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Non-reportable transactions can harm competition, but complainants' role may depend on jurisdiction

PaRR Strong evidence

Regulators in all jurisdictions should be careful about relying too much on competitor complaints in deciding whether to investigate mergers and acquisitions that do not meet filing thresholds, the president of France's competition authority told *PaRR*.

"It is very important for a competition agency to design its own policies and not be dependent on complainants, because sometimes the fact that no one complains is not the sign of good health of competition," said Bruno Lasserre, head of Autorite de la Concurrence, in an interview. "Sometimes people fear retaliation and don't talk about what they feel."

Yet some regulatory bodies may depend on market participants to draw their attention to any potentially anticompetitive deal that falls below the filing threshold.

For example, regulators in Brazil would be "very unlikely" to investigate such deals unless there are complaints by a third party, Francisco Todorov, a partner at Trench, Rossi e Watanabe Advogados, told *PaRR*.

Todorov said there is a provision in the Brazilian law that allows CADE to require filings for up to one year after the close of a transaction that does not meet the filing threshold, but that law has not yet been used.

He also said it is unclear whether companies could play it safe by submitting filings for a deal that does not meet the threshold. "The law doesn't say anything [about that], and nobody has done it," he said.

In the US, companies sometimes seek informational meetings with regulators prior to closing a deal that does not meet the threshold, a former US antitrust litigator said. But in the example of a recent case that has attracted attention -- the **Waze/Google** transaction -- it is unlikely any such meeting took place because the deal closed so quickly, the litigator added.

In theory, there is no statute of limitations that would preclude US regulators from examining a transaction, Bill Batchelor, a partner at Baker & McKenzie, noted in an interview.

"The thing that will make you want to ask for a proactive review is a long statute-of-limitation period, and signs that the authority will actively investigate closed deals," Batchelor said.

According to Todorov, deals that are anticompetitive but below the filing threshold are most likely to occur "in markets that are very volatile in terms of market share", such as technology.

"If a new company comes up today, it can dominate in three or four years. That is more likely to happen in the tech context," Todorov explained.

Lasserre, Todorov and Batchelor are in Chicago attending an antitrust conference hosted by the Searle Center at the Northwestern University School of Law.

In a presentation at the conference, Britt Miller, a partner at Mayer Brown, said US regulators have indicated

they will review anticompetitive deals even if they fall below filing thresholds, as exemplified by the PowerReviews/Bazaarvoice transaction.

by Ryan Lynch in Chicago