

**FEDERATIVE REPUBLIC OF BRAZIL
BEFORE THE ADMINISTRATIVE COUNCIL FOR ECONOMIC DEFENSE (“CADE”)**

DRAFT GUIDELINES CONCERNING ANTITRUST REMEDIES

**COMMENT OF THE GLOBAL ANTITRUST INSTITUTE
ANTONIN SCALIA LAW SCHOOL
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This Comment is submitted in response to the Administrative Council for Economic Defense’s (CADE’s) request for public input on its proposed Guidelines for Antitrust Remedies (“Guidelines”), which focus on policies and procedures with regard to remedies in cases involving structural transactions (mergers, acquisitions, and other transactions that may be characterized as concentrations). We submit this Comment based upon our wide-ranging experience and expertise in antitrust law and economics.¹ As an organization committed to promoting sound economic analysis as the foundation of antitrust enforcement and competition policy around the world, the Global Antitrust Institute (GAI) commends CADE for its transparency and invitation for comments.

General Comments

The draft Guidelines comprise a valuable effort by CADE to formulate and to disclose policies and procedures in one of the most important and relevant areas of modern antitrust practice – the formulation and implementation of relief in cases involving structural transactions. Scores of jurisdictions around the world have adopted and implemented laws that require notification and/or approval of structural transactions by competition agencies. Thousands of such transactions and notifications or approval proceedings occur annually, and although only a small minority is ultimately subject to any remedy, it is essential for effective antitrust compliance and for efficient business planning that the policies and procedures applicable to structural transactions be rationally formulated, clearly explained, and

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consistently implemented. Thus, it is particularly helpful for agencies like CADE to consider and choose their policies carefully, to expose them to public comment, and to make any modifications necessary to achieve best practices. To that end, the publication of Guidelines is an excellent way to communicate agency policies and procedures to the antitrust bar and to the business community in order to facilitate understanding and compliance, and to ensure that competition-law enforcement leads to competitive benefits.

With reference to the content of the proposed Guidelines, the GAI also commends CADE for Guidelines that generally adhere to best practices developed by other leading antitrust agencies and by international collaborations of antitrust enforcement agencies, such as the International Competition Network.² Where international norms are developing in accord with sound economic principles likely to preserve competition at the least cost in terms of enforcement and compliance burdens, multilateral convergence works to the benefit of agencies, antitrust practitioners, and business entities subject to enforcement.

Economic Analysis Suggests an Emphasis on Flexibility in Relief Policies

Structural transactions are numerous, frequent, and extremely diverse. From the smallest local transactions involving a single market to those involving the largest multinational corporation, often reportable in dozens of distinct jurisdictions and involving analysis of scores of potentially affected relevant markets, virtually any product or service may come under agency consideration and analysis. The competitive issues that may require a remedy are equally diverse. Transactions may involve direct competitors in well-established “smokestack” manufacturing industries, or participants in distinct but closely related segments of a high-technology sector where the character of their competitive relationship may be vertical, horizontal, or even difficult to characterize (for example, where two-sided markets are potentially affected) and perhaps likely to shift in the foreseeable future. Following objective economic analysis requires close attention to all the particular features of the products, markets and firms involved, to assure that competitive effects are accurately assessed and that any remedy adopted will preserve or restore competition with minimum compliance, administrative, and enforcement costs.

Importantly, remedies must also weigh the impact on efficiencies.³ In crafting remedy policies, agencies should preserve significant degrees of freedom to adapt to the specific circumstances of a given transaction and how the efficiencies are to be achieved. As mentioned earlier, no two transactions are alike, and one size does not fit all. Thus, agencies should not unnecessarily handicap themselves based on bright-line rules or even strong defaults based on “best practices” or rule out certain practices, such as firewalls, despite their recognized shortcomings in certain instances. Adopting a degree of flexibility in fashioning remedies does

² INTERNATIONAL COMPETITION NETWORK MERGER WORKING GROUP, MERGER REMEDIES GUIDE (2016), <http://www.internationalcompetitionnetwork.org/uploads/library/doc1082.pdf> [hereinafter ICN MERGER WORKING GROUP].

³ See Ken Heyer, *Optimal Remedies for Anticompetitive Mergers*, 26 ANTITRUST 26, 26-27 (2012).

not suggest that agency remedies are “made randomly and untethered from sound economic principles.”⁴ Rather, it allows for agencies to maximize the welfare gains from mergers (namely through the efficiencies that result from the transaction), while also achieving the policy objective of preserving the pre-merger level of competition and minimizing administrative and compliance costs. For instance, as CADE notes, the use of behavioral, or conduct, remedies is often associated with vertical mergers.⁵ The reason is that—despite the shortcomings of behavioral remedies in a number of dimensions including the presumption of higher monitoring costs—behavioral remedies excel at the preservation of vertical efficiencies. To the extent that vertical efficiencies are large relative to the predicted harm, then the benefits of adopting behavioral remedies are greater. CADE firmly recognizes this in the context of vertical mergers: “International experience and that of Cade, on the other hand, points to the greater naturality and adequacy of behavioral remedies, such as non-exclusivity and non-discrimination, among other measures, for Mergers that generate vertical competitive concerns.”⁶

For these reasons, remedy policy is best formulated in contemplation of the enormous range of factual possibilities. Although fundamental objectives may remain fixed – namely, the preservation of competition (or in the case of consummated transactions, the restoration of competition to the level prior to the transaction) -- few rules should be considered inflexible or applied in a manner that ignores or underplays unique facts and circumstances when they arise. For instance, while structural remedies will generally be the preferred approach to relief, because *inter alia* a divestiture may be effective in maintaining competition at present levels yet require a minimum of agency monitoring and enforcement effort, structural remedies also have their shortcomings. These shortcomings include the uncertainty regarding the performance of the assets in the hand of third parties, the scope of the assets needed to be divested, and the potential disruption of the efficiency gains.⁷

In the following sections of this Comment, we identify several areas where the Guidelines propose (or imply) the use of rules or presumptions that appear to be somewhat inflexible, and, thus, might be areas for further consideration to allow CADE greater flexibility in fashioning remedies based on specific facts and circumstances. The GAI offers this Comment in a constructive spirit, and we would be glad to further elaborate on particular suggestions in any appropriate manner designated by CADE.

Specific Comments on Particular Provisions of the Draft Guidelines

Section III.B.1 expresses a preference for structural remedies. As mentioned in the prior section, there are some circumstances, however, where behavioral remedies may be preferable. We generally agree that structural relief should be the preferred remedy in most

⁴ *Id.* at 30.

⁵ See Antitrust Remedies Guide, Brazilian Administrative Council for Economic Defense, at *26 (2018) (“a large portion of the motivations in favor of behavioral remedies are associated with vertical integrations”).

⁶ *Id.* at 27.

⁷ See Heyer, *supra* note 3, at 26-27.

horizontal merger cases. As discussed in the prior section, however, behavior, or conduct, remedies can be a valuable tool for agency enforcement in vertical cases.⁸ Relative to horizontal mergers, vertical mergers characteristically contain the promise of substantial efficiencies (*e.g.*, elimination of double marginalization, overcoming high costs of defining and enforcing long-term contractual commitments, obtaining an assured distribution channel for a product or an assured source of supply for an input), making the costs of false positives (*i.e.*, mistakenly blocking a competitively benign or neutral transaction) greater in the vertical context. Thus, conduct remedies may provide a relatively low-cost way of accepting a transaction presumptively likely to enhance the economic value of output and stimulate competition, while guarding against the possibility of anticompetitive effect.

Therefore, conduct remedies should perhaps not be relegated to a non-preferred status, but rather should be part of an agency's toolkit. The relevant question is not whether to use conduct remedies but rather when and how to use them. Take, for instance, arbitration, which can play an important role as part of a larger conduct remedy or even as a complement to a structural remedy. According to the Arbitration Committee of the ABA Section of Dispute Resolution, "Arbitration is preferred by many as a way to resolve commercial disputes. It has significant advantages over litigation in court."⁹ While there is a general presumption that conduct remedies are almost always costlier to monitor and administer, arbitration does not necessarily require costly government supervision—beyond general compliance considerations which are costs associated with even structural remedies.

Ultimately the issue of conduct versus structural relief is one of determining the appropriate use of each. Thus, we urge the agencies to preserve significant degrees of freedom and use conduct remedies in appropriate circumstances where the weight of efficiencies is particularly important to consider.

Section III.B.3 expresses a strong presumption in favor of an upfront buyer requirement. In fact, this is not viewed as essential in the majority of divestitures in other jurisdictions.¹⁰ The

⁸ See U.S. DEP'T. OF JUSTICE, ANTITRUST DIVISION POLICY GUIDE TO MERGER REMEDIES, at *5 (2011), <https://www.justice.gov/sites/default/files/atr/legacy/2011/06/17/272350.pdf> ("[I]n appropriate vertical merger matters the Division will consider tailored conduct remedies designed to prevent conduct that might harm consumers while still allowing the efficiencies that may come from [allowing] the merger to be realized. The Division also will consider structural remedies in vertical merger matters—they may be particularly effective when the vertical integration is a small part of a larger deal.") [hereinafter DOJ MERGER REMEDIES POLICY GUIDE].

⁹ Edna Sussman & John Wilkinson, *Benefits of Arbitration for Commercial Disputes*, A.B.A. at *1, (Mar. 2012), https://www.americanbar.org/content/dam/aba/publications/dispute_resolution_magazine/March_2012_Sussman_Wilkinson_March_5.authcheckdam.pdf.

¹⁰ See Submission by the United States to the OECD Competition Committee, *Working Party No. 3 on Co-operation and Enforcement*, at ¶¶ 26-30 (June 24, 2011), <https://www.ftc.gov/sites/default/files/attachments/us-submissions-oecd-and-other-international-competition-fora/1106usremediesmergers.pdf>. In the U.S., for example, up-front buyer requirements are imposed only where there is significant doubt regarding marketability of the divestiture asset package, where the availability of a buyer thought likely to make effective use of the divested assets is unclear, where there is an exceptionally high risk of asset deterioration pending completion of the divestiture, or where other similar issues arise.

preference for upfront buyers should be tempered in transactions where the divestiture package is a widely employed and easily marketed type of asset or group of assets such as an efficient-scale production facility. Under such circumstances often there can be a very high expectation of prompt and successful divestiture to a qualified buyer, without the need to ensure identification of the buyer before the parties and the agency formalize a consent disposition of the matter.

Section III.B.5 is highly critical of remedies requiring continuing monitoring, such as firewalls. While the burdens and risks of remedies requiring agency monitoring are well-recognized – especially those that require agency vigilance regarding compliance with such remedies over an extended time – it remains true that firewalls and other types of conduct remedies are sometimes justified.¹¹ This is likely where the specific circumstances suggest that benefits substantially outweigh such burdens and risks, for example where competitive concerns are minimal while consummation of a transaction is likely to produce significant competitive benefits. Again, this is not to minimize the need to properly craft the firewall and be selective in its use.

Finally, Section IV.A.1(c) seems to adopt a strong presumption against mix-and-match divestiture packages. Although many situations involve facts and circumstances counseling against the use of mix-and-match – especially where a more limited and focused divestiture would provide appropriate protection against any projected anticompetitive effect – there are also cases involving multiproduct firms where mix-and-match divestitures may be the preferable option.

A Comment Regarding the Need for Empirical Analysis of Merger Remedies

In recent decades careful economic analysis has been recognized and adopted as one of the fundamental tools for the formulation and implementation of antitrust policy in a large number of jurisdictions around the world. Rigorous theoretical analysis tested by empirical study has contributed to more rational, focused, and beneficial antitrust policies, rules and procedures in a wide variety of contexts including vertical agreements, non-structural competitor collaborations, unilateral conduct by monopolists or dominant firms, and structural transactions. It has recently been noted, however, that empirical economic analysis of merger remedies is relatively sparse and in need of supplementation:

Remedies provide rich natural experiments yielding a treasure trove of potential research questions largely unexplored by economic researchers. However,

¹¹ See ICN MERGER WORKING GROUP, *supra* note 2, at *9 (“Non-structural remedies can be tailored to preserve those efficiencies, for example, by requiring supply obligations, licensing, or information firewalls based on objective criteria such as third party benchmarks.”). See also DOJ MERGER REMEDIES POLICY GUIDE, *supra* note 8, at *14 (“The Division has used firewalls in certain defense industry mergers and in vertical and other non-horizontal mergers when both the loss of efficiencies from blocking the merger outright and the harm to competition from allowing the transaction to go unchallenged are high.”).

despite an increasing collection of merger retrospectives, analysis of merger remedies remains in its infancy with many potential research opportunities.¹²

CADE has been among the leading antitrust agencies in employing sound economic analysis in its case review processes and in formulating policy. Given the resources available at CADE's Department of Economic Studies (DEE), it appears that an empirical study of the impact of CADE's merger remedies would lie comfortably within the mandate of the DEE. Accordingly, while acknowledging that the DEE undoubtedly has a heavy workload at present, we respectfully encourage CADE to pursue any convenient opportunities to undertake or sponsor rigorous economic research into the efficacy of its merger remedies.

Conclusion

We appreciate the opportunity to comment and would be happy to respond to questions that CADE may have regarding this comment.

¹² F. David Osinski, *Merger Remedies and the Undersupply of Economic Research*, A.B.A. Section of Antitrust Law, Economics Committee Newsletter, at *15-16 (2017), https://awards.concurrences.com/IMG/pdf/aba_economics_committee_fall_2017_newsletter-5-19.pdf. This article provides a brief survey of past economic analyses of the efficacy of merger remedies, including several such studies conducted by the U.S. Federal Trade Commission (one concluded in 1999 and the other in 2017) and by other competition agencies.