



Conselho
Administrativo
de Defesa
Econômica

Merger Remedies

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Topics

- How to choose an effective remedy while avoiding over enforcement?
- Should behavioral remedies be allowed?
How to police them?

CADÉ's experience: cases for illustration

- *Merger 1: Coca-Cola/ Matte Leão*
(j. 2009)
- *Merger 2: Telefónica/ Telecom Italia*
(j. 2010)

1) Coca-Cola/ Matte Leão

- Aquisition of Matte Leão by Coca-Cola.
- Main market involved: iced tea.
- 3 main competitors: 1) Coca-Cola/Nestlé (*Nestea*); 2) Pepsi (*Lipton*); 3) Matte Leão.
- High barriers to entry and difficult contestability (strong brands, distribution difficulties, portfolio power).
- Transaction result: near duopoly.

Remedies - Coca-Cola/Matte Leão

- Coca-Cola agreed to cease the production and distribution of *Nestea* iced tea in Brazil.
- Result: elimination of the duopoly, maintenance of 3 main rivals – Coca-Cola (*Matte Leão*), Nestlé (*Nestea*) and Pepsi (*Lipton*) – while allowing efficiencies.

Topic: Choosing remedies and avoiding over enforcement

- Severe risks of over enforcement in Coca-Cola/Matte Leão:
 - unreasonably favour Pepsi;
 - prevent significant efficiencies; and
 - cause the exit of Nestlé (*Nestea*), instead of allowing its maintenance as an independent player.

Solutions:

- Transition periods, in order to allow Nestlé to find other ways to produce and distribute: Coca-Cola would keep providing marketing and distribution for 6 months, production for 1 year and technical assistance for 1.5 year.
- Benefits of a negotiated remedy: more information, more solutions, better understanding.

Topic: Behavioral remedies and monitoring

- Behavioral remedies could not address the structural nature of the competitive problems in the iced tea market (brands, distribution nets, portfolio power).
- Impossible to monitor behavioral remedies in every single city in Brazil.
- behavioral remedies were rejected.

2) Telefónica/ Telecom Italia

- Acquisition of minority shares of TI (controler of TIM) by TEF (controler of VIVO).
- Main market: mobile telephone services.
- Necessary to ensure the passive nature of TEF's investment in TI and to limit the exchange of information regarding the Brazilian market.

Remedies – TEF/ TI

- TEF agreed to give up participation and voting rights in TI's deliberations regarding Brazil.
- Elimination of interlocking directorates.
- Prohibition of information exchange, with personal recognition by TEF's executives.
- Strong monitoring by ANATEL and CADE: board deliberations, contracts, *in locus* inspections, market data reports, independent auditing.

Topic: Choosing remedies and avoiding over enforcement

- Risks of over enforcement in TEF/TI (e.g. complete divestiture or divestiture in regions of Brazil): Reflexes in other countries; minus 1 player in particular regions; damages to the companies based on a wrong assessment of a minority shareholding.
- Once again: reliable competitive analysis and benefits of negotiated remedies.

Topic: Behavioral remedies and monitoring

- Structural remedy: minority shareholding.
- Partially structural remedies: elimination of participation and voting rights and interlocking directorates (considered structural measures by OECD – however, require certain monitoring).
- Behavioral: confidentiality terms; market reports; monitoring of board deliberations, contracts, *in locus* inspections, independent auditing..

- Example of how behavioral remedies can be useful, specially if applied as a complement to structural ones.
- Less drastic than a complete divestiture, but effective.
- However: need for constant monitoring.
 - easier in regulated markets
 - transfer costs to the firms/ heavy penalties
 - transparency: monitoring by competitors

Conclusions

- Choosing remedies/ avoiding over enforcement:
 - No escape: make a reliable analysis;
 - Talk to the firms (benefits of negotiation);
 - Consider the various possibilities: structural, behavioral, both.

- Behavioral remedies and monitoring:
 - Can be useful, specially as a complement;
 - Monitoring: transfer costs to firms and rivals (e.g. independent auditing); heavy penalties; regulatory agencies.



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Thank you!