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In the current context of increasing global mergers and complex vertical arrangements, antitrust authorities all around the world are faced with the challenge of designing remedies to, on the one hand, allowing a given transaction to go forward while, on the other, also preventing competitive harm from taking place.

The traditional approach of imposing structural remedies in horizontal transactions and conduct-based remedies in vertical integrations is being replaced by a growing inclination towards hybrid solutions. Scholars and the business community argue for behavioral or hybrid solutions based on claims that structural remedies are not necessarily the most effective response for an antitrust issue[2] and, therefore, "competition authorities should be (…) creative in devising remedies,"[3] which is one of the guiding principles in conceiving merger remedies according to the OECD. Brazil is one example of a jurisdiction that has been making efforts to introduce "alternative" remedies to address potentially adverse effects arising from a merger.

While desirable in a textbook world, and also worth of praise for the effort to ensure proportionality in antitrust intervention, in practice creativity in devising merger remedies can very easily lead to conflicting decisions in global deals. Imagine a transaction that raises competition concerns in three jurisdictions. It would be very difficult, if not impossible—especially in cases involving relevant markets broader than local—to ensure consistent solutions across different jurisdictions. One agency could follow a traditional clear-cut approach—ordering the divestment of an autonomous ongoing business—while, at the same time, a second authority could prefer to set price bands for the products offered by the merged entity and a third

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[2] *See*, *e.g.*, P. Papandropoulos & A. Tajana, *The Merger Remedies Study—In Divestiture We Trust?* 8 EUR. COMPETITION L. REV. 443 (2006).

[3] OECD, Merger Remedies, DAF/COMP(2004)21, Background Note, *available at* http://www.oecd.org/daf/competition/mergers/34305995.pdf.

could choose to establish minimum production levels and/or order compulsory licensing of relevant patents.

Even assuming an unlikely scenario where authorities would cooperate throughout their respective investigations, it would be very difficult to avoid endless combinations of remedies that ultimately would be impossible for the parties to comply with. As a principle, it is more important that authorities identify competition concerns that would result post-merger under a given theory of harm than to be overly ingenious in crafting the remedy.[4] The burden to devise remedies that may address concerns by multiple authorities should be on the merging parties. And, from a practical standpoint, that is also the only way through which remedies would be consistent and could possibly be implemented throughout the globe.

Under Brazil's new suspensory regime, CADE has already adopted hybrid or conduct-based remedies in a number of horizontal mergers. For example, in the Videolar/Innova case, a three-to-two merger in the market for polyethylene and plastic resins, CADE cleared the transaction subject to the parties (i) maintaining the same pre-merger output level, (ii) investing in research and development to foster competition in the market, and (iii) licensing for free and on a non-exclusively basis the relevant patents for a 5-year period.[5]

Another example is the Oxiteno/American Chemical deal, which created a monopoly in Brazil for sodium laureth sulfate, cleared by CADE subject to the merged entity charging a specific range of prices for the five years following the clearance.[6]

Finally, when reviewing the KPMG/BDO acquisition, in the market for auditing services, CADE approved the transaction with restrictions that included a 24-month ban on KPMG from engaging in other transactions through which it would gain access to clients with over BRL 300 million turnover.[7] After this period, KPMG will need to file all transactions involving clients with turnover greater than BRL 300 million.

The solutions above can of course be superior to clear-cut structural remedies. But they should be the result of a negotiation process considering a range of different solutions, rather than being imposed on the parties. As long as all the competition concerns are duly addressed by the parties, the authorities will also have gained with such an approach.

In this sense, credit should be given to the Brazilian antitrust authority in view of its efforts to be open and flexible when dealing with transactions that require remedies in multiple

[4] *See* Norway's Contribution to the OECD Merger Remedies Report, op. cit., p. 213: "To what extent competition authorities should be creative may also be an issue for debate. If authorities see that a new approach to remedies can restore competition in a market, they should of course indicate the possibility to the parties. However, the main role of competition authorities should be to explain as clearly as possible the harms to competition that arise from a concentration. The creativity with respect to finding solutions should primarily rest with the parties."

[5] Merger Case No. 08700.009924/2013-19 (Videolar S.A., Lirio Parisotto, Petróleo Brasileiro S.A. e Inova S.A.), cleared in April 2014.

[6] Merger Case No. 08700.004083/2012-72 (American Chemical I.C.S.A. and Oxiteno S.A), cleared in November 2013.

[7] Merger Case No. 08012.002689/2011-41 (BDO Auditores Independentes, BDO Consultores Ltda., and KPMG), cleared in October 2013.

jurisdictions. Three cases deserve the attention of international practitioners: In Mach/Syniverse[8] and Ahlstrom Corporation/Munkjö AB,[9] global transactions also subject to the review of the European Commission, CADE accepted the same scope of the divestiture package offered abroad, allowing for an effective divestiture process. More recently, in the review of the Lafarge/Holcim merger,[10] filed before 20 jurisdictions, although the case involved locally-defined markets (and, therefore, local packages in terms of scope) CADE was open to considering the uniform concept proposed by the parties before key authorities reviewing the case.

As merger review evolves around the globe, challenges facing practitioners and enforcers alike tend to get more intertwined. The transition of merger remedies' design into a mature set of practices is an ongoing process—and, as in any such transitions, it will not be without turmoil, especially considering the number of jurisdictions that have only recently adopted merger systems.

[8] Merger Case No. 08700.006437/2012-13 (Syniverse Holdings, Inc. and WP Roaming III S.A.R.L.), cleared in April 2013. Mach/Syniverse was filed under the old law and involved the market for roaming technology to mobile operators. CADE was concerned over the elevated concentration that would arise from the transaction in the markets of GSM data clearing and Near Real Time Roaming Data Exchange. The parties, then, offered commitments to divest a significant part of Mach's assets that adequately addressed CADE's concerns and the transaction was subsequently cleared.

[9] Merger Case No. 08700.009882/2012-35 9 (Munksjö AB and Ahlstrom Corporation), cleared in April 2013. The Ahlstrom Corporation/ Munkjö AB case was also filed under the former statute. CADE took the view that the transaction would lead to a high concentration in the markets for abrasive paper backings and pre-impregnated décor paper lines with no possibility of new entrants to compete with the incumbents (see Case No. 08700.009882/2012-35). To address the agency's competition concerns, the parties proposed the divestiture of Ahlstrom's assets in these two markets.

[10] Merger Case No. 08700.007621/2014-42 (Lafarge S.A. and Holcim, Ltd.), cleared in December 2014.