business and there were no efficiencies that could be expected from this part of the operation. Cade ruled the divestiture of
the respective division to another player able to sustain itself and supply the market in regular basis.

Another aspect to point out is that it is one of our main concerns to harmonize rules and procedures with other jurisdictions, as many transactions are submitted simultaneously worldwide and we understand what it means in terms of costs and uncertainty.

In this sense, we recently approved a new set of procedures to merger review, simplifying dramatically the analysis process and adopting the OECD proposal for merger review notifications.

Because of these new procedures, nowadays it is much simpler and cheaper to get a Cade’s decision.

As we are getting more efficient, we are getting more stringent too, more severe with non-compliance with the law. This trend is reflected in the number and value of fines we have been imposing.

We do not impose fines because we like to do so, but we see it as an important tool to get our major aim, that is to say, to build, by education a competition culture in Brazil.

Talking about fines, it is important to point out two mistakes that can be avoided:

The first of them is to think that if a company has not been operating in Brazil and buys a Brazilian one, or a considerable part of its stocks, it does not need to notify CADE. This is not what the law says and CADE’s jurisprudence is clear in considering the enter an alteration of previous competitive structure, which can generate good or bad effects.

The second mistake is to misunderstand the moment the transaction must be submitted to CADE’s review. The law obliges that an operation of certain magnitude and that may cause effects over competition shall be presented before it has been accomplished or till fifteen days after its realization. Among them are those included in 3rd paragraph of article 54.
The concept of realization is not clearly defined by law, but after consolidating jurisprudence on the theme, Cade’s ruled in its 15th Resolution that:

“Article 2nd – The moment of the execution of the transaction for effects of paragraphs 4th and 5th of Law # 8884/94 shall be set from the first binding document settled by the Applicants, except when it is demonstrated existence of considerable alterations in the competition relations between the Applicants or at least between one of them and a third party, resulting in effects on the market, occurred in a different moment.”

It means that it is not the moment when the price is finally paid or the assets transferred that counts for antitrust purpose, but the moment when the relationship between the parties has changed from rivalry to cooperation.

But, anyway, in case of remaining some doubts whether you have to submit or not a transaction to CADE’s review, please file a formal consultation – the form, a very short one, is available in our web-page – or at any time please send us an e-mail. The new resolution on consultations rules that we shall issue an answer in no more than sixty days.

Finally, because of our severe budget constraint, filing fees were recently introduced by law (fifteen thousand reais for merger and acquisitions and five thousand reais for consultation). With this improvement we are sanguine about doing our job in a faster and more robust way.