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BRAZILIAN COMPETITION AUTHORITIES

Paradigm shift

With the Brazilian competition authorities now operating under a pre-merger notification system, Rachel Hall examines how lawyers can help their clients get their deals through as quickly as possible and compares antitrust laws in the region

When a competition authority changes as dramatically as Brazil's did in its shift from a post- to pre-merger notification regime, the repercussions are felt by a number of players. While lawyers have welcomed the increased efficiency that the new system has heralded, any good dealmaker has to recognise the need to adapt to new rules. As Carlos Ragazzo, CADE's first superintendent since the change was introduced, stresses, "merger work is collaborative".

Introduced on 29 May last year, the change to a pre-merger notification system has already seen deals approved by CADE in a significantly shorter time frame. By the end of last year, fast-track cases averaged 19.5 days, while the more complex deals averaged 40 days. This is in contrast to 250 days in 2005, which had fallen to a still considerable 150 by 2011. Ragazzo explains that part of the reason for this increased efficiency is that prior to the switch, a significant majority of CADE's merger clearance work involved fast tracking simple cases. To remedy this, a new US$750 million threshold was introduced to expedite the clearance of deals with a lower value. Cases that surpass that threshold are channelled through a triage department inspired by the US and European Union systems, which splits deals into those that are considered fast track and those that are not. A date is subsequently set by which clearance must be obtained, with 30 days considered the maximum for fast-track cases.

"The whole idea is to divide up work according to that which is complex and that which is not," explains Ragazzo. For international cases, CADE gets in touch with the jurisdiction involved. If the case has already gone by the US or EU authorities, then a telephone call is set up to

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Carey y Cía. Ltda.
Isidora Goyenechea 2800, 43rd Floor.
Las Condes, Santiago, Chile.
www.carey.cl

exchange views, which limits repetition of work. “Only in a very few cases in which CADE decides to challenge another authority’s decision by imposing remedies or blocking the merger does the case go to the tribunal,” he says.

While things have improved generally since the reform, Ragazzo notes that there have been some difficulties in making the business sector and the government understand that a non-“stop the clock” mechanism is now in place. This means that once the filing has been made before the competition authorities, the parties cannot step in to pause the review process to add in further information – for instance, from third parties that may have taken time to provide them with the details requested. Additional challenges have been posed by parties trying to present their cases as fast track when they are not – for instance, because one of the companies is undergoing an internal restructuring. International cooperation has presented a further challenge. “The whole idea that Brazil didn’t have to cooperate with anyone because it had a post-notification regime has changed, and right now we have to deal with other jurisdictions, which is something new to us,” he says. Even the simple fact that deals are unable to close until they receive CADE approval has presented some obstacles. “People can’t get used to that,” says Ragazzo.

Since the new law was enacted, Pinheiro Neto Advogados antitrust partner Cristianne Saccab Zarzur says one of the principal questions she has been asked by clients involved in international transactions is whether the parties will be able to ask for a carve-out, enabling them to close in other jurisdictions even if the review process remains pending in Brazil. This is forbidden in the US, but in Brazil the authorities are considering it on a case-by-case basis. However, Ragazzo points out that in the few cases where a carve-out has been requested, the discussion has taken longer than the approval of the merger.

Jumping the gun

One of the other potential problems that can arise from a pre-merger notification system is that of gun jumping, where parties coordinate their competitive conduct prior to closing. This can result in companies engaging in activities such as changing board members while they are still under investigation by the competition authorities, to the point that they can appear like cartel arrangements.

Ragazzo points out that gun jumping doesn’t pose a considerable

challenge to competition authorities elsewhere in the world. “It’s not such a big issue elsewhere, so it shouldn’t be here in Brazil,” he says. There are limited cases of it in the US and the EU, and he believes that CADE will be able to prevent instances of gun jumping by making sure parties are well informed as to what they can and can’t do while under investigation, and suggesting that they follow the example of other countries.

“At the end of the day, prior to closing the parties are considered to be independent economic agents and they should continue acting as such,” says Ricardo Pons, a partner at Barrera, Siqueiros y Torres Landa in Mexico, a jurisdiction which also has a pre-merger notification system. “The parties need to understand they are still competitors, especially in horizontal mergers.”

According to Carey partner Francisco Ugarte, in Chile, gun jumping is not a major issue, as the public prosecutor operates on the basis of voluntary consultation proceedings, rather than an obligatory pre-merger notification system. This means that if mergers are subject to consultation proceedings, the parties are obliged to refrain from conducting any activities or signing any contracts that may be perceived as part of the integration process. “The antitrust court has, in theory, a term of 60 days once you agree on a merger review process, during which time you must close negotiations and refrain from challenging the antitrust court,” he says, adding that the ground is also left open for any third party with an interest to step into court and challenge the transaction.

Legal counsel can play an important role in avoiding gun jumping by ensuring a client is aware of the fact the transaction might not go ahead. “You need to be careful when advising parties that they’re aware that they could end up being competitors again if the transaction doesn’t go through, so you’ve got to instruct management about what information may be shared and what not, not only because of government requirements but also for commercial reasons,” says Shearman & Sterling LLP partner Robert Ellison.

Indeed, Ellison, who is based in São Paulo, points out that competition lawyers play an important role in ensuring the merger clearance process runs smoothly. First, he suggests they try and pre-empt the antitrust regulator and understand and address a transaction’s economic risk, even in situations where they can be difficult to predict. “What is it likely to do in terms of antitrust

symptoms? What is the effect likely to be on the prices and quality of the product in the market, and on innovation?" he suggests as questions lawyers should ask, adding that they should "be very aware of what smoking guns you may have in a company's documents – these will come out one way or another depending on the jurisdiction."

Obtaining an agreement on how to proceed between the parties is also something that Ellison suggests is important. For starters, lawyers should aim to come up with a solution in advance that the parties are likely to agree on by balancing the interests of the seller and the buyer. When it comes to the merger agreement, it is important to insert a number of clauses that will commit the parties to organising a defence if there is a challenge from the antitrust agency, as well as potential restructuring obligation and covenants to offer remedies. One seller-friendly clause is what Ellison dubs a "hell or high water provision", which obliges the buyer to carry out whatever remedies the antitrust agency requests of it in order to obtain absolute certainty that the deal will close, or to impose a financial penalty in the event of the deal collapsing. Alternative, "softer" clauses can commit the seller to divesting certain businesses or products; to provide reasonable commercial efforts to close the deal or the inclusion of a cooperation covenant which will ensure parties work together to figure out their message and business plan, satisfying legitimate demands of the antitrust agency.

Ellison cautions, however, that while the filing should try to predict the agency's demands for remedies, lawyers should avoid "putting too much of a roadmap in the document". He explains: "Don't have a document that says 'if the agency comes along, we agree to divest these 30 plants', because the regulators are going to say 'OK, they've done all the work for me' – you're not helping yourself." Instead, competition counsel should address the regulator's competitive concerns with "workable solutions".

Another impact the switch to a pre-notification regime in Brazil has had on lawyers is that they are now required to provide a more complete and transparent merger review form to the authorities. Previously, Zarzur explains, as cases had already closed, it was not so important, as CADE would revert to legal counsel on an informal basis to clarify certain aspects of the form – whereas now closing depends on the lawyers facilitating the review process by providing as full a picture of the transaction as possible. "The burden to present a

complete filing is now on our side, as this will expedite a review and create a positive reaction on the authorities' side," she explains. As Allen & Overy LLP partner Elaine Johnston says, "speed is everything".

Ragazzo affirms that sometimes forms come in without methodology or source, which can make a case take longer than it should. Additionally, finding disparities between the information filed before CADE and that before other jurisdictions is not unknown. "My advice would be to pay attention to the details – lack of that accounts for 50 per cent of amendments I have to make," he says. Beyond that, a willingness to collaborate with the regulators is the most important thing a lawyer can do to accelerate the merger review process. "To keep on discussing and debating once decisions are taken will make your case take longer, and this happens often," he says.

Ultimately, Ragazzo stresses that what CADE is seeking is to have "an open conversation" with lawyers, as it is in the interests of both parties to be as transparent and reasonable as possible. Johnston argues that the best situation between regulators and lawyers is one of an "honest quest for truth". She suggests that, in fact, their roles are more similar than they might perhaps first appear. "We're all trying to get to bottom of what the effects of a transaction are, and everyone should be focused on what realities are," she says.