

Brazil's New Non-Horizontal Mergers Guidelines (V+ Guide)

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In April 2024, CADE published its new merger guidelines, focusing on vertical and conglomerate effects (the V+ Guide). Non-binding in nature, the guide seeks to give more transparency to CADE's work, without limiting its powers to assess any given case.

The new guide makes various passing references to the digital economy. Although it does not establish a specific framework for the digital sector, the frequent references reveal the latency of this issue in Brazil.

According to the V+ Guide, vertical integration occurs in input relationships, broadly considered (products, services, distribution channels, technology and so on), as long as they are in the same production chain; by qualifying the levels as interconnected, the guide seems to contemplate only integration between contiguous vertical links. Conglomerates, on the other hand, are defined by exclusion, and arise when companies are related but are not competitors or customers/suppliers.

The V+ Guide expressly states that theories of harm and methods of analysis are constantly evolving, and that it is very difficult to establish an exhaustive list of all the possible implications of non-horizontal concentrations. Nonetheless, the guide provides a very useful and detailed overview.

Among the types of possible vertical harm, the new guide mentions classic issues such as market foreclosure, raising rivals' costs, increasing bargaining power, and access to sensitive information via supply relationships. It also lists less-addressed issues, such as regulatory circumvention, and more horizontal issues, such as coordination risks, risks to dynamic competition and effects on parameters other than price (innovation, quality, data collection and so on).

Regarding possible harm from conglomerates, the guide refers again to market foreclosure (in the form of leverage from one market to another), but also to product bundling, tie-in sales and coordination risks. It also mentions more subtle concepts, such as "strengthening economic power", "substantial reduction of competition" and "increase in aggregate concentration".

The traditional three-pronged capacity-incentive-effects test used to assess harm is well structured in the V+ Guide:

1. Does the integrated company have the capacity to adopt an anti-competitive strategy?
2. Does integration support the rational adoption of such a strategy? and, in the presence of capacity and incentives,
3. Will the strategy significantly reduce competition?

The test already used by CADE to consider efficiencies in horizontal mergers is maintained by the V+ Guide. To be accepted, efficiencies must be probable, verifiable, timely and specific to the transaction, and must not be achievable in a way that is less restrictive of competition. The new guide also stresses the importance of the benefits being passed on to consumers, and makes it clear that it will be up to the parties to demonstrate the efficiencies: there is no indication that CADE will presume efficiencies from any transaction.

Along with efficiencies, the V+ Guide mentions the importance of demonstrating the economic justification for the transaction, including through presentation of internal documents of the companies involved.

Three important comments in the new guide deal with remedies that CADE will avoid: those that go against the economic logic of integration and nullify its benefits; those that merely represent compliance with the law; that those that deal with issues that are not specific to the transaction.

The publication of the V+ Guide was eagerly awaited and its reception was very positive. The guide contributes to consolidating CADE's analyses and ensuring that the authority's work is better understood, and so gives greater transparency and predictability to the process of reviewing economic concentrations.

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