IBRAC | INSTITUTO BRASILEIRO DE ESTUDOS DE CONCORRÊNCIA, CONSUMO E COMÉRCIO INTERNACIONAL

THE ALLOCATION OF ANTITRUST RISKS IN MERGERS & ACQUISITIONS

25.º Seminário Internacional de Defesa da Concorrência

Campinas, 7 de novembro de 2019

THE ALLOCATION OF ANTITRUST RISKS IN MERGERS & ACQUISITIONS[1]

BACKGROUND

The topic of allocation of antitrust risks usually arises in the context of transactions that may raise competition concerns. Although the issue has been discussed in depth for a long time in other jurisdictions, it has only started to gain importance in Brazil in recent years, namely since the country's transition to a pre-merger review system in 2012, when Law No. 12,529/2011 (the 2011 Brazilian Competition Act) came into force.

A snapshot of the decisions rendered by the Brazilian antitrust authority (*Conselho Administrativo de Defesa Econômica* - "CADE") since the enactment of the 2011 Brazilian Competition Act suggests that CADE has been adopting a more rigid approach to market concentrations, if compared to previous periods where the post-merger control was in place. According to official information by CADE, since the 2011 Brazilian Competition Act entered into force, among the 2,755 merger notifications (or "concentration acts") examined by CADE, approximately 54 were declared complex, 37 were conditioned to the execution and fulfillment of Merger Control Agreements (*Acordos em Controle de Concentração* – "ACCs") which involved remedies and at least 9 cases were entirely blocked. At the time of this writing (August, 2019), in the year of 2019 only, the approval of 4 cases had been conditioned to ACCs.[2]

A scenario of higher probability of imposition of remedies and of a longer merger review period than originally envisaged by the parties when negotiating a transaction may negatively affect the timetable for its closing and completion, and even completely derail a transaction. In cases where a transaction is declared complex by the Office of the General Superintendent of CADE (*Superintendência Geral do CADE* – "SG-CADE"), additional scrutiny will be required and the period of analysis will be longer. particularly if the SG-CADE challenge the case before CADE's Administrative Tribunal.[3]

---

[1] Panel proposed by Gabriela Paiva Reis Monteiro. This presentation paper was prepared by Gabriela Paiva Reis Monteiro and Fernanda Lins Nemer and has received input from the panelists. This paper does not reflect an opinion or official position by IBRAC on any aspect.

[2] Information in CADE' yearly reports and "CADE em Números" page. Available at http://www.cade.gov.br/servicos/imprensa/balancos-e-apresentacoes and http://cadenumeros.cade.gov.br/QvAJAXZfc/opendoc.htm?document=Painel%2FCADE%20em%20N%C3%BAmeros.qvw&host=QVS%40srv004q6774&anonymous=true.

[3] Under the 2011 Brazilian Competition Act, the maximum review period corresponds to 240 days, extendable for up to 90 days.

Another aspect that can make CADE's analysis process more complex and time-consuming is the risk that third parties challenge the transaction, for which reason it is important to be able to anticipate this possibility and properly address it in the contract. Thus, the assessment of the antitrust complexity of a transaction from the outset is key to a precise estimate of the length of the merger review analysis and risks of remedies and for properly addressing them in the agreements.

The competition risks that transactions may suffer in Brazil cannot be overlooked by those who are negotiating the transactions, as antitrust analysis has become an essential part of the planning of timing, steps and structure of many M&A transactions.

Considering this scenario, the purpose of the panel will be to provide an overview of the different types of provisions that may be included in the transaction agreements and their importance to mitigate potential risks and losses deriving from their antitrust scrutiny. The panel will discuss these provisions and contrast the US experience with the Brazilian experience so far.

CHOOSING ADEQUATE RISK ALLOCATION PROVISIONS

When taking part in a typical M&A transaction subject to mandatory filing, sellers are often subject to greater risks, since they may lose employees and customers during the antitrust investigation period and face difficulties in continuing their businesses.[4] Therefore, on one side, sellers will typically seek quick resolution of the antitrust issues, requiring buyers to do whatever it may take to secure the antitrust clearance as quickly as possible.[5] On the other side, buyers will typically want to limit or minimize their contractual obligations to accept any kind of restrictions on the post-merger business. In fact, depending on the transaction, the continuing viability of the target company may not be the primary concern for the buyer, which may even benefit from further weakening the target as a competitor throughout the antitrust investigation of the case.[6] At the same time, some buyers may face additional constraints if they have secured financing limited in time or other conditions.

[4] See Compton, Charles; Sher., Scott. **Allocating the antitrust risk in merger agreements**. Wilson Sonsini Goodrich & Rosati, September 2004. M&A guide 2004 to 2005 introductory chapter. Available at: <https://www.wsgr.com/PDFSearch/0911Intro2US.pdf >. Access on August 29, 2019.
[5] Perlman, Scott. **Allocation of Antitrust Risk in Mergers & Acquisitions**. Mayer Brown. December 11, 2007. Available at: <https://www.mayerbrown.com/public_docs/AntitrustRoundtable.pdf>. Access on August 29, 2019.
[6] Compton, Charles; Sher., Scott. **Allocating the antitrust risk in merger agreements**. Wilson Sonsini Goodrich & Rosati, September 2004. M&A guide 2004 to 2005 introductory chapter. Available at: <https://www.wsgr.com/PDFSearch/0911Intro2US.pdf >. Access on August 29, 2019.

The most appropriate type of provision to be included in a particular agreement will ultimately depend on a detailed assessment of several factors. The following factors, for example, should be assessed: (i) the relative bargaining positions or power held by each party; (ii) the levels and materiality of the antitrust concerns raised by the transaction; (iii) the type of remedy likely to be required by the competition authority; and (iv) the importance of other issues that may cause other party to trade off its preferred type of clause.[7] Additionally, other factors to be taken into account are, for instance, the specificities of the legal procedure applicable for merger reviews in a given jurisdiction, as well as the antitrust authorities' level of scrutiny on the analysis of the transactions.

THE BRAZILIAN MERGER CONTROL SYSTEM AND RISK ALLOCATION PROVISIONS

There is no indication in CADE's case law or public statements on how the use of antitrust risk-shifting provisions by parties to a transaction may impact its analysis. Also, since the underlying agreements of the transactions submitted to CADE are usually treated as confidential, it is hard to investigate whether the cases declared complex contemplated risk-shifting provisions.

A question to be discussed refers to the types of clauses to allocate risk CADE would be willing to accept in the context of its pre-merger review system, considering that some of them may establish payments from one party to another before the antitrust clearance or in cases where the transaction ends up not being consummated. CADE's Guidelines for the Analysis of Previous Consummation of Merger Transaction (the so-called "Gun-Jumping Guidelines") expressly exclude breakup fees as contractual provisions that could result in gun jumping violations under the Brazilian legislation, therefore accepting its use in transactions in Brazil, in principle.[8][9]

Another point that could be considered in discussing traditional risk-allocation provisions is to what extent they would fit the system of negotiating remedies currently in place in

[7] Perlman, Scott. **Allocation of Antitrust Risk in Mergers & Acquisitions**. Mayer Brown. December 11, 2007. Available at: <https://www.mayerbrown.com/public_docs/AntitrustRoundtable.pdf>. Access on August 29, 2019.

[8] CADE's Gun-Jumping Guidelines list the following contractual provisions, among others, as being able to result in a premature integration of the activities of the merging parties:"*c) clause for full or partial payment, non-reimbursable, in advance, in consideration for the target,* ***except in case of*** *(c.i.) typical down payment for business transactions, (c.ii.) deposit in escrow accounts, or* ***(c.iii.) breakup fee clauses (payable if the transaction is not consummated)***" (our highlights). It is worth noting that CADE's Gun Jumping Guidelines do not differentiate between breakup fees and reverse breakup fees (See Almeida, Fabricio A. Cardim de. **Reverse break-up fees: a recent trend in M&A strategic deals?** Merger Control in Brazil: Frequently Asked Questions, IBRAC, p. 121-128, March 1, 2018. Available at: <http://www.ibrac.org.br/UPLOADS/Livros/arquivos/Merger_control_in_Brazil_-_Frequently_asked_questions.pdf>).

[9] In this regard, see Commissioner Paulo Burnier's vote in Administrative Proceeding to Investigate Merger (APAC) No. 08700.005408/2016-68.

Brazil. Considering procedural specificities, some risk allocation provisions may be preferable to others, in appropriately reflecting the parties' intention of protecting their respective interests.

TOPICS TO BE DISCUSSED IN THE PANEL

Considering the context briefly outlined above, the panel intends to discuss the following topics, among others:

- What are the most traditional risk-allocation provisions foreseen in the antitrust literature and M&A practice and what are their objectives?
- What are the factors that should be identified and taken into account in each case to determine the type of provisions that could be adopted in a particular case?
- Are there provisions that would not be adequate to be included in transaction agreements considering Brazilian's particular process of merger review and remedies negotiation?
- Have transaction agreements been affected by CADE's pre-merger review in place since 2012? If so, how?
- In addition to antitrust risks, are there other factors that may impact the choice of the risk-allocating provisions?
- What are the most relevant aspects that should be taken into account by lawyers negotiating deals considering the antitrust risks?

* * *

PANELISTS

ELAI KATZ

Elai Katz is a partner of Cahill Gordon & Reindel LLP in New York, where he leads the antitrust practice groups. His practice focuses on a wide range of antitrust law matters, including M&A, counseling, litigation, and government investigations.

Elai has successfully guided a broad range of transactions through antitrust and foreign investment regulatory reviews in the United States and abroad. He has represented buyers and sellers in many industries, including financial services, insurance, healthcare, media and telecommunications, online retailing and others. Elai has a particularly strong record in obtaining quick and positive resolutions during the early phases of merger reviews and is particularly attuned to the role global antitrust review plays in negotiating and completing mergers and acquisitions.

Elai writes and speaks frequently on antitrust topics. He writes an antitrust developments column in The New York Law Journal and is recognized among the top antitrust lawyers in New York by *Chambers USA*. He was chair of the Executive Committee of the New York State Bar Association's Antitrust Law Section and is Co-Chair of the ABA Antitrust Section's Corporate Counseling Committee.

FABRICIO CARDIM

Fabricio Cardim is a founding partner of Souza, Mello e Torres Advogados, where he heads the antitrust and competition practice of the firm. Fabricio holds a J.D. and LL.M. from University of São Paulo's Law School and an LL.M. from Columbia Law School. He previously worked as an International Antitrust Consultant at the U.S. Federal Trade Commission (FTC).

Over the past 15 years, Fabricio has represented Brazilian and foreign companies in numerous merger control filings (domestic and cross-border M&A deals) with the Brazilian antitrust authorities in different economic sectors and industries. Fabricio is an associate member of IBRAC.

GYEDRE CARNEIRO DE OLIVEIRA

Gyedre has more than 20 years of experience in the corporate and M&A area. She has a Bachelor of Laws from the University of the State of São Paulo and a Master of Laws from the University of Michigan. Gyendre was an International Associate at Cleary, Gottlieb, Steen & Hamilton in New York, USA and a Partner at Cescon, Barrieu, Flesch & Barreto Advogados in São Paulo, Brazil between 2005 and 2015, when she started her own firm.

She is recognized as a highly experienced professional in her areas of expertise by several specialized publications, such as Who's Who Legal, Chambers and Partners (Latin America and Global), IFLR1000 and Analise Advocacia 500, being ranked as one of the top most admired M&A and corporate lawyers in Brazil.

MÁRIO GORDILHO

Mário Gordilho is a federal public servant since 1995 and belongs to the career of Specialists in Public Policy and Governmental Management since 2000. He works with competition policy in the Brazilian Government since 2000, firstly in the Secretary of Economic Monitoring (SEAE), linked to the Ministry of Economy (from 2000 to 2012), and from May 2012 on at CADE. He is graduated in Economics with specializations in Public Administration and in Competition Policy, among other short courses regarding Economic Laws in Brazil and abroad.

Currently he is the head of Merger and Antitrust Unit 2 of the General Superintendence (CADE) since May 2019. He was the head of Merger and Antitrust Unit 5 since 2012, which is in charge of screening all mergers and acquisitions notified to CADE.

MARIANA VILLELA (moderator)

Mariana Villela is a partner in the Antitrust and Competition Law practice group at Veirano Advogados. She has over 20 years of experience in antitrust and competition area and has represented national and international clients in several important merger cases and investigations of anticompetitive conduct.

Mariana holds a Bachelor of Laws from the University of the State of Rio de Janeiro, a Master of Banking and Securities Law from University of London, a Master and PhD of Commercial Law from the University of the State of São Paulo. She is a frequent speaker on antitrust and competition law and teaches post-graduate courses at Pontifícia Universidade Católica do Rio de Janeiro (PUC-RJ).

She is recognized by several specialized publications, such as Who's Who Legal, Chambers and Partners, Legal 500 and others.

* * *