Businesses still weary of CADE, says panel

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More than two years after CADE's pre-merger notification regime took effect, and despite advances in the time the antitrust authority takes to analyse complex deals, global companies still push to carve Brazil out of worldwide deals to prevent holdups, but CADE is standing firm on its refusal to allow it.

The Brazilian antitrust regulator's performance and other antitrust developments in the region were discussed at Latin Lawyer's 5th Annual M&A Conference, held on Tuesday in São Paulo.

Eduardo Frade Rodrigues, who became general superintendent of CADE in June, defended the authority's refusal to allow Brazilian legs to be excluded from global deals when the local operations are clearly part of companies' global functions. "It poses a problem, as it would anywhere in the world," he said, adding that it would not be right for companies to take steps to merge in Brazil before obtaining CADE approval, even if the deal has been approved elsewhere.

Barbara Rosenberg, antitrust partner at Barbosa Müssnich & Aragão, said that her clients will often ask to carve out Brazil before her firm even begins discussing the timeframe of CADE's approval process, for fear that Brazil's pre-merger process will delay closing the deal worldwide. Such a procedure would only be feasible if the Brazilian asset is completely separated from others around the world – if it is presented as such but the authority disagrees, CADE can ask to review the whole deal again from scratch.

However, CADE has put other measures in place to try and ensure that the pre-merger process doesn't hold up M&A deals. It coordinates with antitrust authorities around the world, either through a benchmark procedure or on specific cases. "It is very important for the parties themselves that the different authorities coordinate, because you do not want conflicting remedies," said Rodrigues. Most importantly, companies' lawyers across jurisdictions need to be in communication, he urged, to make sure remedies are imposed smoothly – something that fails to occur all too often.

The Brazilian regulator also raised its notification thresholds to reduce the number of cases that it had to review and created a streaming system to manage incoming cases. The system includes a fast track, which have to be dealt with within 30 days and today includes around 80 per cent of the deals CADE reviews. On average, fast-track cases are reviewed in 21 days, although complex cases that end up going to trial or a tribunal take much longer.

In addition to the policies CADE has adopted, the pre-merger process has also forced lawyers to adapt. "We know we have to file a complete filing," said Rosenberg. "In the past we would file with whatever information we have, but now we have to convince clients that it is much better to spend another week preparing." Ultimately, the switch to a pre-merger system has altered the dynamic of the antitrust legal community, propelling antitrust lawyers from a purely post-closing environment to having a close involvement in the early stages of a deal.

Coordination between antitrust authorities – as well as interactions between law firms and a single authority – need not violate attorney-client privilege, the panel heard, although legislation across Latin America is largely silent about how the principle fits in with antitrust regulation. "The agenda of our analysis is not to come between that, so if you don't submit certain information it just affects the timing because we will have to find it another way," explains Rodrigues, explaining that CADE would simply look to market research or would speak to companies' clients and suppliers to get the information it wanted.

Elsewhere in the region, recent changes to Mexico's antitrust law, which also imposes a pre-merger system and was updated in June, were also a topic for debate. Mexico's Federal Economic Competition Commission now verbally briefs parties seeking to close deals on competition concerns rather than publishing specific issues, which it did in the past, something Fernando Carreño of Von Wobeser y Sierra SC said creates uncertainty in complex cases. "There is uncertainty about the timing and when the secretary of the

commission will call parties, but most importantly, the parties will have to prepare evidence based on verbal communications and they won't know the exact position of individual commissioners." Companies only have three working days to submit evidence to dispel antitrust doubts after they receive the verbal summons.

Marking it apart from both Brazil and Mexico, Chile does not yet have a pre-merger filing regime but instead uses a semi-voluntary system that imposes the burden on private companies, which must decide whether or not to submit mergers to an antitrust court either before or after closing a deal. The country is set to amend its antitrust legislation next year, but Guerrero Olivos partner Pedro Pellegrini would favour a cure rather than prevention approach. "We are a little country, so almost every single merger would affect the market in some way."

Despite regional legislative developments in antitrust, the rules on gun jumping – closing a transaction before it has received antitrust approval – remain unclear. Across Latin America, the range of actions that can be considered to be jumping the gun are not set in stone, meaning there are "no clear cut answers," said panel moderator Andrea Gomes da Silva of Freshfields Bruckhaus Deringer, leaving many law firms to adopt international principles for guidance. As such, law firms advise their clients to continue business as normal until a merger or acquisition has closed and to avoid coordination of prices or market strategy so that the companies are still competing. In extreme cases, gun jumping has been alleged to occur during the due diligence process, where information on each company is exchanged, but Rodrigues argued that there are ways for companies to avoid antitrust issues at this stage if they are willing to be creative. In Mexico, Carreño advises his clients to assemble a "clean team" of people who have access to sensitive information, but who don't have any role in determining company prices and strategy. The practice is also one Rosenberg uses in Brazil, but she admits it can be challenging to convince clients who are eager to capitalise on the synergies of a merger straight away.

The conference also saw banking representatives cast their judgment on Brazil's M&A activity in the last year. Latin Lawyer will continue to report on the conference in upcoming news briefings.

Comments

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