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CADE

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One Year After: Premerger Notification Unit in Brazil

Carlos Emmanuel Joppert Ragazzo & Mário Sérgio Rocha Gordilho Jr.[1]

I. INTRODUCTION

On November 30, 2011, after a lot of debate in Congress, Brazil's President sanctioned the approval of a new Competition Law (Law 12.529/11). After the six-month *vacatio legis* that aimed to give the authorities time to prepare the new competition policy system, the law came into force on the May 29, 2012, bringing about substantial innovations to the national antitrust scenario, especially regarding mergers. Brazil had been one of the very few countries in the world that reviewed mergers only after they were consummated. After the Law was issued, however, merger control started to be reviewed *ex ante*, following the international trend.

With the new Law, the following challenge was set for Brazil's antitrust authority: Structure the new infralegal framework and the new administrative structure of the agency[2] in a way that would make the new system more efficient and able to benefit from these advantages.[3] And accompanying this challenge during the transition period was, without doubt, a generalized feeling of uncertainty by the private sector, especially economists and lawyers who deal with antitrust issues in Brazil. For this reason, a swift and efficient response from the new CADE was necessary to calm the general agitation and, ultimately, neutralize the feeling of insecurity that reigned over the new Brazilian antitrust model, especially in merger review.

This article focuses its attention on the creation of a merger-screening sector (the Premerger Notification Unit)[4] that proved to be essential to the new CADE's initial success in its challenge to create a modern, efficient, and effective antitrust agency for Brazilian society. Since the new Competition Law came into effect in May 2012, the Premerger Notification Unit has

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[2] The new CADE has two main bodies: (i) The Tribunal, which decides all the anticompetitive conducts and the merger cases challenged by the General Superintendence; and (ii) The General Superintendence, which assesses all the mergers cases and also the conducts (unilateral and cartels). Inside the Superintendence there are 8 units in charge of assessing the cases, 3 especially designed to deal with cartels, one designed to screen all of the merger cases and prepare a decision for those eligible for a fast track procedure (the Premerger Notification Unit), and 4 units that deals with mergers non-eligible for fast track and unilateral conducts in some specific sectors.

[3] In fact, the "new" body arose from the junction of two of the three antitrust agencies: the Administrative Council for Economic Defense (CADE) and the Secretariat of Economic Law (SDE), also absorbing the Secretariat for Economic Monitoring's (SEAE) merger review competence. Under the new law, this body remained a part of the Brazil's competition policy system antitrust authority, but with the exclusive competence of competition advocacy.

[4] The Premerger Notification Unit is in charge of screening all the merger cases presented in Brazil. It reviews the fast track procedures and remands the ordinary cases to the sectorial units. Beyond the Premerger Notification Unit there are four other sector-specific units in CADE's General-Superintendence (divided in 4 great areas: differentiated goods, services, industries and regulated markets). They act in merger cases as well as unilateral conduct cases, and there are also three departments totally dedicated to fighting cartels.

gone through four well-defined moments, and the details of each of them will be the objective of this article.

The first moment was the creation of a new merger review model; the second moment occurred when, just as it was beginning to function, the competition authority had to deal with 140 mergers that were submitted under the previous Law (and 40 others inherited without review from the previous antitrust competition bodies); the third moment concerned the consolidation of the pre-merger review; and, finally, the fourth moment, occurring presently, is the reorganization of the Premerger Notification Unit with the aim of becoming the center of intelligence of the Superintendence going forward, as well as preparing it for other functions.

II. FIRST MOMENT—STRUCTURING THE SCREENING SYSTEM

Right after Congress approved the new competition law, CADE started to think about its future duties. Many workgroups were swiftly created involving public servants from the three bodies that had previously made up the Brazilian Competition System. Each workgroup had a specific responsibility to deal with, and was always coordinated by a commissioner. The group created to discuss the issues concerning merger control was responsible for structuring both the new administrative structure and its regulatory framework, including the new merger notification forms.

After an initial research that compiled relevant and successful international experiences, the members of the *ex ante* merger review workgroup paid visits to foreign antitrust authorities, in an *in loco* benchmarking project. This project proved to be most fruitful, for it raised many different ideas. Among them was the creation of a specific sector to both screen merger cases and separate out the cases that did not present significant competition concerns (the so-called fast-track cases), as well as to prepare simple decisions for them, with a short deadline. Although not all of the countries visited used a screening department, the team that conducted the project concluded that, due to the number of merger cases and their profile (predominance of fast-track over ordinary cases), it would be necessary to design an organizational unit with this objective, selecting the most suited employees to identify the complex cases and answer lawyers' questions regarding the merger review forms.

After the creation of this specific unit for the screening of merger cases (the Premerger Notification Unit), the next step was to design two notification forms: one exclusively for fast-track cases, and the other for cases that did not fit that profile, both according to the criteria established in the normative act and also as elaborated by the *ex ante* merger review workshop group. This work demanded a lot of internal discussion, along with the analysis of the forms used in other jurisdictions, After this phase, drafts of the two forms were put up for public consultation in CADE's website, generating a significant amount of contributions by society as a whole. Many of these contributions were, in the end, incorporated in these documents.

All of this process was aimed at solving a problem in the incentives game played between the parties during the period in which the former legislation was in effect. On one side, merging companies had little incentive to disclose information, since the case would only be analyzed *a posteriori*, and wouldn't be an obstacle to the consummation of the operation. On the other side, CADE's own employees would, on many occasions, ask the parties for information, given that this was necessary to suspend the review deadline. In the end, all of the parties involved assumed

that the eventual gaps coming from forms submitted with incomplete information could be filled out during the review period. This had created an inefficient culture that impaired the speedy analysis of merger cases, which became a more pressing concern since the new Competition Law provides for an *ex ante* approval system with a fixed review period,[5] and the parties cannot consummate the operation without CADE's approval.

To use an antitrust term to illustrate the challenge, due to the *ex ante* merger review a structural remedy needed to be adopted in order to confront this incentives defect. The creation of a Premerger Notification Unit was the structural remedy chosen. The proposal was to both identify fast-track cases and verify the correct filling-out of the merger notification forms (both fast-track and ordinary cases), avoiding delays. Therefore, this would be the moment when the Premerger Notification Unit became effective.

III. SECOND MOMENT—LAW 8.884/94'S BACKLOG

The Premerger Notification Unit´s second moment began on the first day the new Competition Law came into effect—May 29, 2012. Starting that day, during a period of 15 business days (during the transition from Law 8.884/94 to Law 12.529/11 from May 29 to June 19, 2012) the unit had to deal with 140 operations that had been submitted under the previous law regime, plus some 40 other mergers inherited from SEAE because they couldn't be reviewed on time.[6] The submission of these 140 requests, a volume that was three times larger than normal, reflected the private sector's apprehensiveness regarding CADE's future performance in the management of merger review. It would be good to remember that, under the previous Law, merger control was carried out *ex-post,* which means that all mergers could be consummated before CADE's final decision.

Along with the flood of cases submitted for review under the previous Antitrust Law, CADE physically moved to a new building that had to be remodeled to accommodate the new larger agency. And it was exactly in this period of transition between the old and the new Law that countless delays in the new building's construction work occurred. For approximately two weeks, CADE's employees had to work in precarious conditions, many times at home.

The Premerger Notification Unit had already begun working at this time, separating all of the fast-track cases from those that deserved more attention. With the collaboration of all of the teams responsible for CADE's merger review, the results could not have been better. All of the fast-track cases (around 70 percent) were analyzed in less than 30 days, and at the end of 2012 almost all of the 180 mergers submitted and inherited had already been analyzed by the

[5] The Competition Law sets forth a 240-day maximum period for merger review in Brazil. There is, however, a possibility of a 90-day extension should the transaction be considered complex. It is important to stress that such review period (240 plus 90 days, solely in case of complex transactions) is divided between the General Superintendence and the Tribunal. Merger cases without a decision within this timeframe are automatically approved.

[6] In fact, in the last two weeks before Law 12.529/11 came into effect the flow of merger cases grew considerably. Since SEAE already had a considerable stock of merger cases to review (more than 100), CADE inherited many of them, some received directly by the Rapporteur-Commissioners' offices, others absorbed by the new structure of the General-Superintendence through the Premerger Notification Unit.

Superintendence.[7] By May 2013, the Superintendence no longer held reviews for mergers submitted under the previous Law.

IV. THIRD MOMENT—THE BEGINNING OF EX ANTE MERGER REVIEW

The work of CADE's General-Superintendence team began to show results in the first few months, but there was a greater test to come—the swift review of mergers under the new Law, especially cases with less competitive risk that could be put under fast-track review. Since the maximum deadline for merger review for fast-track cases had not been regulated, there was a lot of concern that at least some of these cases that were "simpler" could take the greatest amount of merger review time (up to 330 days maximum). However, as CADE had always made clear even before the passing of the new Law, simple cases would be dealt with under a fast-track procedure and its review period would not exceed the 30-day globally accepted deadline.

Considering that many of those 140 cases notified during the transition were closed quickly so that the merger could be submitted to CADE under the previous antitrust Law (Law 8.8884/94) and, therefore, would not run the risk of being conditioned to CADE's *ex post* approval,[8] the first *ex ante* case was only submitted 15 days after the new Law came into effect, which was in mid-June. During the first month of the new law's validity, only two cases were submitted and during the second, merely nine. The average number of cases submitted during the new Law's first year was about 22 per month. The result presented by CADE of these first 11 *ex ante* merger reviews, submitted during the first two months of the new Law, was very satisfactory.

The average time span for merger review during the first two months of the new Law was 18 days, with a minimum of 9 and maximum of 28 days, thus showing the *ex ante* merger review project had been successful. Further, during the next two months (Aug. and Sept.) 37 mergers were submitted, which was more than three times the number of the cases submitted during the first two months (June and July). And still the average time of analysis was kept constant. This would be the third moment of the new Premerger Notification Unit.

During the beginning of CADE's activities under the new Law, many lawyers acting in antitrust cases would get in touch with the Brazilian antitrust authorities to have questions answered regarding both the new regulation that was adopted and how to fill out the new merger notification form. These questions spanned from simply how to fill out the notification form to asking which form should be filled out. There was, moreover, a lot of fear that the notification might not be accepted by CADE.[9] Nevertheless, through the open communication channel

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[7] Out of the 180 mergers submitted, CADE's General-Superintendence's opinions recommended three mergers to be blocked, and other opinions suggested to the Tribunal the imposition of remedies in order to clear the merger. One of the cases in which the Superintendence suggested that the merger be blocked was, in fact, already blocked by CADE's Tribunal on April 3, 2013.

[8] Many of these 140 cases submitted under Law 8.884/94 would not have had to be notified under the new rules. And many of the cases that fit the requirements for notification pursuant the new Law were approved within a more extensive deadline than would have been the case had they been submitted under the new Law.

[9] The new Law created a rule that allowed CADE to solicit additional information when what is submitted is insufficient. Even new information may be requested. This power was granted in order to settle all of the questions necessary for the beginning of the merger review. If the additional or new information requested is unsatisfactory CADE can reject the notification without analyzing substantive issues.

between CADE and lawyers, using the Premerger Notification Unit as an initial contact, many questions were answered before notifications were sent.

With regard to the resolution that regulated the submission of mergers, the main questions concerned the rules that needed to be followed when designing the constitutions of corporate groups, and the objective rules regarding operations when acquiring shares in a company. Nowadays, some of these questions are still asked, but they are rarer every day and focus on the rules that have not been regulated yet, such as the associative contracts review rule.

Until May 2013, the Premerger Notification Unit had ordered the amendment of a form,[10] pursuant to article 53, paragraph 1º, of Law 12.529/2011 in only 13 occasions (out of which two were fast-track cases and 11 were ordinary cases). The amendments were usually ordered in the following situations: (i) the petitioner submitted the fast-track form even though the case didn't fit the requirements for a fast-track proceeding; (ii) there were doubts regarding the definition of relevant market (and there was not trustworthy data on possible alternative relevant market scenarios); and (iii) the petitioners were not able to prove their low market share, and ended up submitting estimated market shares without any adequate data to back them up, thereby generating untrustworthy supply structures.[11] There have other types of simple questions, but most of them can be—and are—solved over the phone.

Looking at these orders in more detail, almost all of the amendments made during the new CADE's first eleven months focused on certain points. In an *ex ante* merger review scenario, when the petitioners defend their market share as not large enough to be a competitive concern, it is of the upmost importance that they bring all the possible evidence that could justify their reduced market share. However, this has not happened in some of the cases submitted as fast-track in which there is a horizontal overlap and/or a vertical integration.[12] There are also cases in which the filings are presented as simple estimates produced by the petitioners according to their "best available information on the market," without any indication of the source or the methodology adopted. And even when the data is used as a source for building the case's relevant market supply structure, they are rarely submitted to CADE's staff for verification.

Overall, there has been notable progress during the first 12 months validating the new Brazilian antitrust law. First, the forms are being submitted in a more complete manner, and amendments have been ordered on fewer occasions. The Premerger Notification Unit's rigorous

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[10] According to the new Law, when faced with insufficient information in the notification form, CADE may request its amendment before rejecting the filing. Should the reply to the amendment requested be still incomplete CADE is allowed to reject the notification.

[11] The DG Comp of the European Commission, for example, removes the case submitted under the simplified form (Short CO) when there are questions about the definition of the relevant market (for example, new markets or markets with which the authority has no prior experience) and when the petitioners' market shares are clearly unproved. Source: *Commission Regulation (EC) nº 802/2004, amended by Commission Regulation nº 1.792/2006 e 1.033/2008*.

[12] The specific regulation of merger review (CADE's Resolution n. 02/2012) determines that cases subject to fast-track procedure are those that, although there is horizontal overlap and/or vertical integration, generate a market share that is proven to be under 20% percent, in order to remove all doubts concerning the irrelevance of the case from a competition policy standpoint.

approach to requiring complete forms has turned out to be fundamental for disrupting the defective incentives culture established under Law 8.884/94.

Another reason for this progress is the specific rule in CADE's Internal Regiment (CADE Resolution 01/2012) that created what is now known as the pre-notification meetings. The first few experiences have proved to be very positive. To this day, no merger case in which the petitioners solicited a prior meeting required its notification form to be amended, and the maximum of time taken for these cases, (up until May 29, 2013, when CADE completed one year under the new law) was 205 days after the formal submission of the amended form to CADE.[13] This latter case was quite complex, and the Superintendence suggested to CADE's Tribunal that its approval should be conditional on remedies in order to reduce negative impact. After having received Superintendence's report, CADE's Tribunal took its decision in 20 days, approving this transaction with some conditions.

This is a review period consistent with international standards set by the main antitrust authorities in the world.[14] It should be noted that the Premerger Notification Unit participates in each of these pre-notification meetings, this being the first moment in which the petitioners get in touch with CADE. The sector-specific department of the market affected by the merger is also a part of these meetings, and starts reviewing the case after a public notice is published, which means CADE's approval of the information is provided in the notification form.

The Premerger Notification Unit continues to maintain its review of cases in a 30-day time period (with an average time span of 19 days), and the other sectorial units have started to respond to concerns regarding the review deadline of a case under ordinary procedures. The first ordinary procedure case approved by CADE involved two large commercial banks[15] and was analyzed in 48 days. The average time period of the non fast-track cases assessed until May 29, 2013 was 67 days —a time span congruent with that of the main antitrust authorities worldwide. Below is the relevant data on CADE's Superintendence regarding *ex ante* merger review:

CADE's General Superintendence
Data on Merger Review (May 2012 to May 2013)

STATISTICS	FAST-TRACK CASES	ORDINARY CASES
Nº of mergers reviewed	**228**	**23**
Average time period for review (days):	**19,3**	**67,4**
Median (days):	**19**	**52**
Mode (days):	**18**	**49**
Standard deviation (days):	**6,1**	**43,2**

Source: SG/CADE

[13] 205 days amounts the total period including the review by the General Superintendence as well as the judgment trial by CADE´s Tribunal.

[14] In fact, in this specific case, remedies were being discussed by European DGComp at the same time, and with an equivalent review period.

[15] AC nº 08700.006962/2012-39, between Itaú Unibanco S.A. and Banco BMG S.A.

As we can see from the data above, after 251 merger reviews carried out by CADE in the first year under the *ex ante* regime, every merger review time period exceeded initial expectations. This illustrates that CADE was able to excel and show great results from almost a year's work done by the groups formed to deal with the transition process. It did so even in the face of the many difficulties it had to overcome (lack of staff, loss of expertise, change of address, private sector distrust).

Just to further emphasize this point, the average review period for a merger under the previous system, in 2011, was about 150 days and that had been the best result since 2005 (a year in which the average review period was approximately 250 days). During the first year operating an *ex ante* merger review the average time span for merger analysis for both fast-track and ordinary cases was 25 days. Throughout this period of time the case that took the longest to be analyzed was reviewed in 205 days. The swiftest took six days. The efficiency gain is undeniable.

The General-Superintendence's Premerger Notification Unit greatly contributed to the success of this initial phase. The team that was designated to work in this unit, made up of very diverse personal profiles and employees with vast experience on the subject, also seems to have supplanted all of the initial distrust. The structure adopted by the General-Superintendence, with the constant exchange of experiences between the Premerger Notification Unit and sector-specific units is responsible for a great part of the success reached in merger review. The dialogue, which used to be a problem in the previous regime with three antitrust authorities, is now a pillar of the General-Superintendence.

V. FOURTH MOMENT: NEXT STEPS

At this moment, a project that has as its objective the administrative reorganization of the Premerger Notification Unit is being implemented, modifying some internal procedures in order to increment merger control efficiency even more. The project's priority, which marks the fourth moment of the Premerger Notification Unit, is structuring the monitoring system of cases that aren't submitted to CADE, because (i) they do not fit the submission criteria established in the Law but can still be a competitive risk;[16] or (ii) the parties fail to file a merger that does meet the submission criteria.[17] To monitor these cases, regional newspaper databases will be acquired and scrutinized, a process that will be complemented by structuring a procedure under which requests are processed so that CADE can analyze those mergers that don't fit the Law's requirements. Additionally, the Superintendence will carry out periodic investigations directly in some local markets and even with companies with the aim of mapping the operations that aren't submitted before CADE.

The Premerger Notification Unit can also be used as a pilot to structure a new electronic system to manage databases, through which it will be possible to compile the information received and produced by the General-Superintendence; for example, the number of cases in a certain sector and examples of market tests. It will also be possible to create sectoral analysis flow charts and legal opinion templates in order to standardize the procedures. This part of the

[16] Usually mergers between small companies in local markets

[17] According to § 7º, art. 88 of Law 12.529/11, CADE may request the notification of any operations it deems potentially harmful, even if the parties do not meet the turnover notification thresholds.

screening project will create internal administrative routines in order to optimize the flow of information, speeding up the review of the cases.

At the same time as it is experiencing the increase in case management, the Premerger Notification Unit will also be responsible for: (i) the constant review of the merger notification forms (fast-track and ordinary cases), in order to verify the best ways of improving and reducing the bureaucracy of information requests on behalf of the petitioners; and (ii) competition advocacy activities so that the quality of the information submitted before CADE improves. With regard to the first of these functions, the Premerger Notification Unit maintains an ongoing accompaniment of the merger review cases in other countries in order to better evaluate possible alterations and best practices. The advocacy activities, on the other hand, will start from a better evaluation of the points to be communicated to the private sector in order to make the merger review process even swifter. Some of these points find themselves in this paper.

The Premerger Notification Unit is the General-Superintendence's center of intelligence and creates and promotes new management and substantive analysis techniques for the mergers notified. It is definite that a great deal of the new Competition Law's success, including fast review periods and qualitative improvements in the Superintendence's opinions, happened because of its employees and the systemic vision that this type of organizational structure allows for antitrust policy in Brazil. Adjusting the management of *ex ante* merger review was merely the first step of many that will come to bring us toward the further development of our country.