

Remedy commitments in Brazil: negotiation, procedure and recent trends

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Introduction

Just as is the case with other jurisdictions that have established antitrust systems, applicants to merger cases in Brazil may negotiate remedies with the Administrative Council for Economic Defense (CADE), the Brazilian competition agency, to seek approval for transactions that raise competitive concerns. CADE is up-to-date with recent developments in this area and allows for many forms of remedy commitments amid merger procedures, which receive the name ‘merger control agreements’ in Brazil.³

However much the topic of merger control agreement may have been debated, little is discussed about its procedural aspects. Two decisions issued by the CADE in 2021 highlighted the importance of understanding the procedures for negotiating and changing the terms of merger control agreements once they have been signed.

As we will describe in more detail below, in two decisions last year CADE concluded that the applicants to merger cases had violated the terms of the merger control agreement negotiated with CADE, which led the authority to reject the

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proposed merger – one of which had been implemented more than six years earlier. CADE afterwards reverted the latter of these decisions, but a definitive decision on the case is pending.

The procedures surrounding merger control agreements probably receive little attention because the agreements themselves are few. From 2015 to 2021, CADE conditioned the approval of transactions to remedies in only one per cent of cases, for a total of 41 merger control agreements in the span of six years. Even if we consider only cases that were not subject to the fast-track procedure, remedies were negotiated in only eight per cent of cases.⁴

Despite merger control agreements not being common, the two recent aforementioned decisions indicate that CADE takes these agreements very seriously and is willing to go to the extreme of rejecting a transaction if the applicants fail to meet the negotiated remedies.

In this article, we will present an overview of the procedures for the negotiation of merger control agreements, as well as those concerning the execution phase of the agreements and will demonstrate that applicants in Brazil – especially those involved in multijurisdictional transactions – must be prepared for a long and complex relationship with CADE when they enter into merger control agreements.

Negotiation procedure

The Brazilian Competition Act (BCA)⁵ mentions merger control agreements very sparsely, mainly because the section of the law that would have regulated the matter – Article 92 – was vetoed by the President of the Republic when enacting the BCA.⁶ Because of the veto, the main rules concerning merger control agreements were established directly by CADE in its Internal Rules.⁷

Before advancing into the actual procedures for the negotiation and signing of merger control agreements, we should briefly describe the stakeholders and summarise their roles relating to merger control agreements:

4 According to data from CADE's website (www.gov.br/cade/pt-br/centrais-de-conteudo/cade-em-numeros), from 2015 to 2021, CADE approved 3,071 merger cases, of which 490 were not eligible for the fast-track procedure.

5 Law No 12,529/2011.

6 The Presidential message that communicated the veto clarified that a veto was necessary because, as approved by Congress, 'The provisions restrict the possibility of entering into agreements at the stage of investigation of the cases, unduly limiting a relevant instrument for the Tribunal to act in the prevention and repression of infractions against the economic order'. Curiously, at the time of the enactment of the BCA, many practitioners feared that the veto meant the end of merger control agreements in the Brazilian antitrust system when, in reality, the veto aimed at granting applicants more opportunities to negotiate them.

7 An official English version of CADE's Internal Rules is available on <https://cdn.cade.gov.br/Portal/centrais-de-conteudo/regimento-interno/Statutes-of-Cade.pdf>, last accessed 10 April 2022.

- CADE's *General-Superintendence* (GS) is the body within CADE responsible for reviewing merger cases and approving them without restrictions when no concerns are identified. If the GS concludes that a transaction raises competitive concerns, it will forward the case to CADE's Tribunal recommending its: (1) rejection; (2) approval subject to remedies to be defined by the Tribunal; or (3) approval subject to the terms of a merger control agreement. As per article 13(X) of the BCA, the GS can negotiate the terms of a merger control agreement with applicants but cannot sign it. The BCA also provides that it falls on the GS to monitor compliance with merger control agreements.
- The *Office of the Attorney-General* (OAG) is a legal advisory body that does not take part in negotiating or signing merger control agreements unless it is called upon to issue legal opinions.⁸ On the other hand, as we will explain below, the OAG takes part in monitoring compliance with merger control agreements.
- CADE's *Tribunal* is the decision-making body of CADE. The Tribunal is composed of up to six Commissioners and a president – who also votes in cases – and its decisions are taken by majority vote. The Tribunal is, among other things, responsible for deciding on merger cases that are brought before it,⁹ and is the body that approves merger control agreements and that decides whether the agreements have been fully executed or violated.
- The *Reporting Commissioner* is a member of CADE's Tribunal who is randomly assigned to report on cases (including mergers) brought before the Tribunal. As per Article 11 (IX), reporting Commissioners may propose agreements for the approval of the Tribunal.

As a last introductory note, in one of the few articles of the BCA that address merger control agreements (Article 9(X)), the law provides that CADE's Tribunal may enter into merger control agreements whenever it deems it 'convenient and opportune', making it clear that CADE has full discretion to accept merger control agreements.

Having set the stage for the topic, we start by noting that the applicants to a merger case can submit proposals for merger control agreements from the date of the filing of the case until up to 30 days after the case has been assigned to a reporting Commissioner at CADE's Tribunal.

On the other hand, CADE's Tribunal has decided that its Commissioners can initiate negotiations for merger control agreements even after the 30-day period

8 On this note, we highlight that the OAG has issued an important opinion – Opinion No 244/2014 – in Merger Case No 08700.009924/2013-19 (*Videolar/Innova*), addressing the possibility of CADE (and not the applicants) initiating the negotiation of merger control agreements.

9 Merger cases are reviewed by the Tribunal in three circumstances: (1) if the GS challenges the case; (2) if an intervening third-party challenges the GS's approval decision; or (3) if the Tribunal accepts a request from one of its commissioners for a second review of the case (known, in Portuguese, as *avocação*).

established in CADE's Internal Rules.¹⁰ The reasoning for this distinction is that CADE has a statutory deadline of 240 days (which can be extended in up to 90 days) to conclude its analysis of merger cases; if CADE fails to meet this deadline, the merger case is automatically approved.

Thus, if applicants were free to propose merger control agreements at any time, there is a risk that they would try to initiate negotiations close to this deadline and mislead CADE into missing the statutory deadline, especially because negotiations for merger control agreements neither suspend nor interrupt CADE's deadline.

The beginning of negotiations for merger control agreements – whether with the GS or reporting Commissioner – are usually informal. The applicants to a transaction or the agent at CADE will usually approach the matter in a meeting, in which the general outline of the agreement will be discussed. These discussions are not registered in the case records of the merger case, nor are presentations or e-mails exchanged between the applicants and CADE concerning the negotiation. If necessary, CADE will include any such documents in separate confidential records that are accessible only to CADE and the applicants.

At the early stages of negotiations, CADE will indicate to the applicants the specific concerns that it has identified, and the applicants may try to counter some of CADE's concerns to reduce the scope of remedies. Once both sides reach a common ground on the problems that should be tackled, CADE will usually leave it to the applicants to present their remedies proposal.

Applicants may propose a wide array of both structural and behavioural remedies. The most common remedies negotiated with CADE include provisions concerning:

1. divestment of tangible and intangible assets;
2. non-discrimination;
3. business transparency obligations;
4. suspension or withdrawal of exclusivity clauses;
5. commitment to supply;
6. commitment not to acquire other businesses; and
7. commitment to report any new mergers (regardless of meeting the legal thresholds).¹¹

It has become common practice for CADE to request from the applicants that they engage monitoring trustees and, when applicable, divestment trustees to assist CADE in monitoring the fulfilment of the remedies.

Merger control agreements also usually contain provisions concerning the situation in which deadlines can be extended and commitments altered, as well

¹⁰ Merger Case No 08700.009924/2013-19 (*Videolar/Innova*).

¹¹ See CADE's Guide on Antitrust Remedies, available at <https://cdn.cade.gov.br/Portal/centrais-de-conteudo/publicacoes/guias-do-cade/Guide-Antitrust-Remedies.pdf>, page 11.

as provisions concerning the applicable fines in case the applicants fail to meet deadlines or part or all their commitments. The terms of all these clauses are open to negotiation.

Moreover, merger control agreements generally reproduce the text of the BCA to provide that, if the applicants do not implement the remedies and CADE decides that they have violated the terms of the agreement, CADE may revert its decision for the approval of the transaction.

Once the applicants and CADE reach an understanding on how the agreement should be structured, the applicants will submit a draft agreement proposal to CADE. After reviewing the proposal, CADE will either request that the applicants make final adjustments and submit the final version of the proposed agreement, or will simply request the formal submission of the final document.

As noted above, if negotiations are undertaken at the GS level, the applicants must bear in mind that their agreement proposal will be subject to discussion at CADE's Tribunal. For this reason, it is important to ensure that the GS representative maintains constant and active communication with members of the Tribunal to negotiate terms that will be acceptable to the Commissioners. Once the case is forwarded to the Tribunal, applicants can (and should) meet with CADE's Commissioners to discuss the remedies proposal but altering the terms of the agreement becomes much more challenging at this stage.

This two-stance procedure at CADE has been posing an additional challenge to applicants in the past couple of years, and applicants should be mindful of this when negotiating at the GS level.

Up until mid-2019, it was common for CADE's Tribunal to maintain a close communication channel with the GS concerning merger agreement negotiations and to approve them speedily after receiving the GS's recommendation for the approval of the case subject to the agreement. In 2019, CADE's Tribunal underwent a significant change in composition, receiving four new Commissioners (ie, the majority was now made up of new members) and altering the dynamic in the Tribunal-GS relationship.

To illustrate, in *Localiza/Unidas*,¹² the applicants negotiated a merger control agreement with the GS, who forwarded the case to the Tribunal with a recommendation for the approval of the acquisition subject to the merger control agreement. However, at the Tribunal level, the transaction – even with the proposed remedies – faced opposition from the Commissioners, leading the reporting Commissioner and the applicants to renegotiate the terms of the agreement and make it more robust. Notwithstanding the renegotiation, the transaction was approved by a tight margin of three for, two against.

12 Concentration Act No 08700.000149/2021-46.

To further illustrate, in *Claro/TIM/Vivo/Oi*,¹³ the GS issued its opinion for the approval of the transaction subject to a merger control agreement on 2 November 2021 and CADE's Tribunal only decided on the case 100 days later, on 9 February 2022.

Negotiating at the Tribunal level, applicants tend to have more immediate feedback regarding the concerns of the Commissioners; however, even in this case, applicants should be aware that the reporting Commissioner plays a central role in transmitting the development of the negotiation to the Tribunal. Although in most cases the reporting Commissioner is the one to lead negotiations and submit the remedies proposal to the Tribunal, if the reporting Commissioner indicates to the applicants that they are not comfortable with the terms of the negotiation, the applicants are free to seek another Commissioner to continue their negotiation. In this scenario, the reporting Commissioner would issue a vote for the rejection of the transaction and the Commissioner who undertook the negotiation would issue a dissenting vote for the approval subject to the merger control agreement (assuming they agree with the remedies proposal).

Applicants should also be aware that they generally tend to have less time to conclude negotiations at the Tribunal level and that they must submit their final proposal at least 108 hours before the judgment session scheduled to analyse the case.

During the judgment session, the Tribunal will disclose to the public the main aspects of the merger control agreement submitted by the applicants; however, details of the proposal – such as timeline for divestments, assets to be divested – are kept confidential if the applicants so request. If most of the Commissioners approve the case subject to the merger control agreement, CADE's President and the applicants sign the document and it becomes binding. In up to five days from its signature, a public version of the merger control agreement is included in the public case records.

It has become ever more common for CADE to condition the closing of the transaction to certain goals of the merger control agreement, such as to the submission of binding agreements for the divestment provided by the remedies commitments. Applicants should, therefore, carefully analyse and negotiate provisions on this regard and keep in mind that all hold-separate commitments will likely be subject to the scrutiny of a monitoring trustee.

The merger control agreement was approved, now what?

Having a merger control agreement approved by CADE is certainly a milestone, but it is not the end of the case, especially considering that merger control agreements may include commitments that must be observed and reported to CADE for five to ten years.

13 Concentration Act No 08700.000726/2021-08.

As mentioned above, merger control agreements establish several reporting obligations for the applicants, and it is mostly based on these reports that CADE assesses whether the agreement is being complied with. CADE may also request information directly to the applicants or monitoring trustee, as well as to third parties when monitoring the execution of the agreement.

Applicants should be aware that CADE's bureaucracy is not aligned with the fast-paced speed and dynamics of private deal negotiations. CADE's officials play their part and try their best to render timely decisions to answer requests from the applicants and to react to their reports, but the BCA, CADE's statutes, and regulations have created a cumbersome procedure for the monitoring of merger control agreements.

The BCA provides that the GS is responsible for monitoring compliance with merger control agreements.¹⁴ The BCA further establishes that CADE's Tribunal may request that the GS be responsible for monitoring the implementation of its decision and agreements, in which case '[o]nce the Tribunal's decision or the merger control agreements and cessation commitments have been fully complied with, the General Superintendence, ex officio or at the request of the interested party, will express its opinion on compliance therewith'.¹⁵ Based on this, one would imagine that the applicants would mainly interact with the GS during the execution phase of the agreement, but this is not the case.

Straying from the system designed by the BCA, CADE issued Resolution No 6/2013 (the 'Resolution'), establishing that the Tribunal will send case records to the OAG, to prepare analyses concerning the execution of merger control agreements. According to the Resolution, the OAG will analyse all reports and requests submitted by the applicants and issue opinions as to whether they are aligned with the terms of the merger control agreement. After issuing this opinion, the OAG will send the case records to the GS, who will issue a decision on the matter; but this decision is still subject to referendum by the Tribunal, which only convenes at pre-scheduled dates, usually twice per month, but with month-long breaks at the middle and end of the year.

We must stress the following point regarding referendum by the Tribunal: if the GS, for example, decides on a request from the applicants for the extension of a deadline, or for the approval of a monitoring trustee or proposed purchaser for divestment assets, this decision is a binding act issued by a CADE authority; however, it is subject to the referendum of CADE's Tribunal, meaning that the decision only becomes definitive after said referendum. While this can payout to the benefit of applicants, who can receive faster approvals from the GS for important

14 Article 13(X).

15 Article 52, paragraph 2.

milestones of remedies commitments (especially during recess periods), it leaves them susceptible to uncertainties as to whether the decision is final.

It is, as anticipated, a very cumbersome procedure, and applicants should plan well ahead anytime they require decisions from CADE concerning their agreements. For better reference, applicants usually request decisions from CADE for the approval of:

- the monitoring/divestment trustee and its mandate;
- the proposed purchaser for divestment assets;
- the terms of the agreement for the divestment of assets; or
- extensions in deadlines concerning: (1) the submission of reports and (2) divestment of assets.

Considering the above, it is important that applicants engage (when necessary) monitoring trustees that are familiar with CADE and its proceedings, because CADE has become increasingly dependent on the opinion of monitoring trustees to issue its decisions.

Thus, aside from depending on acts from the OAG, GS and Tribunal, applicants also depend on the monitoring trustee to submit its own opinion to CADE in a timely fashion. As a rule, the OAG will only issue its opinion after hearing the monitoring trustee.

Noteworthy recent decisions by CADE

The purpose of this topic is not to delve into CADE's caselaw concerning merger control agreements, but rather to discuss two decisions from 2021 that provide important insights for companies and legal practitioners.

1. Videolar/Innova

The first relevant decision was issued by CADE on 28 April 2021, in case *Videolar/Innova*,¹⁶ when CADE rejected the transaction, declaring that the applicants had failed to uphold the terms of the merger control agreement they had signed. We will summarise the main discussions that led to the rejection – and, later, to its reconsideration – to highlight key takeaways from the case.

Videolar/Innova refers to the acquisition, by Videolar SA (Videolar) and its main shareholder of the entire capital stock of Innova (Innova), which belonged to Petróleo Brasileiro SA (Petrobras). The transaction was approved by CADE subject to a merger control agreement on 7 October 2014 and was closed in November 2014; Innova would be incorporated into Videolar in August 2015.

16 Concentration Act No 08700.009924/2013-19.

The focus of the debate in this case was whether Videolar-Innova had fully complied with the terms of the merger control agreement concerning the agreed-upon level of output of their production plants (which they had to observe for ten years according to the agreement). The applicants submitted motions to CADE stating that, due to external economic conditions, they were unable to meet the agreed-upon production levels and requesting CADE to consider these external factors when assessing if they had complied with the merger control agreement. According to the GS and OAG, although permitted by the agreement, the applicants failed to formally request changes to the terms of the agreement. Instead, they had merely informed CADE of the situation and, having failed to meet the production level established in the merger control agreement, violated its terms.

CADE's Tribunal fined the applicants R\$9m in July 2019 for violating the agreement's terms, pursuant to the provisions of the agreement itself. Following this decision, CADE's Tribunal completely reassessed the transaction and rejected it, even though the transaction had been filed many years before and had been closed for more than six years. In the rejection decision, CADE determined that Videolar-Innova and its main shareholder should transfer back to Petrobras sufficient assets for the company to re-establish its activities in the relevant market with the same competitive force that it had before the transaction, and divest one of Videolar-Innova's production plants to a third party.

As anticipated in the introduction of this article, CADE's Tribunal reviewed its rejection decision following a motion for clarifications from the applicants. In a truly mind-blowing turn of events, the Tribunal approved it subject to a *new* merger control agreement that largely replicated the terms of the original agreement but also added new behavioural commitments.

Videolar/Innova is the first case since the enactment of the current BCA in which CADE indicated to the market that it is willing to go to the extreme of rejecting a transaction that has already been closed if the applicants fail to meet the terms of merger control agreements. Shortly thereafter, however, in November 2021, CADE issued a second decision for the rejection of a transaction due to violation of a merger control agreement, this time in *Hapvida/Plamed*.¹⁷

2. *Hapvida/Plamed*

Hapvida/Plamed refers to the proposed acquisition, by Hapvida Participações e Investimentos SA (Hapvida), of certain assets from Plamed Plano de Assistência Médica Ltda (Plamed), relating to its customer portfolio in the medical insurance segment, along with a medical clinic.

17 Concentration Act No 08700.001846/2020-33.

The GS sent the transaction to CADE's Tribunal, recommending its rejection. The GS had concluded that it would not be possible to implement antitrust remedies that could effectively address the concerns that it identified, as simply divesting part of Plamed's assets to a third party would likely represent a decrease in the level of rivalry in the market.

Notwithstanding the GS's opinion, CADE's Tribunal accepted a proposal of a merger control agreement by the applicants through which, among other things, they would have to divest a significant part of Plamed's assets, refraining from closing the transaction until CADE approved the divestment transaction. In the approval decision, CADE's Commissioners emphasised that if the applicants were not able to meet the agreed timetable for the divestment, CADE would review its decision and reject the transaction.

Before the end of the divestment period, Hapvida filed a request for an extension of the deadline for the proposal of a purchaser. CADE's Tribunal decided the request could not be granted, because it had been submitted only six days before the end of the divestment period, thus in an untimely fashion according to the provisions of the agreement. Following this, the Tribunal declared that the applicants had violated the terms of the merger control agreement and granted them a 10-day deadline to submit a defence on this matter.

During the period granted by CADE for the applicants to submit their defence, they continued to negotiate the divestment of the assets with a potential buyer and submitted to CADE a motion for the approval of the potential buyer for the assets along with a request for CADE to reconsider its decision that had declared the violation of the merger control agreement. CADE's Tribunal, however, was not moved by the efforts of the applicants, and stated that CADE's previous decision was definitive and that the applicants should have used their time to submit a defence regarding the reason they had failed to fulfil the agreement.

In a subsidiary manner, CADE reviewed the request for the approval of the proposed purchaser and concluded that the company did not meet the minimum requirements provided by the agreement, confirming the rejection of the transaction in its entirety.

Conclusion

In this article, we have shown that the procedures for negotiating and executing merger control agreements with CADE are cumbersome. We have also demonstrated that companies should be wary that, as a rule, it takes time and effort to have a merger case shelved after signing a merger control agreement.

In this regard, the two precedents discussed above provide important insights for companies and lawyers negotiating merger control agreements with CADE, which can be summarised as follows.

1. Be mindful that CADE takes deadlines seriously. If possible, therefore, negotiate better terms concerning deadlines, especially terms for submitting requests for extensions or changes to the agreement.
2. Be proactive when seeking a position from CADE. As noted, there is much bureaucracy involved in merger control agreements, so applicants should be sure to voice their requests clearly and to follow through with them until a decision is issued.
3. Do not be shy in submitting requests for changes to the terms of agreements. Both cases above could have had different outcomes and been subject to less turmoil if the applicants had expressly requested changes to the terms of the agreements in a timely fashion.
4. Remember that CADE will follow through with imposing fines if the merger control agreement is violated, so take the time to negotiate the value of these fines carefully.
5. Finally, note that CADE can revert its approval decision if the merger control agreement is violated, so take the agreement seriously and ensure that it receives the required attention both inside the companies and from the attorneys acting before CADE.

Author biographies

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