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Brazil's CADE New Guidelines for the Assessment of Non-horizontal Mergers: Background and Main Aspects

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The Brazilian Competition Authority – CADE – has just recently published its [Guidelines for Non-Horizontal Merger Reviews](#), which consolidate and formalize the competition authority's best practices in reviewing vertical and conglomerate mergers (the “V+ Guidelines”).

The V+ Guidelines complement CADE's [2016 Horizontal Mergers Guidelines](#) and other relevant documents that have been published by the Brazilian competition authority and widely adopted as soft law in CADE's decisions: the [Gun Jumping Guidelines](#), the [Compliance Programs Guidelines](#), the [Leniency Guidelines](#), the [Calculation of Fines Guidelines](#), and the [Remedies Guidelines](#). The newly published guidelines also follow similar initiatives by foreign authorities, most relevantly the FTC's [2020 provisional Vertical Mergers Guidelines](#), the CMA's [2021 updated Merger Assessment Guidelines](#) and, most traditionally, the [2008 European Commission Guidelines on the assessment of non-horizontal mergers](#).

The publication also highlights a notable increase on the vertical merger cases reviewed by CADE. [A recent study indicates a significant rise in the proportion of cases involving vertical integrations](#). In the decade following the enactment of Brazil's currently applicable Competition Law, which introduced pre-merger review, CADE assessed nearly 1,600 cases with vertical effects. Additionally, the proportion of vertical integration cases relative to the total number of merger review cases almost tripled, rising from 14% in May 2012, when the Brazilian Competition Law came into effect, to 46% in December 2022. Research further reveals that in nearly 20% of the decisions, CADE conducted a thorough and detailed assessment of vertical effects, including more than 60 cases with remedies specifically designed to address concerns related to vertical integration.

Recent cases of complex merger reviews involving non-horizontal mergers also strengthen how well received is the timing for the V+ Guidelines. The [Rede D'Or/Sulamerica](#) case in the healthcare sector; [Gepar/Lubnor](#) case in oil & gas; [Stone/Linx](#) in payments; [Magalu/Hub](#) in ecommerce; and [Microsoft/Activision](#) in mobile and videogames were all landmark cases in which CADE explored and tested some of the theories of harm that are included in the Guidelines. The latter, a multijurisdictional merger, which received great attention by multiple authorities, is also illustrative of the relevance of some level of material convergence across jurisdictions, which was a nuclear aspect of CADE's policy decisions behind the planning and making of the V+ Guidelines.

This short piece presents the background, introduces its main aspects and discusses some of the challenges ahead of the publication of the V+ Guidelines.

Background

The publication of the V+ Guidelines sums up a process of nearly two years since CADE launched a working group and declared its intention to prepare discussions to support the development of guidelines for the review of non-horizontal mergers. This process was particularly transparent and open to contributions by private actors and stakeholders. CADE is usually very open to public participation preceding the launching of agency regulations and guidelines, and often submits drafts for public consultation before adopting a regulation's final text. This time, however, the agency went further and relied on outside participation and feedback throughout the entire process of drafting. CADE invited IBRAC (the Brazilian Institute of Studies on Competition, Consumption, and International Trade) – a Brazilian association and think tank meeting lawyers, economist and scholars in competition law and policy – to create a parallel group to discuss the merits of the initial draft and provide its support to its working group meetings and activities.

IBRAC members prepared the groundwork to support CADE with a thorough review of Brazilian case law as well with a review of the most remarkable and recent foreign decisions. The working groups met several times during the second semester of 2022 and held public events to examine the research findings. They also hosted representatives from foreign authorities and scholars to discuss the latest developments in the international arena.

Following this preparatory phase, in early 2023, CADE hired an external consultant funded by the United Nations Development Program to work on the Guidelines. The UNDP consulting research, backing the final version of the Guidelines, was published by the agency as [Working Document no. 01/2023](#).

This document indicated that the Brazilian Guidelines were heavily influenced by 2022 research conducted by DG-Comp within the ICN's Merger Working Group ("Updating the Recommendations Procedures Chapter on non-horizontal merger" – the "ICN Survey"), which provided a benchmark of the experience of several national competition agencies with soft law and guidelines for merger review, and specifically related to non-horizontal merger. According to the [Working Document no. 01/2023](#), the ICN Survey is a confidential document.

The official draft was presented for public consultation in mid-2023 and following a months-long review, the final version was approved by CADE's Tribunal and ultimately published on April 17, 2024.

The final 2024 document for the V+ Guidelines is very close to the 2023 draft, both in structure and in content. There were minor (but non-negligible) improvements included in the definitive version. Those especially related to the relevance of buyer power in the assessment of downstream market power; the need to adapt the basic merger review assessment to minority acquisitions and the importance of portfolio effects in conglomerate mergers.

The overall structure, however, remained greatly unaltered. The Guidelines indicate that merger review should follow a traditional four-step analysis of defining relevant markets, assessing upstream and downstream market power, identifying potential harm to competition, and evaluating

transaction-specific efficiencies and the merger's overall benefits. The document also brings limited considerations on the application of remedies, though it does not detail or exemplify what type of remedies would be preferable to address vertical concerns.

Ability-Incentive-Effects

The V+ Guidelines adhere to the international benchmark assessment of vertical mergers, following the ability-incentive-effects framework.

Ability is measured against the yardstick of an assessment of market power, based on the definition of relevant markets and market shares. Market definition overall follows the scheme provided in the [CADE's Horizontal Mergers Guidelines](#) but recognizes the peculiarities of vertical integration that might lead to different product or geographical market definitions.

A relevant aspect of the updated and final version of the Guidelines is that the recognition of downstream market power should reflect the players' buyer power (which is exerted towards upstream suppliers of inputs), rather than their shares in the subsequent market for the output of goods and services.

In regard to market power, CADE's regulation of pre-merger filings ([Resolution no. 22/2023](#)) indicates that vertical mergers involving market shares inferior to the 30% threshold may be reviewed through the fast-track procedure, which is simpler, requires less information, and is subject to a 30-day review deadline. The Guidelines do not introduce safe harbours for transactions involving parties with market shares lower to 30%, but expressly indicate that CADE usually adopts a relative presumption of absence of anti-competitive effects when the parties' shares do not surpass such threshold.

Incentives encompass the post-merger economic incentives to adopt conduct that may harm competition, according to the theories of harm included in the guidelines. As mentioned above, a relevant contribution of the feedback received during public consultation of the earlier draft is the express indication that incentives shall be balanced accordingly to economic interest. Thus, the V+ Guidelines indicate that acquisitions of minority stakes should be taken into consideration as mitigating factors for the post-transaction incentives to adopt conducts that are potentially harmful to competition. In order to evaluate incentives and assess potential anti-competitive effects, the document indicates that CADE may use quantitative methods and highlights the use of vertical arithmetic ("VA") to assess the profitability of foreclosure post-merger. The Guidelines include an annex where the VA methodology is described.

Theories of harm

CADE's V+ Guidelines present an array of theories of harm than can be resorted to in non-horizontal mergers, encompassing (i) total or partial foreclosure (upstream and downstream); (ii) raising rivals' costs; (iii) increased bargaining power; (iv) access to competitively sensitive information; (v) reduced incentives for competition; (vi) reduced incentives for innovation; (vii) increase in downstream prices; (viii) increased coordination between the parties and rivals; (ix) elimination of potential or dynamic competition; (x) bypass of regulatory norms or long-term

agreements; (xi) obstructions to interoperability and multi-homing; (xii) changes in non-price parameters of competition (especially in zero-price markets; (xiii) increased incentives to foreclosing digital ecosystems; and (xiv) other theories of harm related to unilateral conducts and vertical restrictions (e.g., refusal do deal, incentives toward exclusive dealings, price discrimination etc.).

The long list of vertical theories of harm raises up the question on whether and how they will be effectively applied and developed by CADE's decisions. Some correspond to clearly structured and logical theories of harm (i.e., a legal test linking specific conducts to specific harms), such as input or customer foreclosure, access to competitively sensitive information and obstructions to interoperability. However, many of the theories of harm listed by the V+ Guidelines could be better framed as potential effects of the transaction. But, in order to investigate those effects in practice, CADE might have to previously link them to a structure, practice or conduct that might derive from the transaction. This is the case with "reduced incentives to competition"; "increase in downstream prices"; and "changes in non-price parameters of competition", for example.

Additionally, the aforementioned empirical study reviewing the agency's case law on vertical mergers indicated that in more than 80% of the cases, CADE relied on the assessment of foreclosure, and less often reviewed the transactions' effects on incentives to discriminate rivals, increased market coordination and access to competitively sensitive information.

This does not necessarily mean that the agency has not contemplated alternative and innovative effects or even concrete theories of harm in past cases or decisions. But one cannot presume that all possible risks and effects listed in the V+ Guidelines have been effectively tested in concrete cases, nor that they reflect CADE's consolidated case law.

This is curious because, according to the [Working Document no. 01/2023](#), which sums up the research that backed the development of the V+ Guidelines, the main jurisdictions benchmarked by CADE (EU and UK) did not adopt such a varied list of vertical theories of harm in their respective guidelines. It does, however, mention that many of the listed effects (e.g., ecosystem theories of harm, price increases, quality degradation, access to infrastructure, dynamic effects etc.) were included in the ICN Survey as potential forms of input foreclosure or conglomerate concerns.

Therefore, the final list of theories of harm available in the V+ Guidelines may result from CADE's broad interpretation of international benchmark provided by the ICN Survey in an attempt to cover a wide range of possible effects that might emerge from non-horizontal mergers and could be investigated in concrete cases reviewed by the competition authority.

Efficiencies

Following the list of possible theories of harm, the V+ Guidelines provide examples of economic benefits and efficiencies related to vertical integration as possible aspects to be considered by the agency when balancing potential anti-competitive harm. The list is less innovative and detailed, but includes elements usually mentioned in the specialized literature:

- Elimination of double margins.

- Reduction of transaction costs.
- Improvement in production process coordination.
- Enhancement of distribution process coordination.
- Alignment of incentives.
- Reduction of hold-up problems.
- Data sharing.
- Elimination of free-riding.

The V+ Guidelines also indicate that – as applicable for the case of the review of horizontal mergers – if CADE decides to investigate efficiencies related to vertical integration, the parties must sufficiently prove they are probable, verifiable, transaction-specific, observable in less than two years, and that they can “result in benefits and be passed-on to consumers”. The V+ Guidelines do not elaborate or further describe how such benefits to consumers shall be identified in concrete cases. Nor do they make a clear distinguishment from the (equivalent) provisions on efficiencies included in CADE’s Horizontal Mergers Guidelines.

Conglomerate mergers and conglomerate effects

The main development CADE introduced in its later version of the guideline draft was a fairly extended section on conglomerate mergers and conglomerate effects, which had not been covered by IBRAC and CADE’s earlier research work.

The V+ Guidelines propose a similar structure to evaluate vertical and conglomerate mergers, highlighting foreclosure risks when the combined entity leverages its market power in one market, to strengthen its position and foreclose access to an adjacent or complementary market.

Apart from market foreclosure, the document also presents “*other non-coordinated/unilateral conglomerate effects*” as “*subtle practices*” that may hamper effective rivalry and lead to higher prices in conglomerate mergers. Those are mainly related to different strategies of portfolio power and tying/bundling practices.

On top of that, the Guidelines also mention alternative theories of harm that can be applied to conglomerate mergers, including: (i) entrenchment, through increased economic power by the combined entity; (ii) substantial lessening of competition, through decreased incentives for rival innovation; and (iii) increased aggregated concentration, with express indication that, the competition authority can intervene without the need to “*prove damages to individualized markets*”.

This is coherent with CADE’s Department of Economic Studies (“DEE”) [recent study on conglomerate effects in the authority’s case law](#). Despite all being largely consistent with Brazilian competition law, most of those theories of harm have not been incorporated in CADE’s decisional practice. Indeed, a review of CADE’s case law indicates that conglomerate mergers are largely reviewed in light of their potential in giving rise to incentives to tying and bundling practices and in strengthening the undertaking’s portfolio power, as described by [CADE’s 2020 contribution to OECD’s roundtable on conglomerate effects of mergers](#).

Again, although the Guidelines do not necessarily convey consolidated precedents on the assessment of conglomerate mergers, they do offer the authority and market players a potential outlook of how transactions may be reviewed and the sort of risks that might be raised and investigated in the future.

Digital markets and digital ecosystems

Finally, unlike international benchmark documents, CADE's V+ Guidelines also devote some lines to the issue of non-horizontal effects of mergers specifically within digital platforms and markets. This is done both in relation to the assessment of market power, and with the indication of theories of harm that can be applied by the agency to review a transaction's potential effects.

With regard to market power, CADE indicates that direct and indirect network effects – usually featured in digital platforms – and the services' "*integration within broader ecosystems*," shall both contribute to the assessment of market power in upstream markets. The document also expressly states that the definition of the relevant market can be challenging in complex markets, especially those that are technology-intensive or where there is intense innovation.

CADE's DEE study on conglomerate mergers also highlights several features of digital economies that make them prone to conglomeration, including (i) supply side economies of scope; (ii) demand side consumption synergies of various products/services; (iii) high levels of product level innovation; (iv) sharable assets. It also indicates how digital markets also tend to distinguish forms of inter-firm competition, where different conglomerates, with products that are potentially complementary to each other. According to the DEE, conglomerate mergers involving digital ecosystems may lead to specific competitive risks, including (i) the tying of services offered by the ecosystem's organizer; (ii) the envelopment of digital services, with leveraging of shared users/customers; (iii) foreclosure of adjacent markets; (iv) the overall reduction of long-term competition.

Accordingly, as for the theories of harm presented for vertical mergers, the V+ Guidelines mention changes in competitive parameters unrelated to prices (especially relevant in markets where consumers do not pay a monetary value to acquire or use a certain service such as digital platforms, or in markets where prices are regulated.) The document also indicates increased incentives for the foreclosure of digital ecosystems, preventing third-party participation in these ecosystems (preventing multi-homing or interoperability, for example), or imposing discriminatory access conditions, among others.

Concluding remarks

CADE's V+ Guidelines represent a clear advancement in Brazilian merger review policy. The document is innovative and encompasses the traditional and the consolidated assessment of vertical mergers, while still opening the door for novel and current discussions. If one looks back to CADE's decisional practice after the publishing of other guidelines, one should expect to see the V+ Guidelines largely mentioned and applied to future cases. This will certainly be an interesting opportunity for the provisions to be tested, further developed, adapted and applied via the case law, especially in regard to those less-traditional or consolidated indications.

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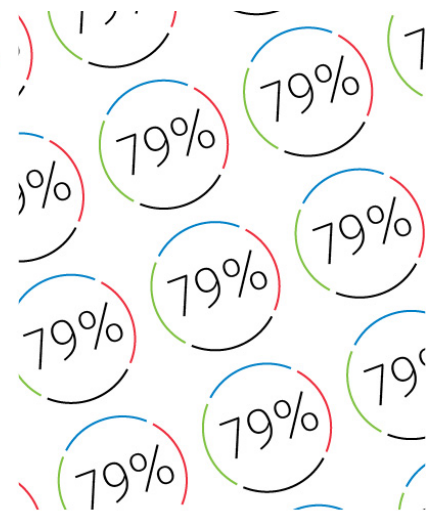
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This entry was posted on Wednesday, May 29th, 2024 at 9:00 am and is filed under [Brazil](#), [Guidelines](#), [Merger control](#)

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