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CADE's non-horizontal merger guidelines expected to streamline reviews – analysis

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- Agency has never rejected a non-horizontal deal
- Mergers involving digital ecosystems addressed in separate paper

The guidelines on non-horizontal merger reviews (V+ guidelines) published last month by Brazil's competition authority CADE are expected to streamline the agency's merger reviews, according to three Brazil-based antitrust lawyers.

The guidelines are a systematization of CADE's precedents, rendering explicit what the authority has been doing in practice rather than introducing new concepts, said Paula Camara and Lauro Celidônio, partners at Mattos Filho, and Bruno Drago, a partner at Demarest.

As such, the document is expected to enable parties on "both sides of the table" – the authority and companies/lawyers – to be more objective, Drago said.

The guidelines outline the same merger review procedural steps as those established on CADE's horizontal merger guidelines: relevant market definition; determination of market shares and concentration levels; analysis of potential harm to competition (theories of harm); analysis of the net benefits of the transaction (efficiencies); remedies.

The main difference to CADE's horizontal merger guidelines lies in the analysis of the theories of harm, Camara and Drago said. Additionally, non-horizontal mergers usually involve a higher number of relevant markets, they said.

Camara added that efficiencies tend to be more easily measurable in non-horizontal mergers, and Drago added that the relative presumed market power threshold in vertically related markets is 30% (rather than 20% in horizontal mergers).

After listing nine theories of harm, the guidelines make a deep dive into market foreclosure, raising rivals' costs, accessing sensitive information and coordinated effects in vertical mergers. The guidelines lay out the methodology

adopted by CADE to assess these theories of harm: the agency evaluates the capacity and incentives to harm competition, and the expected post-merger effects.

The guidelines were preceded by the publication of a benchmark study which looked into 242 non-horizontal mergers reviewed by CADE between 2012 and June 2022. Market foreclosure was by far the most common theory of harm in CADE’s review of these mergers, having been raised in 180 cases, followed by raising rivals’ costs in 27.

Lawyer Amanda Athayde, a consultant with the United Nations Development Programme (UNDP) who wrote the benchmark study and collaborated in the V+ guidelines, confirmed to this news service that, according to case law research developed by CADE’s General Superintendent’s Office (SG), CADE has never rejected a non-horizontal deal.

Highlights

The lawyers highlighted some issues in the guidelines that caught their attention. The document acknowledges that it is not always necessary to pinpoint the relevant markets, particularly in deals involving digital platforms, Drago said.

The guidelines acknowledge that, in a vertical relationship, a downstream player’s market power is more closely related to its purchasing power vis-à-vis the relevant input than to its share in product sales in downstream markets, Camara said.

Meanwhile, the guidelines do not state that behavioral remedies have been much more frequent than structural remedies in non-horizontal mergers, Celidônio said.

In addressing vertical restrictions and conglomerate effects, the guidelines address practices that are investigated by CADE in the context of unilateral conduct investigations, Drago said. The guidelines therefore give more transparency to the market as to what the authority sees as problematic in unilateral practices by firms with market power, he added.

Celidônio also highlighted the section on coordinated effects of vertical mergers. The logic behind the risk of coordinated effects is the same as in horizontal mergers – *i.e.* the removal of a player from the market could theoretically increase the chances of coordination between the remaining market players –, but in vertical mergers this is an exceptional risk, he said.

Finally, one of the theories of harm associated with conglomerate power is bundling, Camara said. The guidelines indicate that a company may try to use a customer base to leverage its market power into an adjacent market, Camara stated.

Digital ecosystems

The guidelines mention but do not specifically address mergers involving digital ecosystems.

Asked if the theories of harm cited in the guidelines are sufficient to analyze potential harm in these mergers, Athayde said that the document had a broader goal of defining the step-by-step process and general methodology of non-horizontal merger reviews.

Discussions about theories of harm in digital ecosystems are ongoing and are specifically addressed by a CADE working paper on the matter, Athayde added.

The working paper in question, developed by CADE’s former Chief Economist Guilherme Resende and Commissioner Victor Fernandes, addresses the theories of harm employed by CADE in the review of conglomerate mergers involving traditional and digital markets.

CADE has mainly adopted the theory of “reciprocity dealings” to assess competition risks associated with a portfolio power increase in conglomerate mergers, the paper said.

According to the reciprocity dealings theory, a company may use its power in a specific market to leverage its power in other related markets through conduct such as tying and bundling, according to the paper. However, CADE is yet to employ new, specific theories to assess conglomerate effects in digital ecosystems, the paper said.

Theories of harm to assess mergers involving digital ecosystems emphasize that these mergers may increase the chances that the central platform will distort competition by leveraging barriers to entry in adjacent markets where independent competitors have supplementary operations, the paper stated.

Additionally, the true risks of digital mergers do not lie in the total but rather the partial foreclosure of the market, according to a separate 2023 paper by Fernandes on theories of harm in data-driven mergers.