Antitrust remedies: in search of a balanced dosage

The assessment of antitrust remedies under the merger control realm has been raising noteworthy reflections worldwide, and one clear-cut challenge in this strand concerns the gauging of remedies to achieve an adequate and balanced dosage so as to avoid perverse effects. Ultimately, the remedy can turn itself into poison (*sola dosis facit venenum*) if not well-structured.

In Brazil, the Administrative Council for Economic Defense (*Conselho Administrativo de Defesa Econômica* – CADE) has recently blocked two high-profile transactions.[1] Indeed, discussions involving remedies have permeated CADE's scrutiny in the face of those rejections and, consequently, have pushed the subject among the economic agents, practitioners, academics etc.

At first sight, the rejections at hand might have generated some market noise and, above all, an initial feeling of an adamant and even arbitrary antitrust authority, thus signaling a possibly turning point in the sense of a stiffer antitrust policy under the premerger control system. Regardless, it is still premature to draw any solid conclusion against this backdrop.

Irrespective of the merits on the aforementioned cases (in parallel, the case law shows a negligible number of rejections under the Law No. 12,529/2011[2] to date, that is, less than 1%), in Brazil we foresee an opportune timing to invigorate the discussions on antitrust remedies. Incidentally, CADE is expected to issue

---

Authors:
Eduardo Caminati Anders – President of the Brazilian Institute of Studies on Competition, Consumer Affairs and International Trade – IBRAC, and Partner of Lino Beraldi, Belluzzo e Caminati Advogados.
Guilherme Teno Castillho Misale – Associate to the Brazilian Institute of Studies on Competition, Consumer Affairs and International Trade – IBRAC, and Associate of Lino Beraldi, Belluzzo e Caminati Advogados. LLM Candidate in Commercial Law at University of São Paulo (USP).

[1] The CADE's Tribunal has recently rejected two transactions, namely: the intended acquisition of Estácio by Kroton Educacional (education sector) analyzed under Merger Filing No. 08700.006185/2016-56, and the intended acquisition of Alesat by Ipiranga (fuel distribution sector) analyzed under Merger Filing No. 08700.006444/2016-49. See, respectively, http://en.cade.gov.br/press-releases/cade-blocks-estacio2019s-acquisition-by-kroton and http://en.cade.gov.br/press-releases/cade-vetoed-the-acquisition-of-alesat-by-ipiranga. Accessed on September 12, 2017. CADE is expected to face complex transactions from the antitrust standpoint in view of its pipeline, which, in turn, might require the negotiation of remedies with the involved parties to secure the approval.

[2] The Brazilian Antitrust Law entered into force on May 29, 2012. Its 5th anniversary was celebrated this year (2017).

guidelines on remedies in the near future, reinforcing the appropriate circumstance of the debate.

Broadly speaking, the purpose of the remedies is to neutralize potential / real impacts of a given transaction in a way to ensure that it does not lead to anomalies in market structures. In theory, conditioned to remedies, the execution of a given transaction that requires so is supposed to be authorized from the antitrust viewpoint, while preserving its net efficiencies, safeguarding the competition insofar as counterbalances the potential / real anticompetitive effects of the merger filing.

In light of this landscape, the economic agents should be attentive and commit themselves to evaluate alternatives for the authority to approve the deal, highlighting the importance of diligently engaging in the negotiation with the competent authority. In that particular, one should underscore the need for proactivity and also the convenient timing in the proposal of remedies (e.g., considering the case of divestiture of assets, it would be opportune if the agent promptly submit a comprehensive mapping of assets to start-off the negotiation with the authority in search of effective solutions). Likewise, CADE should adopt a transparent approach open to dialogue since the beginning of the negotiation process. Indeed, negotiated solutions tend to achieve a more effective outcome in comparison with unilateral interventions.

In essence, the authority is responsible for assess, from the robustness, sufficiency and feasibility of the proposed remedies, whether they are effective to counterbalance possible competitive concerns identified in the review. We adduce a double benefit to antitrust policy when well-structured measures are embedded into remedies: potential competitive problems are removed and the efficiencies of the transactions remain sheltered.

Accordingly, it is of utter importance in the elaboration of the remedy that a myriad of variables be weighed in vis-à-vis the specific case. In addition, one should not disregard an increasing proclivity of sophisticated and cross-border transactions in the business world dynamics. Some of them might give rise to competition concerns, so requiring nuanced solutions in terms of remedies. In that regard, the

perceived problems may vary across different jurisdictions, thus calling for a tailor-made approach when calibrating the remedy dosage (the coordination between the competent antitrust authorities is also an important factor in that respect).

The rule of thumb in this environment is to grasp that remedies are not unique: in principle, they are not born ready. Put it simply, remedies should be considered in light of the specific background of the case and, consequently, under nuanced lenses on the basis of the antitrust concerns they intend to address.

Depending on the antitrust issues posed by the transaction, structural remedies may be preferable to behavioral ones (and vice-versa), based on the traditional classifications established in the doctrine. Nonetheless, structural interventions tend to be more desirable from the regulator's angle. As pointed out by the International Competition Network (ICN) in its Merger Remedies Guide (2016),[3] "*competition authorities are responsible for ensuring that remedies are necessary, clear, enforceable, effective, sufficient in scope and capable of being effectively implemented within a short period of time*". Therefore, the ideal intervention would be punctual and guided by the ICN's premises. Further, in some cases "creative" remedies may be opportune to alleviate the antitrust problems by mixing both structural and behavioral remedies ("hybrid remedies").

Under the premise of a minimalist intervention, our understanding is that the success of the remedy fundamentally relies on its ability to perform plain, transparent, definitive and feasible solutions, which should be, in turn, easily administered and monitored from the regulator's perspective to satisfy the enforcement. This is particularly relevant due to the existing informational asymmetry within the market. In this strand, for example, the presence of trustees to provide the authority with reports attesting the monitoring and effectiveness of the remedies is becoming more usual (overall).

Indeed, in some cases there can be a plethora of remedies that may be put forward; the key in this field, at least from the authority's eyes, is to have due caution when gauging the dosage, to avoid distorting the parties' incentives and also unbalancing

[3] Available at: http://www.internationalcompetitionnetwork.org/uploads/library/doc1082.pdf. Accessed on September 12, 2017.

the health of the market. Ultimately, excesses should be avoided, either by excessively soft remedies or by highly restraining ones. Clearly, cooperation is fundamental to achieve workable solutions.

Hence, the dosage of a remedy essentially requires proportionality with a view to avoiding vexing situations that otherwise can augment problems, meaning remedies that demand more competition than in the previous scenario – which in turn could discourage efficient transaction –, or remedies that has no connection with the concerns verified in the transaction. In sum, remedies should be thought and designed in accordance with the potential negative effects to the competition that a given transaction may entail.

That being said, our view is that only when a definite diagnosis is reached, depicting an insurmountable situation, that is, an "incurable disease" – and have been exhausting all "antidotes" to revert such a picture –, is that the rejection of a given transaction should be contended by the antitrust authority. In some circumstances, chances are that the effects of a rejection end up being perverse, hindering a range of socioeconomic benefits that could arise from an approval conditioned to well-structured remedies, for instance. Notwithstanding the foregoing, one should also bear in mind that poorly designed measures can equally generate collateral effects in terms of remedies.

As a matter of fact, for certain sorts of transactions no remedy might be able to truly obviate and neutralize the negative impacts that would be generated within the economic order. For these specific cases, the rejection tends to be, in theory, the logical and safest outcome. Obviously, the authority should manage its decision on the basis of reasonableness and proportionality, fully cognizant of its implications for the society as a whole.

All in all, in the face of sophisticated scenarios that permeated the corporate universe, unveiling complex and multijurisdictional transactions from the antitrust standpoint, one big challenge posited can be synthesized as for the formulation of an adequate and balanced remedy dosage to precisely eradicate the perceived "malaise". It is crucial to approach this matter with cautions, so as to effectively

gauging the remedy dosage, preventing market from distortions and, above all, avoiding the formation of teratological structures.