

Third Parties under Merger Review in Brazil



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Overall, the corporate environment has been becoming more sophisticated when it comes to the structuring of corporate deals and transactions, many of which depicting significant interfaces with the competition realm. Indeed, complex transactions that require notification before the Administrative Council for Economic Defense (CADE) involving competitively sensitive markets may give rise to an opportune context for third parties with interests/rights affected by the future decision to seek the competition authority to submit counterpoints to the arguments of the parties, underlining the concerns arising from the case.

Lately, one could see a gradual increase in the intervention of third parties before CADE in Brazil; this year, in particular, one could notice some high-profile transactions reviewed by CADE that counted with third parties' interventions, whose manifestations were important for the final outcome. In essence, what may help explain the greater interest of third parties within CADE relates to the institutional strengthening of this antitrust authority since the advent of Law No. 12,529/2011, which, in turn, introduced the pre-merger review system and set forth the third interested party's institute in light of a democratic and collaborative spirit, to ensure, fundamentally, greater quality and legitimacy to CADE's decision.

In principle, the third party is a player who collaborates to refine the instruction phase, clarifying eventual gaps and detailing specific issues of market dynamics in order to provide a more comprehensive view of the transaction landscape, the alleged impacts of the case and so on. The concept of third party is relatively generic and encompasses both competitors (direct or indirect) and agents which operate in markets that are vertically related or complementary, besides trade unions/trade associations etc.

In general, given its discretionary power, there is a permissive judgment of CADE regarding the legitimacy for admission of third parties in the merger review. Nevertheless, it is necessary that certain criteria be met for a given third party to be admitted as so in the case records (temporal and materially speaking). In particular, the manifestation of the





third party should be supported by credible information and technical documents, bearing in mind the case at hand and noticing the legal interest protected (competition). Conversely, this implies to say that the institute of the third party cannot be converted into artifice for resolution of private conflict.

With respect to the latter, the intervention of a given third party driven by a mindset that seeks the delay in the merger review should be checked with caution; ultimately, it can be imposed administrative sanctions against this third party, who, in reality, would be seen as an uninterested agent from the good faith standpoint since, at the end, its interest would be to purposefully delay the antitrust scrutiny by setting out unfounded statements (and even more worrisome if it brings misleading information). Obviously, the regulator is not bound by the arguments addressed by the third party -- especially when clearly distorted --, carrying out its analysis based on a rationale of convenience and opportunity.

Although CADE has the prerogative to consult the market agents over the instruction phase through market tests by sending out official letters and questionnaires, and this usually occurs in the face of more nuanced mergers review, the third party that formally qualifies in the process, in theory, has a fuller and more assertive faculty to present documents to oppose the data and explanations of the parties. Theoretically, along the process, for instance, a third party can avail itself of prerogatives that a "non-third party" does not take advantage of,¹ mainly to react and oppose to a certain opinion rendered by CADE.

In addition, the complexity of certain transactions in markets where CADE has already perceived structural sensitivities is highlighted. In sectors considered historically problematic from the competitive viewpoint, in principle, mergers review tends to awake even greater interest from third parties. Moreover, transactions with a global outreach tends to attract the attention of third parties, particularly if the case involves relevant players in markets in which the post-transaction scenario will culminate in clearly raising barriers to entry, diminishing rivalry, potentializing coordinated effects etc.

Another element that has contributed to the strengthening of the "culture" of the third party concerns the breadth of press coverage with respect to competition law in Brazil. In addition to that, one can observe several events hosted and studies organized by civil associations, think tanks and academia in cooperation with the representatives of the Brazilian Competition Defense System - SBDC, with the purpose of critically reflecting on the strides of competition policy in Brazil, in order to advance with a proactive agenda for institutional improvements. In this wake, an amalgam of public and private competition advocacy has also collaborated, among others, to contextualize the role of the third party and to outline its importance, notably by reducing the asymmetry of information that prevails in this field.

¹ What we call here as a "non-third party" can be interpreted as being an agent that is not formally qualified by CADE as third party in view of the fail to meet the criteria to be classified as so. Such agent can collaborate with CADE in the role of *amicus curiae*, for example. However, in principle, it would have less leverage to intervene in the merger review process if compared with the third party officially admitted in such position.





In prospective terms, especially considering (i) the characteristics of certain sectors and industries (historically concentrated and frequently on the antitrust radar), (ii) a potentiality of more sensitive transactions under the competitive lenses to be reviewed, (iii) an increasing apprehension of competitive law among the economic agents etc., it would not be surprising to visualize a greater involvement of third parties within CADE in the future. In this environment, one might expect that the numerical incremental be accompanied with a material increase of the intervention, so that the third party can effectively bring noteworthy and useful insights that will help CADE perfects its understanding on the alleged implications of the transaction, in a way that the authority's decision reflects a pondered analysis of the competitive variables involved in the case.

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