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ROUNDTABLE ON DYNAMIC EFFICIENCIES IN MERGER ANALYSIS

-- Note by Brazil --

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The Treatment of Efficiencies in Mergers: the Brazilian Case

1. Background

1. According to Kolasky and Dick (2003) - “There is a widening consensus among jurisdictions with competition laws that ‘the basic objective of competition policy is to protect competition as the most appropriate means of ensuring the efficient allocation of resources—and thus efficient market outcomes—in free market economies.’ As this statement indicates, it is efficiency, not competition, that is the ultimate goal of the antitrust laws.”

2. Although this vision is considered among almost all jurisdictions (including the Brazilian one), the practice of merger control policy in Brazil has taken efficiency defence into consideration only in very few cases. In Brazilian tradition, until recently, competition was viewed as the main objective of antitrust policy. As in other jurisdictions most part of the reviewed mergers and acquisitions does not raise competition concerns. 75% of the cases are included in a fast track procedure and less than 10% are approved with some restriction.

3. Efficiencies are considered only in complex cases where current and potential rivalry are not able to contest the post merger market power and where there is a strong probability of higher prices and lower quantities, affecting negatively the social welfare.

4. There are three main other reasons for not considering efficiencies as a defence. The first is the information asymmetry, creating some kind of distrust on the data presented by the merging parties. The second is that the merging parties do not quantify the cost savings and productivity gains appropriately. Antitrust analysis lacks a wide accepted methodology to assess efficiencies. The third one is related to the fact that there are very few quantitative studies for the anticompetitive impacts of mergers (merger simulation for example) to contrast to efficiencies. For those reasons, efficiencies were taken into consideration very seldom.

5. In the last few years, the Brazilian Competition Policy System (BCPS)’s view over efficiencies has been changing. Since the merger involving the Nestlé and Garoto firms in the chocolate industry in 2004, efficiencies have been treated in a more serious manner. In the cases involving Vale do Rio Doce Company (CVRD) efficiencies were also discussed. These cases will be discussed in another section.

6. If the question involving efficiencies (mainly static) is complicated, the treatment of dynamic efficiencies is even more difficult and is a very recent topic in antitrust litigation. Brazil, as other jurisdictions such as the US and the European Union, is studying the best way to treat them. Dynamic efficiencies are directly linked to the innovation process. In industries characterised by an intense and continuous innovative process, market concentration does not necessarily cause anticompetitive effects. Katz and Shelanski (2006) argue that:

“Some scholars and policy makers argue that merger enforcement must be active in markets characterised by high levels of actual or potential innovation. They assert that the existing framework for merger analysis can be applied to dynamic markets or, alternatively, that incorporating innovation into merger review can be accomplished by modifying the Standard approach to merger analysis.

An opposing set of observers argues that, as a practical matter, “innovation markets” are so difficult to define that they cannot be the basis for rational enforcement decisions. More fundamentally, some of these opposing observers also argue that innovation provides a rationale for a more permissive merger policy. One argument advanced in support of this line of

reasoning appeals to what is known as “Schumpeterian competition,” in which temporary monopolists successively displace one another through innovation.”

7. In this paper, the role and the use of efficiencies in the Brazilian merger review process is presented and discussed. In the next section, the kinds of efficiencies that can be achieved by mergers are presented and the relation between efficiencies and competition. In section III, there is a brief presentation of the BCPS and the merger review legislation. In section IV, some Brazilian cases are discussed. Finally, in the fifth section the conclusion is presented.

2. Efficiencies

8. In this section, we will briefly present the types of efficiencies that can be generated in merger cases, and also the standards to compare these efficiencies and the anticompetitive effects (mostly, price increases).

2.1- Types of Efficiency

9. There are four kinds of efficiencies that arise in mergers' analysis:

- (i) productive efficiency;
- (ii) allocative efficiency;
- (iii) dynamic efficiency;
- (iv) transactional efficiency.

10. Productive efficiency refers to the ability of firms to get the most output from the least input. This kind of efficiency can be achieved by the merged firm benefiting from economies of scale through longer production runs or the sharing of fixed assets. Additionally, the merging firms may be complementary with respect to outputs in the sense that the merged firm will enjoy economies of scope, which arise when it is less costly to provide a set of products than to provide the products individually. Mergers that allow firms to offer more complete product lines and so to economise on marketing and distribution costs would create these kinds of benefits. Cost subadditivity (see Jacquemin, 1987) is the essential concept underlying productive efficiencies out from a merger.

11. Mergers could also reduce productive efficiency. Inefficiencies can arise if the incentives to the merged firm to keep costs down are reduced due to its higher market power. Roughly speaking, the inefficiencies that arise when firms with market power get lazy with respect to cost control.

12. Allocative efficiency is achieved when firms produce any units for which consumers are willing to pay the marginal cost of production and when whatever quantity is produced is allocated to the highest value buyers.

13. Mergers can improve or impair the achievement of allocative efficiency. The greater concern is that they will damage allocative efficiency by creating market power, permitting firms to raise price by reducing the quantity produced below the socially optimal level. On the other hand, some mergers may have positive implications for allocative efficiency. As example, vertical mergers can improve efficiency by removing the double mark-up.

14. Dynamic efficiency requires that sufficient resources be devoted, and efficiently employed, to support innovation leading to lower costs and new/better products. With increased recognition of the importance of dynamic efficiencies merger analysis has become even more complicated, requiring us to predict a merger's impact on markets not only in the short term, but also in the future. Traditional antitrust analysis is concerned to assess market power in current markets, even in projections and prospective

exercises. The focus is always the consequences of mergers in the future. Dynamic efficiencies are related to innovations and creation of new markets, frequently a risky process. Available information on past performance is not sufficient and sometimes misleading to foresee the effects of mergers in industries subject to rapid technological change. As example, Hartman et al. (1993) shows that leading firms in image analysis equipment for medical diagnosis markets were unable to keep their market positions as new image technologies were developed.

15. As with the previous cases, mergers can improve or retard dynamic efficiencies. A merger of two firms with sub-efficient research and development groups might allow the R&D groups to benefit from economies of scale, scope and network effects. However, if mergers reduce the vigour with which firms undertake risky and costly research programs, the result could be less total research done and eventually a slower rate of technical progress in the market. Technological lock-in effects of mergers are also a source of antitrust concerns, since firms endowed with significant market power can block the diffusion of new and/or more efficient technologies. Bundling and blocking interoperability practices can arise from mergers.

16. Finally, Beaton (2006) says that transactional efficiencies occur where a firm is able to reduce costs associated with business transactions through business practices, contracts, and organisational forms. Costs associated with business transactions include, but are not limited to, information costs and exposure to possible hold-up. There are several ways in which a firm can obtain transactional efficiencies. With respect to vertical mergers, firms in the distributional chain are often repeated players, and they incur in expenses each time the firms negotiate a new deal. However, if the firms merge, such costs can be avoided. As a result of the possibility of transactional efficiencies, firms have an incentive to expand up to the point where the cost of organising an extra transaction within the firm equals the cost of engaging in the same transaction outside of the firm.

2.2. *Efficiency gains X competition losses*

17. The assessment of mergers supported by efficiencies claims is based on a balance between efficiency gains and losses due to expected reduced competition. Such an exercise is not trivial and needs methodological choices, among them a rule or standard to decide whether a merger passes or fails. Mainly, there are four different standards:

- (i) Price standard
- (ii) Consumers' surplus standard
- (iii) Total surplus standard
- (iv) Weighted surplus standards

- (i) Under a price standard, a merger is approved if the price will not increase as a result. In such an approach, efficiencies can be considered, but they will only save a merger if they are of such a magnitude that price actually falls (or does not rise) post merger.
- (ii) The **consumers'** surplus standard is very similar to the price standard, but it allows for other changes brought about by the merger that impact upon the surplus derived by consumers. Differences between the consumers' surplus standard and the price standard can also arise due to a deterioration of the quality of the product post-merger. This could be due, for example, to a reduction in variety as firms trim the number of brands produced.
- (iii) The total surplus standard is also very easy to describe. Under this standard a merger is approved if the sum of consumers' plus producers' surplus (or profits) increases after the merger.

The total surplus standard has broad (but not universal) support among economists who recognise that other standards will sometimes sacrifice social surplus. It is essentially the standard described by Williamson (1968). It has the advantage of relative simplicity – surpluses are simply added up with no special weighting attached to any particular groups. This means that we do not have to know anything about the consumers and producers except the effects on them of the merger – for example, we do not need to know if they are rich or poor buyers, or if the firms are large or small.

- (iv) Finally, under weighted surplus standards, the various effects of the merger are added together, as under the total surplus standard, but in this case each gets multiplied by some sort of “social weight” reflecting the importance attached to that group’s welfare by the reviewing body.

Some jurisdictions consider other effects of mergers than on consumers’ and producers’ surpluses. Effects on employment and local or regional development are often taken in account. The introduction of multiple policy objectives tends to increase the complexity of merger analysis and reduces the predictability of competition authorities’ decisions.

Brazilian competition law, nowadays under revision in Congress, refers explicitly to absence of consumers’ losses as a condition to a merger approval and to the “fair” distribution of efficiency gains, but this statement does not impose the adoption of any specific standard. Standards have been recurrently discussed in cases involving efficiency arguments, mainly because the proposition of remedies is close related with standards used to assess the welfare effects of a merger. A standard reflects at some extent the way in which authorities conceive the competition policy and its objectives. As Jenny (2003) stated:

“If merger control is aimed at promoting economic efficiency, when faced with an anticompetitive merger having efficiency benefits, the competition authority will be tempted to use remedies to alleviate the competition problem while at the same time enabling the parties to go through with the merger, and thus allowing the realisation of the efficiency benefits associated with it..... If the merger control is solely aimed at promoting competition (or preventing the creation or reinforcement of a dominant position) one would expect the competition authority to have fewer qualms about blocking a merger having anticompetitive effects (even if the merger has efficiency benefits) or imposing more sweeping remedies...”

3. Merger Review Process in Brazil

18. The BCPS is composed by two investigative bodies, the Secretariat for Economic Monitoring of the Ministry of Finance (SEAE) and the Secretariat of Economic Law of the Ministry of Justice (SDE), and the Administrative Council for Economic Defence (CADE).

19. The Brazilian Antitrust Law (Law no. 8.884/94), states that “any acts that may limit or otherwise restrict free competition, or that result in the dominance of relevant markets for certain products or services, shall be submitted to CADE for review” (Article 54).

20. Article 54 (Law 8.884/1994) does not contain any language providing the substantive standard to be employed in reviewing submitted acts. Paragraph 1 of the article, however, provides that a transaction submitted for review may be approved if it meets the following conditions: (1) It is intended to “increase

productivity; improve product or service quality; or cause an increased efficiency,” or “foster technological or economical development.” (2) It generates benefits that are equitably allocated between the merging parties and consumers. (3) It does not eliminate “a substantial portion of the relevant market for a product or service.” (4) Its provisions are no more restrictive than necessary to obtain the beneficial effects. The Horizontal Merger Guideline states (paragraph 2) that “the rule of reason [is] the fundamental principle in the control of mergers,” attributing this proposition to the statement of objectives set out in Article 1 of Law 8884. This language, along with that of Article 54 itself, could be interpreted to place the burden on the merging parties of showing that their transaction is economically beneficial. In practice, however, CADE has not imposed such a requirement, intervening only when it concludes that, on balance, there would be a significant lessening of competition. Thus, paragraph 1 of Article 54 is considered to establish an efficiencies defence, to be applied only in the case of mergers that are otherwise deemed anticompetitive.

21. The 2001 Horizontal Merger Guidelines, issued jointly by SEAE and SDE, describe a five-step analytical process employing concepts found in similar guidelines published by other countries. The elements of the process include (1) defining the relevant markets; (2) determining whether the market share of the merged entity is sufficiently large to permit the exercise of market power; (3) assessing the probability that market power will be exercised post-merger; (4) examining the efficiencies generated by the transaction; and (5) evaluating the net effect of the transaction on economic welfare.

22. The methodology for defining the relevant product and geographic markets, contained in step 1 of the Guidelines, focuses on determining the smallest market in which a hypothetical monopolist could impose a small but significant and non-transitory price increase. In step 2, the Guidelines consider two contexts (unilateral action by a single firm and coordinated action by multiple firms) in which certain levels of market concentration will be deemed to raise a significant prospect of post-merger market power. Where the focus is the power exercised by a single firm, the threshold for concern is a merged entity with a market share of at least 20 per cent.

23. Where the focus is the coordinated action by multiple firms, the threshold is a four-firm concentration ratio of at least 75 per cent coupled with a merged entity market share of at least 10 per cent. If either set of thresholds is met, analysis proceeds to step 3, which entails an assessment of the probability that post-merger market power will actually be exercised. Such exercise will be considered improbable if (a) imports are an effective remedy against the exercise of market power, (b) new entry is “probable, timely, and sufficient,” or (c) rivalry in the market is such that existing firms would have both the capacity and the motivation to resist attempts by the merged entity to exercise market power. If step 3 demonstrates the prospect of anticompetitive effects from a transaction, the analysis proceeds to the step 4 for consideration of efficiencies that the merger may generate, and ultimately to step 5 for evaluation of the net economic effect of the transaction. A transaction will be rejected if, after accounting for efficiencies, it will produce a net decrease in economic surplus. If surplus will increase because anticompetitive effects are outweighed by efficiencies, further analysis is required. Under Article 54 paragraph 1 of the statute, efficiencies defence will be accepted only if the economic benefits of the transaction are equitably allocated between the merging parties and consumers or end users.

24. However, the application of the Brazilian Horizontal Merger Guidelines regarding efficiencies has faced some challenges.

1. How to empirically apply the criteria of specificity of the alleged efficiencies, such as economies of scale and scope, introduction of new technologies, etc. The absolute majority of them can be achieved by green investments provided the proper time horizon, though the Guideline establishes a two years time perspective.

2. How to identify the cost reductions that result from mere transference due to the increase of bargaining power of the merged firm and the ones which result from real efficiency gains? If there are reduction in logistic costs or in transaction costs related to the volume of transactions that are translated in lower prices of inputs it can be easily interpreted as transference and not as a real efficiency gain. Though it is not difficult to conceptually separate the two phenomena, in the concrete case it is not so clear.
 3. If the efficiency defence is only accepted on a consumer-surplus criteria (price-standard, e.g.) only the efficiency related to variable costs will be considered. However, the Guideline recognises the reduction in fixed costs as a source of efficiency. In developing countries, such as Brazil, which have experienced strong productive restructuring processes in a very short period of time, the reduction in fixed costs are really important and it will be not considered.
 4. The Guideline establishes that the alleged efficiencies must be quantifiable and verifiable. This criterion raises especial difficulties to consider dynamic efficiencies related to the innovation capacity and technological changes. However, speculative “efficiencies” must be avoided.
25. The Table below demonstrates that only 4,5 % of the mergers reviewed by the Brazilian competition authorities received any kind of restriction, most of them on companies’ behaviour.

Table 1: CADE Decisions in Merger Cases: 2000-2006¹

Year	Transactions Reviewed*	Approved without conditions	Approved with conditions	Approved with conditions		Disapproved
				Structural	Behavioral	
2006	402	352 (87,6%)	20 (4,9%)	1 (0,24%)	19 (4,72%)	0
2005	497	345 (69,4%)	37 (7,4%)	7 (1,41%)	30 (6,04%)	0
2004	618	574 (92,9%)	43 (6,9%)	2 (0,32%)	41 (6,63%)	1 (0,16%)
2003	491	484 (98,6%)	7 (1,4%)	1 (0,20%)	6 (1,22%)	0
2002	485	474 (97,7%)	11 (2,2%)	0	11 (2,27%)	0
2001	571	559 (97,9%)	12 (2,1%)	0	12 (2,10%)	0
2000	507	490 (96,6%)	15 (2,9%)	1 (0,20%)	14 (2,76%)	2 (0,39%)
Total	3571	3278 (91,8%)	144 (4%)	4 (0,15%)	84 (3,14%)	3 (0,11%)

¹ This figure is net of filings that were not reviewed by CADE because the transaction did not meet the notification filing thresholds or because the parties withdrew the notification.
Source: BCPS, January 2007

4. Cases

26. In this section three important merger cases where efficiency defence was alleged by the merging parties, are presented.

4.1 - *NESTLÉ / GAROTO*

27. One of the most emblematic cases in the Brazilian Merger review process, in which the transaction was blocked by CADE, is the chocolate case in which Nestlé tried to acquire Garoto. In fact, Garoto was the third biggest Brazilian chocolate company and Nestlé alternated the leadership with Kraft Foods (Lacta) in the Brazilian chocolate market. The merger increased the horizontal concentration in the market of chocolates and sweets. This market was subdivided in other relevant markets and a very high concentration was verified in most of them even prior to the acquisition.

28. CADE's decision defined the relevant market as chocolates of all forms, excluding the homemade chocolates, in the Brazilian market. CADE's explanation was that econometrical studies had demonstrated high crossed elasticity of the demand among the several segments of chocolates and between the different brands. CADE also based its decision on the existence of low importance of imports and on barriers due to the wholesale distribution. For the first time a merger case used economic simulation methods to predict post-merger consequences on prices and quantities and also to estimate the reduction in marginal costs needed to compensate the increase in market power, adopting a "price-standard" rule, and a consumer surplus criterion.

29. Also, for the first time, a deep analysis of efficiencies was provided for the petitioners based on a study developed by an independent auditing company and discussed by CADE under the antitrust perspective.

30. The efficiencies alleged by the parties and analysed by the Brazilian Antitrust authorities were: 1) Reduction of Costs with Closing of Deposits; 2) Gain with Reduction of Location of Warehouses; 3) Reduction of Costs with Packing; 4) Reduction of Costs with Alterations in Formulas and Ingredients; 5) Advantage of utilisation of Garoto's Formula in Nestle's Chocolates Toppings; 6) Gain with Reduction of Overweight; 7) Aligning of input prices; 8) Transferring of the Production of Chocolate products and Comfits for Nestle' 9) Absorbing Chocolate Easter Egg Production of Chocolates Garoto; 10) Gain with Renegotiation of Freight; 11) Gain optimising distribution; 12) Gain with Renegotiation of Packaging Items; 13) Gain with Purchases of Derivatives of cacao

31. From this efficiencies listed above, CADE accepted only three, numbers 1, 3 and 10. If all of them were accepted the variable cost reduction would be of 13%. Considering only these 3 accepted efficiencies, this number reduced to around 2%. Two main reasons were given for dismissing the alleged efficiencies: they were not specific to the acquisition, or they were pecuniary gains originated from the increase in bargaining power not from real cost reductions, following the recommendation of the Brazilian merger guidelines. No dynamic efficiency was alleged.

32. CADE understood that the transaction could not be approved, since the reduction in variable costs was not enough to hinder the increases of prices and consequently the conditions foreseen in §§ 1º and 2º of article 54, of Law 8,884/94 had not been satisfied. CADE concluded that, neither rivalry among current competitors and barriers to entry, nor enough efficiency were shown to allow the merger approval and no structural remedies were available to reduce the negative effects of the higher concentration. CADE decided that Nestlé should sell Chocolates Garoto for a competitor who had a market share under 20% of the relevant market. The decision was suspended in the Judiciary.

4.2 *CVRD X Ferteco/Caemi/Socoimex/Samitri*

33. In a 2000 transaction CVRD acquired four iron ore mining companies and their associated railroads in the southeast region of Brazil. CADE decided to jointly analyse the seven merger operations involving CVRD.

34. CVRD is, nowadays, the world leader on production and export of iron grains and iron pellets and also one of the most important companies in the world when it comes to mining and metals. For its size and position in the country's productive structure, its strategies may substantially affect the allocation of national productive resources.

35. The parties presented two studies on the associated efficiencies obtained from the transactions. The most relevant alleged efficiencies were: (i) those related to the quality of raw materials employed in pellet production as well as those attending the use of the product previously discarded; ii) those related to improvement on the use of assets (intensity of mine exploitation, postponement of expansion projects, reduction of logistic costs); iii) reduction on commercialisation expenditures, including fees for delay on the accomplishment of export contracts, elimination of intermediates and enlargement of merchandise portfolio; (iv) those resulting from the sharing of administrative costs, such as the human-resource costs; (v) those related to joint purchase of materials, supplies and services, including financial ones; vi) those referring to the elimination of taxes brought by the vertical integration with the railway, also controlled by CVRD

36. The competition authority criticised the efficiencies alleged dismissing (i) those not directly related to the operation; (ii) those that could be obtained through other organisational arrangements, apart from integration; (iii) pecuniary efficiencies consisting on transfers among agents. Regarding the reduction on taxes due to vertical integration of railway transport, only the tax's deadweight losses were accepted as efficiency, dismissing the avoided tax amount.

37. The alleged efficiency of the postponement of the investment project in Brucutu Mine, due to the acquisition of Socoimex, was strongly disputed. It was argued that the mere delay in investing did not constitute efficiency in itself, but only the replacement of one mineral supplier for another. On the other hand, it was considered that a gain was generated from the improvement on the natural resources exploitation allocation throughout time, as the market was first supplied with low-costs minerals. Thus, the analysis should not confine itself to examining the allocation, as to time, of the minerals in a certain mine, but consider the whole universe of mines. It was also taken into consideration that minerals hailing from different mines presented different degrees of iron and impurities, so that integration would enhance the value of top-quality minerals. As a consequence, the prolonging on the exploration of top-quality mines was regarded as efficiency.

38. It was recognised as directly-related to the acquisition of Samitri the additional delay on investments to the Brucutu Mine, as well as the reduction of costs brought about by the merger.

39. One economic study estimated in US\$ 118,4 millions the efficiencies emerging from the acquisition of Ferteco. Those gains would be related to (i) the replacement of small miners on the supply of minerals to the pellet-producer plant, (ii) the replacement of road transport by railway transport, which would provide non-quantified positive external effects for the environment, besides the reduction of freight costs, (iii) absorption of Ferteco's technology on the production of pellets by CVRD.

40. It was argued that the suppliers' substitution and the change on transport modal could have been obtained through contracts, being unnecessary the vertical integration between miner and pellet-producer companies. As to technology absorption, its character as a "once and for all process".

41. Efficiencies related to the optimisation on the use of railways and ports were also admitted. Those regarded as specific to the acquisition of Ferteco were estimated in US\$ 73 millions.

42. The efficiencies allegedly attributed to Caemi's acquisition were related to optimisation on the supply chain, to suppliers' replacement, to economies derived from the joint purchase of materials and to the reduction on the acquired company's financial costs. None of them were regarded as specific-related to the operation.

43. In order to justify the mergers conducted by CVRD welfare effects were introduced in the discussion. Prices in domestic and international markets are strongly correlated. A hypothetical significant and non-transitory price increase would raise CVRD profits in both markets. According to total surplus standard, domestic welfare loss is identical to the dead weight in domestic relevant markets. The increase in producers' surplus would be larger than domestic consumers' surplus losses, since CVRD exports 85% of its iron ore production. Increased profits would be more than sufficient to compensate dead weight losses and even domestic losers. Net welfare reduction in the rest of the world is beyond of the scope of Brazilian antitrust law.

44. Under the consumer surplus point of view, two arguments supported the mergers. Iron ore is at the upstream of a complex productive chain, made of successive stages dominated by strong oligopolies (steel industry, automotive industry, home appliances, etc). In such an environment, price pass through is mitigated. Moreover, as the demand for iron ore is inelastic, the deadweight loss would be small, as quantities do not change in the same proportion of prices. Consumer prices are expected to increase less than raw material prices. Major effects of the mergers would be related to distribution of surplus between successive links of productive chain. The other argument takes in account the fact of important iron ore consumers are also exporters of steel and steel products. If iron ore price in international market is increased in a significant and non-transitory way, steel prices are also expected to raise, partially offsetting raw material consumers' losses.

45. Modest expected effects on final consumers' prices supported the proposition of minimal antitrust remedies.

46. The recognition of considerable efficiency gains recommended the adoption of remedies that could alleviate the monopoly in the iron supply in Brazil, but preserve the efficiencies. After mergers, CVRD became the only iron supplier for the Brazilian market that can be classified as "world class" mining company. As iron ore business is an international business by its very nature, a small company, operating only in the Brazilian market could not be considered an option for Brazilian industry, such as steel sector. Therefore the mergers were approved conditioned to the divestiture of one of the acquired mines (Ferteco) or to the abandonment of the preference clauses in the Casa de Pedra mine, owned by CSN, one of the largest steel companies in Brazil.. In any case, there would be at least one "world class" iron company in Brazil that could run the business independently to CVRD.

4.3. Ambev

47. The Companhia Antarctica Paulista Indústria Brasileira de Bebidas e Conexos (Antarctica) and Companhia Cervejaria Brahma (Brahma) decided to merger into a new joint-stock company named Companhia de Bebidas das Américas (Ambev).

48. The two merged parties, Brahma and Antarctica, controlled approximately 50% and 25%, respectively, of the national sales of beer. The third largest brand in Brazil was Kaiser, which was indirectly controlled by the Coca-Cola Company, and whose market share was about 15%. There were several other small, regional brewers operating in the country. The market shares and concentration

resulting from the merger were clearly very high, and raised serious competitive concerns. The main issue in the case involved entry barriers, which had three major components: the establishment of a consumer brand, access to an effective distribution system and access to retail points of sale (the great bulk of beer sold in Brazil is consumed on premises at retail establishments rather than at home).

49. Rivalry was not considered as a restriction on parties to the merger's market power since the main merger effect was the decrease of rivalry among brands and consequential creation of Ambev's market power.

50. The parties alleged some efficiencies such as: 1) reduction of fixed costs and workforce; 2) reduction of fixed cost by closing plants; 3) reduction and optimisation of freight costs; 4) reducing variable costs; 5) reducing raw material costs; 6) reduction of costs with packing; 7) reduction of cost by the management unification; 8) renegotiation of Antarctica's debts; 9) unification of computer systems; 10) aligning of input prices; 11) implementation of a productivity program at the distributors' facilities; 12) reduction and unification of regional directors; 13) release of new brands; 14) creation of financial capacity for the company internationalisation.

51. Although SEAE and SDE accepted some of the efficiency claims made by the parties, both of them concluded that the transaction was competitively harmful, so they recommended that it would be approved only if some restrictions to the merger were imposed.

52. It was concluded that the net effect, in terms of efficiency, of the operation on the market was positive. CADE defended its decision as a compromise that sufficiently dealt with the merger's anticompetitive effects by providing the opportunity for a new entry, while also permitting the merger's efficiency gains to be realised (6,9% of reduction of costs estimated by SEAE, which will be reflected on price reduction) and its adverse effects on employment to be improved. The remedy adopted was the divestiture of one of the brands and five plants, besides the compromise to not require exclusivity of the distributors (wholesalers and retailers).

5. Conclusion

53. In this paper, we have discussed the treatment of efficiencies in some Brazilian merger reviews. The efficiencies considered and assessed in the cases listed in last section were basically productive and allocative efficiencies. Brazil does not have experience in assessing dynamic efficiencies. As other jurisdictions, the BCPS is studying the best way to do it, especially because many cases in high technology sector will be notified to the System.

54. Efficiency analysis has been given a more important role in merger review in Brazil in the last three or four years. It is a factor to be considered in cases with high probability to generate anticompetitive impacts. In the Brazilian experience it has never changed the conclusions over the anticompetitive effects of a merger. It possibly occurred because efficiencies defense was always used in complicated cases, which generated high concentration and in markets characterised by low rivalry and high entry barriers. However, as efficiency has been the ultimate goal of merger review, even if constrained by a consumer perspective, the Authority has strived for finding remedies (structural or behavioral) in order to address the competition concerns, while preserving the potential efficiency gains.

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