Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development

05-Feb-2014

English - Or. English

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

DAF/COMP/WP3/WD(2014)5
Unclassified

Cancels & replaces the same document of 31 January 2014

Working Party No. 3 on Co-operation and Enforcement

INVESTIGATIONS OF CONSUMMATED AND NON-NOTIFIABLE MERGERS

-- Brazil --

25 February 2014

This note is submitted by Brazil to the Working Party No. 3 of the Competition Committee FOR DISCUSSION under Item III at its forthcoming meeting to be held on 25 February 2014.

Please contact Mr. Antonio Capobianco if you have any questions regarding this document [phone number: +33 1 45 24 98 08 -- E-mail address: antonio.capobianco@oecd.org].

JT03351960

Complete document available on OLIS in its original format

English - Or. English

− Brazil −

Introduction

1. The topic of consummated and non-notifable mergers is very interesting and CADE has devoted a fair amount of time and resources to properly address this issue in Brazil. As a preliminary remark, one should note that the Brazilian Competition Authority (CADE) has undergone a major reform that took effect on May 2012 with its new Competition Act (Law nº 12.529/2011). Amongst the major changes, the new legislation adopted a pre-merger review system in Brazil. Besides, it changed the criteria for notification.

2. The former legislation (Law nº 8.884/1994) established two alternative criteria for notification of a transaction: a 20% market-share or a given threshold based on company's latest annual turnover:

- Law nº 8.884/1994 (former law): Art. 54. paragraph nº 3: The acts dealt with in the main section of this article also include any action intended for any form of economic concentration, whether through merger with or into other companies, organization of companies to control third companies or any other form of corporate grouping, when the resulting company or group of companies accounts for twenty percent (20%) of a relevant market, or in which any of the participants has posted in its latest balance sheets an annual gross revenue equivalent to R$ 400,000,000.00 (four hundred million of Reais).

3. The new Brazilian legislation eliminated the market-share criteria, leaving only the objective criteria of a threshold based on companys' latest annual turnover. In addition, it established a double-threshold criterion, considering both acquiring and acquired economic groups:

- Law nº 12.529/2011 (current law): Art. 88: The following shall be submitted to Cade by the parties involved in the operation of acts of economic concentration in which, cumulatively:

    1. at least one of the groups involved in the transaction has registered, in the last balance sheet, annual gross sales or total turnover in the country, in the year preceding the transaction, equivalent or superior to four hundred million Reais (R$ 400,000,000.00); and

    2. at least one other group involved in the transaction has registered, in the last balance sheet, gross annual sales or total turnover in the country, in the year preceding the transaction, equivalent to or greater than thirty million Reais (R$ 30,000,000.00).

4. These thresholds were increased to seven hundred and fifty million Reais (R$ 750,000,000.00)[1] and seventy-five million Reais (R$ 75,000,000.00)[2], respectively, accordingly to the Joint Regulation issued by the Brazilian Ministry of Justice and the Brazilian Ministry of Finance on 30 May 2012. It was issued on the same day that the new law took effect, so the thresholds originally established were never applied in practice.

5. This was a substantial change in terms of the criteria for merger notification in Brazil. On the one hand, it eliminated the difficulty of the market-share based criteria, which imposes the pre-definition of a relevant-market in order to properly assess the former 20% market-share criteria for notification. On the

1 Approximately, 220 million Euros.

2 Approximately, 22 million Euros.

other hand, it poses nowadays an additional challenge concerning the investigation of consumed and non-notifiable mergers, reason why CADE is especially keen on this topic.

6. One should also note that Brazil is a continent-dimension country and this characteristic adds to the announced challenged in merger review. There are indeed many local or regional mergers within the immense Brazilian territory that may fall under the current thresholds and, thus, should be subject to CADE's scrutiny, in particular if it is considered that these non-notifiable transactions may present anticompetitive concerns in certain cases. This is especially true in certain markets, such as those related to services that have local implications and may be unfeasible to be offered otherwise.

1. Pre-merger notification regime

Are mergers that meet specific size and geographic nexus thresholds subject to mandatory notification provisions in your jurisdiction? If so, is there a mandatory period following the notification during which the parties are prohibited from consummating the merger? (Please note: detailed descriptions of merger notification provisions are not necessary for purposes of this roundtable, which focuses on the situations below.)

7. As per the current Brazilian competition law, mergers must be notified if (i) at least one of the economic groups involved in the transaction had a gross national annual sales or a total national turnover equivalent or greater than 750 million Reais (R$ 750,000,000.00)[3] during the precedent financial year; and (ii) at least another economic group involved in the transaction has registered a gross national annual sales or turnover equivalent or greater than 75 million Reais (R$ 75,000,000.00)[4] during the same period.

8. The merger cannot be consummated until CADE renders a final decision as stated by Article 88, paragraph 3, of the Brazilian Competition Law. The merger control is done within 240 days after the merger notification (Article 88, paragraph 2) with a possible extension of 90 days maximum.

2. Review of mergers that fall below notification thresholds

For a merger that does not meet the notification thresholds or is otherwise exempt from the notification requirement, does your agency have authority under your merger review provisions to review the merger? If so, what remedies are available, and do they differ from remedies available in a notifiable transaction? Does your agency have authority to review such mergers under some other provision of your competition law, and if so, what remedies are available?

If your agency decides to challenge a consummated merger that was not subject to mandatory notification provisions, what remedies can your agency seek? Have you had success with remedies in these situations? Please provide examples.

Are there differences in practice or procedure for the investigation or challenge of a consummated or non-notifiable transaction?

3 Approximately, 220 million Euros.

4 Approximately, 22 million Euros.

9. CADE maintains authority to review mergers which do not initially meet notification thresholds or those which are exempt from notification requirements. Article 88, paragraph 7, states that within 1 (one) year from the merger date, CADE **can** require the submission of mergers which do not fall under the empire of the competition law:

> *Article 88, paragraph 7: "Cade may, within one (1) year as of the respective date of fulfillment, require the submission of the concentration acts that do not fall within the provisions of this article".*

10. Thus, an *a posteriori* merger control is still possible, albeit it remains optional. Brazil is a continental-like country and mergers which do not meet the notification thresholds can still have anti-competitive effects at a regional or at a local level. CADE intends to refer to article 88, paragraph 7, for such purposes and also plans to intensify its efforts to identify such cases.

11. For instance, the use of the regional medias – newspapers, local magazines – as to inform on the nature and consequences of this type of mergers is a possible means. Of course, complaints from consumers and competitors are also important tools to identify potential anti-competitive mergers that fall below notification thresholds. Although CADE has not yet applied this provision, considering that the new legislation took effect on May 2012, its Merger Screening Unit its Superintendence receives complaints from third parties and follows media vehicles in order to identify both consumed and non-notifiable mergers. CADE is also working on ways to create and foster further channels to monitor these transactions.

12. Although unable to provide a specific report on the success of remedies in these situations, CADE accumulated a rich post-merger control experience, considering that it was the system in place until May 2012. Thus, Brazil has developed significant expertise in the imposition of remedies to consumed transactions, which may be useful for the current regime and for the possible needs of competition enforcement. Regarding available remedies, they are the same and do not differ from those available in a notifiable transaction.

13. CADE's Internal Regulation, in its Articles 112 and 113, establishes the procedure for the investigation of a consummated or non-notifiable transaction. Furthermore, it empowers the Competition Authority to cancel the acts related to the transaction and to suspend its effects until a final decision is rendered.

14. Lastly, changes in equity control of publicly-held companies and records of merger, without prejudice to the obligation of the parties involved, must be reported to CADE by the Brazilian Securities and Exchange Commission (CVM) and by the Brazilian National Registry of Commerce of the Ministry of Development, Industry and Foreign Trade, respectively, within five business days, if necessary, to be examined, accordingly to Article 88, paragraph 8, of Law nº 12.529/2011.

3. Review of mergers that's should have been notified but were not

If the parties fail to notify a merger that was subject to mandatory notification provisions, are they subject to penalties? In such a case, does your agency retain the power to review the merger under merger review or other competition law provisions? Is there a time limit on when the agency can bring an enforcement action?

If an anticompetitive merger should have been notified, but was not, and it has already been consummated, what remedies can your agency seek? Have you had success with remedies in these situations? Please provide examples.

15. The new Brazilian legislation adopted a pre-merger review system, in which notification is mandatory when thresholds are met. This means that a merger which should have been legally notified, but was not, infringes the Brazilian Competition Law. The merger may, in such cases, fall under a penalty of nullity and the parties may be subject to a fine ranging from 60 thousand Reais (R$ 60,000.00) to 60 million Reais (R$ 60,000,000.00) accordingly to Article 88, paragraphs 3 and 4:

> *Art. 88, paragraph 3: The acts found under the provisions set forth in the caput of this article shall not be fulfilled before being appreciated, under this article and the procedure set forth in Chapter II of Title VI of this Law, under penalty of nullity, a pecuniary fine also being imposed, in a value not less than sixty thousand reais (R$ 60,000.00) nor more than sixty million reais (R$ 60,000,000.00) to be applied under the regulations, without prejudice to the opening of an administrative proceeding, under Article 69 of this Law.*
>
> *Art. 88, paragraph 4: Until the final decision on the transaction, the conditions of competition shall be preserved between the companies involved, under penalty of incurring the sanctions provided for in § 3 of this article.*

16. For the moment, CADE's Tribunal has only rendered a decision in one case concerning such non-notified mergers: the OGX case, although a few others are currently under analysis by the Tribunal.

17. In the above-mentioned case, *OGX Petróleo* acquired 40% of the participation of *Petróleo Brasileiro (Petrobras)* in BS-4 Block, located in the Santos Basin, in the State of São Paulo, without notifying CADE about the transaction. CADE understood that it was a case of gun jumping since the transaction was consumed prior to its analysis. This enabled, for instance, the premature exchange of important commercial information, including confidential issues. Considering that the transaction did not pose any particular anti-competitive concern, CADE's Tribunal did not rule for its nullity and the gun jumping was characterized specifically for the implementation of the transaction without prior review from CADE. The purchasing company was fined 3 million Brazilian Reais.[5] This amount was defined through a settlement procedure between CADE and the involved companies.

18. Consequently, during such operations all activities of the concerned parties must remain separated and restricted to each one's own sphere, considering that they remain potential competitors before CADE's final decision. In the same vein, any exchange of information is, in principle, prohibited, unless fundamentally required for the success and well-being of the operations.

19. As for the competence to review a merger that should have been notified and to impose possible remedies, the answers are the same as those of the prior section concerning the review of mergers that fall below notification thresholds.

---

[5] Approximately, 1 million Euros.

4. Subsequent review of previously cleared and consummated mergers

If your agency decides after investigation not to challenge a merger, or has approved a merger with remedies, but later concludes that the merger in fact was anticompetitive, can the agency still challenge the merger, either (1) under your merger review law, either by reopening the original investigation or by starting a new one, or (2) under some other provision of your competition laws? What remedies are available then? Is there a time limit on when such a post-merger review can take place? Please provide examples.

20. Approved mergers can be challenged in specific cases: (i) if the concerned parties have provided false or misleading information for an adequate and complete review by CADE; (ii) in cases of non-compliance of remedies by the merged companies; and (iii) if the intended benefits of a cleared transaction were not achieved. All these situations fall under the empire of Article 91 of the Brazilian Competition Act:

> *Art. 91. The approval referred to in article 88 of this Law may be reviewed by the Tribunal, ex officio or upon request of the General Superintendence, if the decision is based on false or misleading information provided by the interested party, in case of non-compliance with any of its obligations or if the intended benefits are not achieved.*

21. In any case, CADE maintains full jurisdiction to monitor any future abuse of dominant position or cartel formation by an approved merger.