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MERGER CONTROL IN BRAZIL

FREQUENTLY ASKED QUESTIONS

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FOREWORD

Since Law No. 12,529/2011 came into force in 2012, Brazil witnessed a revolution in the merger control work carried out by the Administrative Council for Economic Defense- CADE.

It is now hard to consider that, ten years ago, mergers could take years under review; it is indeed difficult to describe the level of improvement, but we will try to highlight the most important ones:

- The General Superintendence has been deciding the vast majority of the cases, applying the fast track procedure review to those which do not raise competition concerns;
- New forms have been adopted for both the fast track and ordinary merger review;
- The General Superintendence has developed several tools and procedures to enable the reviews to be carried out in a very expedited way. It has created units dedicated to work on specific sectors, as well as a first-analysis unit responsible for assigning the cases and rule on the ones with low competition concerns;
- Procedural rules are very clear in CADE's Internal Regulation and Resolutions;
- Pre filing conversations and negotiations exist and usually expedite the review process in complex cases;
- The Department of Economic Studies - DEE has grown in size and relevance, and it has been providing invaluable support for the General Superintendence and the Tribunal during the review process;
- The number of merger cases reviewed by CADE's Tribunal has drastically reduced. Nowadays the Commissioners only review more complex cases and have more time for anticompetitive practices investigations.
- International cooperation has greatly increased.

- Gun Jumping and revised Horizontal Merger Analysis Guidelines have been released.

The objective of this book is to describe and discuss these achievements, with practical information and lessons from case law and practice.

Contributors for this work include IBRAC associates, both lawyers and economists, with experience in antitrust law in Brazil, and a large number of CADE's officials, who have kindly shared their personal and high valued views on important aspects of the merger review work.

We hope that you enjoy this journey. For further information on IBRAC, please visit our website at www.ibrac.org.br, or write to ibrac@ ibrac.org.br.

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GLOSSARY

Brazilian Antitrust Law - Law No. 12,529, enacted on November 30, 2011

CADE – Administrative Council for Economic Defense

CADE's Internal Regulation or Ruling – Internal regulation approved by Resolution No. 1, enacted on May 29, 2012, as amended

GS – CADE's General Superintendence

SEAE – Secretariat of Economic Monitoring (Ministry of Finance)

Tribunal – CADE's Administrative Court or Tribunal

BEYOND THE TURNOVER THRESHOLDS: HOW DOES THE LOCAL EFFECTS TEST FUNCTION IN THE CONTEXT OF MERGER CONTROL?

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Patrícia Bandouk Carvalho
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The Brazilian Antitrust Law (Article 2 of Law No. 12,529 of 2011[1]) establishes the limits of the antitrust law enforcement in Brazil and the legal/statutory duties to be performed by the Brazilian antitrust agency, CADE.

In effect, from a legal point of view, Article 2 of Law No. 12,529 of 2011 determines that one must demonstrate the actual or potential effects in the Brazilian territory for the application of the Brazilian Antitrust Law, which is also referred to as the principle of territoriality. The Brazilian Antitrust Law is applicable to the extent of the Brazilian territory whenever the effects or the potential effects of an economic event are applicable in the national market. It should be noted that the aforementioned provision does not distinguish between practices of different natures (for instance, anticompetitive conducts and/or economic concentrations). Therefore, it is understood that the principle of territoriality will be applied in Brazil, regardless of the type of act perpetrated in the economic environment.

Based on the above, it is possible to state that foreign-to-foreign mergers are subject to mandatory pre-merger notification in Brazil whenever they (i) produce immediate effects or potential effects in the

[1] "Article 2. This Law, without prejudice to conventions and treaties of which Brazil is a signatory, applies to practices committed in whole or in part of the national territory or that produce or may have effects on it."

country and (ii) meet the objective requirement of the double turnover thresholds[2].

However, one may raise the question on how the local effects test (to confirm the abovementioned requirement of effects or potential effects) works in the context of merger control in Brazil.

In this regard, it is important to remark that the Brazilian Antitrust Law does not expressly establish the rules of application of the local effects test in Brazil. It is also important to stress that the law does not provide any *de minimis* rule in terms of effects or potential effects in the country that would exempt small turnovers.

In general, CADE is of the opinion that, for stating its jurisdiction in foreign-to-foreign mergers, the local effects threshold test applies to transactions with a nexus to the Brazilian territory. This would be the case whenever the parties directly involved in the transaction or their economic groups have sales, assets or legal entities in the country involved in the relevant market affected by the transaction. In a joint-venture, those conditions would normally apply to the business being transferred into the joint-venture. However, there has been discussion on joint-ventures that will be selling into Brazil after they are created and whether their creation in itself should be seen as having effects in Brazil and therefore should be notified. As a result, and as CADE's decisional practice demonstrates, there is a debate about how CADE can establish thresholds that incorporate appropriate material local nexus standards[3].

We analyzed the following precedents on this subject for the purposes of this paper: (i) Concentration Act No. 08700.006037/2016-

[2] The turnover jurisdictional thresholds for mandatory notifications are turnover or volume of sales in Brazil in the year prior to the transaction, by one of the parties, equal to or in excess of 750 million reais, and by another party equal to or in excess of 75 million reais.

[3] Concrete cases always bring new situations, which may not be covered by law dispositions and previous cases. As an example, the payment of royalties as a sufficient element to establish the local effects nexus (i.e., confirmation that there was turnover out of Brazil in the form of the payment of the royalties) is a unique situation to be analyzed by the authority.

31, (Applicants: Knorr-Bremse Commercial Vehicles Systems Japan Ltd. & Bosch Corporation), ruled in September 2016; (ii) Concentration Act No. 08700.008819/2014-43 (Applicants: Roberto Bosch GmbH & Siemens AG), ruled in September 2014; and (iii) Concentration Act No. 08700.001204/2013-13 (Applicants: Roberto Bosch GmbH, ZF Friedrichshafen AG & Knorr-Bremse Systeme fur Commercial Vehicle GmbH), ruled in March 2013.

After the analysis of the aforementioned precedents, we came to the following conclusions and elements in relation to the applicability of the local effects test in Brazil.

In the 2016 case[4], CADE's General Superintendence[5] did not acknowledge the merger notification and as a consequence, it did not analyze the merits of the transaction, considering that this was a hypothesis of non-mandatory notification in Brazil[6]. The General Superintendence justified its opinion because it considered that, although the economic groups of the applicants fulfilled the requirement of the double turnover thresholds in Brazil, (i) the assets acquired by one of the applicants (target of the transaction) would have its activities limited to Asia; (ii) the target of the transaction had not sold its products (affected relevant markets) in Brazil within the last five (5) years and the acquiring company did not have the interest in changing this scenario in the next five (5) years[7]; (iii) the applicants clarified that none of the companies that were part of the respective economic groups marketed any of the

[4] Acquisition of assets. Merger Review No. 08700.006037/2016-31 (Applicants: Knorr-Bremse Commercial Vehicles Systems Japan Ltd. & Bosch Corporation), ruled in September 2016.

[5] CADE's investigative body and the unit responsible for unconditionally clearances on merger control.

[6] In this case, the Applicants are free to close the transaction (without depending on CADE's pre-approval), considering the hypothesis of a non-mandatory notification.

[7] It is important to note that CADE did not mention that Brazil, in this specific transaction, was expressly excluded (for instance, by contractual terms) from the scope of the activities of the target. Apparently, the Brazilian authority only considered the information/expectation provided by the Applicants themselves.

affected products to other intra-group companies with activities in Brazil, directly or indirectly, in the last five (5) years; and (iv) the characteristics of the relevant market in the case at stake (auto-parts) suggested that the geographic scope should be defined as national. Based on these elements, CADE concluded that this was a case of non-mandatory notification in Brazil, considering that this was a deal that occurred abroad, the assets involved did not offer products or services into Brazil in the last five (5) years and these assets would not offer products or services in Brazil in the "near future".

In the 2014 case[8], CADE indicated that the target-company of the transaction did not have any activities in Brazil even though the economic groups of the applicants fulfilled the requirement of the double turnover thresholds in Brazil. It should be noted that CADE also argued that the aspects related to the geographic scope of the markets affected by the transaction in Brazil (production and sale of small and large household appliances) presented some characteristics that suggested that the scope of the market was limited to the national territory, at most, and it was unlikely that this market (and part of the national demand) could be met by foreign suppliers. There was no horizontal overlap or vertical integration in the Brazilian territory or with impacts on it. Therefore, similar to the 2016 case, the General Superintendence did not acknowledge the merger notification and consequently it did not analyze the merits of the transaction. It is important to note that CADE stressed that such ruling/opinion would not extend to possible transactions involving a company that, prior to the transaction had already offered products or services in Brazil. In this case, even though the sales in the national territory may be considered insignificant, only a more careful competitive analysis could conclude the absence of potential overlaps, low market-share or another relevant competitive factor.

[8] Acquisition of corporate shares (consolidation of control). Merger Review No. 08700.008819/2014-43 (Applicants: Roberto Bosch GmbH & Siemens AG), ruled September 2014.

In the 2013 case[9], the applicants entered into the creation of a greenfield joint-venture for the development of an European concept of commercial vehicle workshop (workshops offering maintenance and repair services for commercial vehicles). The joint-venture would offer services (e.g., technical training, marketing, etc.) to commercial vehicle workshops for a certain amount, similar to a network of workshops in Europe. The General Superintendence considered once again that, although the economic groups of the applicants fulfilled the requirement of the double turnover thresholds in Brazil, (i) the joint-venture would serve for a specific demand in the European market and it would offer its services taking into account the profile and peculiarities of its target-audience in that region; (ii) the joint-venture was not expected to offer its services in Brazil or generate any revenues in the country in the future; (iii) the economic group of the applicants did not operate commercial vehicle workshops in Brazil; and (iv) the geographic scope of the market affected by the transaction (maintenance and repair mechanic services) presented some characteristics that suggested that it was limited to the national territory, at most. The General Superintendence considered that this was a case of non-mandatory notification in Brazil and did not proceed with the analysis of the merits of the transaction.

It is interesting to note that in such decisions[10], the General Superintendence also briefly analyzed the application of the local effects test in other jurisdictions, mainly in the United States of America ("USA") and in the European Union. The General Superintendence pointed out that the North-American agencies, for instance, grant an antitrust exemption for acquisitions of assets overseas that do not have

[9] Creation of a greenfield joint-venture. Concentration Act No. 08700.001204/2013-13 (Applicants: Roberto Bosch GmbH, ZF Friedrichshafen AG & Knorr-Bremse Systeme fur Commercial Vehicle GmbH), ruled in March 2013.

[10] Please, refer to Concentration Act No. 08700.008819/2014-43 (Applicants: Roberto Bosch GmbH & Siemens AG), ruled September 2014; and Merger Review No. 08700.001204/2013-13 (Applicants: Roberto Bosch GmbH, ZF Friedrichshafen AG & Knorr-Bremse Systeme fur Commercial Vehicle GmbH), ruled in March 2013.

sales in the USA, or when such turnover is limited. The rules reflect the North-American agencies' views that certain foreign acquisitions may affect competition in the USA, but the pre-merger notification should not be required if there is insufficient nexus with USA commerce[11]. According to General Superintendence, the European Commission adopts a similar position. If the target-company does not have turnover within the European Community, the transaction will not be subject to pre-merger notification[12].

Law No. 12,529 of 2011 does not expressly establish the rules for application of the local effects test in Brazil. The analysis of CADE case law in relation to the applicability of the local effects test in Brazil does however provide some clarity on the essential aspects to verify if the transaction is subject to the pre-merger mandatory notification as follows:

(a) analyze if, prior to the transaction, the target, any of the direct parties or their economic groups have already offered the products and/or services affected by the transaction in Brazil in the last years or have plans to offer in the near future[13] (revenues derived from the affected relevant markets);

[11] Please, refer to <https://www.ecfr.gov/cgi-bin/text-idx?SID=c7509a1cd69b91b56013a4cf931176fd&mc=true&tpl=/ecfrbrowse/Title16/16cfr802_main_02.tpl>. Access on March 19, 2018.

[12] Please, refer, for instance, to the document of the European Commission entitled "Consolidated Jurisdictional Notice", available at <eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:095:0001:0048:EN:PDF>. Access on March 19, 2018.

[13] Based on the precedents analyzed, CADE usually considers the time period of five (5) years, which is in line with the period that the Brazilian antitrust agency generally analyzes overall data for its merger review. In the Brazilian full notification form (non-fast proceeding), for example, CADE requests historical sales figures of the applicants in the five (5) years prior to the transaction, in addition to the expectation of growth for the next five (5) years as well.

(b) analyze if Brazil is not expressly excluded by any means (e.g., contractual terms) from the activities/scope of the proposed transaction;

(c) analyze the geographic scope of the relevant markets affected by the transaction, that is, whether they are national or worldwide (even through exports).

Lastly, it is worth noting that while the double turnover threshold considers the revenues derived from any activities and /or services in Brazil (and not only in relation to the affected markets), the local effects test takes into account the generation of revenues specifically in relation to the relevant markets affected by the transaction This would entail the activities performed by the target itself in Brazil and/or the activities of any other company of the economic groups involved which may be active in the same affected market of the target.

WHICH INTERNATIONAL TRANSACTIONS ARE SUBJECT TO ANTITRUST REVIEW?

Luiz Eduardo Salles
Ingrid Bandeira Santos

A key threshold question that antitrust lawyers must invariably answer when planning an international transaction is whether the transaction is subject to mandatory clearance and, if so, in which countries. This contribution tackles this basic question from the perspective of the Brazilian Antitrust Law (Law No. 12,529/2011). To that effect, it outlines a basic, threefold script that parties may use as a framework to determine whether a given transaction is subject to notification and approval by the Brazilian competition authority (CADE).

A doctrinal script to address the issue of whether a transaction must be notified in Brazil would cover (i) the application of the Brazilian Antitrust Law regime as such, (ii) the nature of the transaction, and (iii) the revenues of the parties. In a nutshell, firstly, does Brazilian Antitrust Law apply? Secondly, is there an act of concentration? And thirdly, are the revenues' thresholds met? For any transaction to be subject to notification in Brazil, these three questions must be answered in the affirmative. In practice, the question about the revenues is a definitive filter to many transactions. Hence, the order of a more practical script can be reversed compared to the typical doctrinal presentation. In addition, the answer to the question of whether Brazilian Antitrust Law does apply tends to be more relative, and it therefore merits separate, more detailed treatment in other chapters. Accordingly, this note discusses first the revenue thresholds; then the concept of an "act of concentration"; and it finally touches upon the application of the Brazilian Antitrust Law. As stated above, this last question is covered in additional detail in a separate contribution to this volume.

1. Meeting the revenues' thresholds

The double revenues' threshold

An act of concentration shall be subject to antitrust review provided that, first, it meets a double revenues' threshold. Ruling No. 994/2012 issued by the Ministries of Justice and Finance establishes the applicable thresholds pursuant to Article 88, Paragraph 1, Law No. 12,529/2011. These thresholds apply equally to all transactions; there are no sector-specific thresholds or geography-specific sectors. The thresholds are cumulative, and they are met when: (i) at least one of the economic groups involved in the transaction has had annual gross revenues (turnover) or volume of business in Brazil (including exports to Brazil) over BRL 750 million in the financial year ended prior to the transaction; and (ii) at least another economic group involved in the transaction has had annual gross revenues (turnover) or volume of business in Brazil over BRL 75 million in the financial year ended prior to the transaction.

Revenues in foreign currency

The practice is not entirely consistent regarding the conversion of revenues. Generally, the revenues in BRL from foreign currency should be converted according to the exchange rate published by the Brazilian Central Bank on the last business day of the financial year ended before the year of the transaction.[1] Nonetheless, there is also precedent of the use of the average exchange rate of the year ended prior to the year of the transaction.[2]

Calculating revenues: definition of economic group

The sum of the total revenues in Brazil of each entity of an "economic group" is the relevant figure to be checked against the

[1] See, e.g., Concentration Acts No. 08700.004156/2015-79; and 08700.006425/2017-01.

[2] See. e.g., Concentration Act No. 08700.009898/2015-91.

threshold, regardless of the interest held in each entity. Hence, the definition of the economic group is crucial to the calculation of the revenues. An economic group for such a purpose comprises (i) the undertakings under common control (internal or external) and (ii) the undertakings in which they hold at least 20% of the equity or voting capital.[3] In the case of investment funds, an economic group comprises (i) the economic group of each quota holder that holds, directly or indirectly, at least 50% of the fund involved in the transaction through either individual interest or any type of agreement; and (ii) the companies in which the fund directly involved in the transaction holds, directly or indirectly, at least 20 per cent of the equity or voting capital.[4]

Irrelevance of the value of the assets, of the transaction, of the target

Brazilian Antitrust Law does not establish any threshold based on the value of the assets or of the transaction. Moreover, the target's turnover or volume of business is not as such a determinative criterion for the purpose of notification requirements; although this may be relevant to calculate the revenues or volume of business of the seller's group. Thus, the revenues in Brazil of the economic groups involved shall govern the analysis, including concerning international transactions, and even if the target's presence in Brazil is limited or if the Brazilian assets are of limited value.

2. Types of transactions subject to merger control

Definition of an act of concentration

A transaction may only be subject to antitrust review if, second, it is defined as an "act of concentration". Acts of concentration cover: (i) the merging of previously independent undertakings; (ii) the direct or indirect acquisition of control by one undertaking of another undertaking or parts thereof, by any means, including purchase or exchange of stocks,

[3] Article 4, Paragraph1, Resolution CADE No. 02/2012.

[4] Article 4, Paragraph2, Resolution CADE No. 02/2012.

quotas, titles or securities convertible in stocks, or tangible or intangible assets; (iii) incorporation of one or more undertaking(s) by one or more undertaking(s); and (iv) "association agreements", consortia and joint ventures.[5] The above definition of acts of concentration applies to all economic sectors.[6] The only exception is association agreements, consortia and joint ventures specifically destined to public bids and agreements deriving therefrom, which shall not be considered acts of concentration and are thus not reportable.[7]

Acquisitions of assets

There are no special provisions concerning acquisitions of assets and the concept of assets and of acquisition of control over assets has been interpreted broadly.

Acquisitions of shares: controlling and minority stake

Acquisitions of additional shares by a unified controlling shareholder are not subject to mandatory notification.[8] By contrast, acquisitions of shares which grant the acquirer the control of the invested company are considered acquisitions, and are thus subject to notification.[9] Moreover, acquisitions of shares in which the economic group invested and the economic group of the acquirer neither compete nor participate in vertically related markets are notifiable provided that the transaction grants the acquirer 20% or more of the equity or voting capital;[10] or if the transaction results in additional 20% or more of the equity or voting

[5] Article 90, Law No. 12,529/2011.

[6] Recent specific developments in the banking sector are not covered due to space constraints. See the *Memorandum of Understanding between the Brazilian Central Bank and CADE concerning the Proceedings of Cooperation on the Analysis of Acts of Concentration in the National Financial System.*

[7] Article 90, Law No. 12,529/2011, Sole Paragraph.

[8] Article 9, Sole Paragraph, Resolution CADE No. 02/2012.

[9] Article 9, I, Resolution CADE No. 02/2012.

[10] Article 10, I, a, Resolution CADE No. 02/2012.

capital acquired directly or indirectly from a single seller.[11] Acquisitions of shares in which the economic group invested and the group of the acquirer do compete or participate in vertically related markets are notifiable provided that the transaction confers 5% or more of the equity or voting capital to the acquirer's group;[12] or an additional share of 5% or more in the equity or voting capital (irrespective of the seller).[13]

Securities convertible into shares and public offerings

The subscription of titles or securities convertible into shares is subject to mandatory notification if, first, the future conversion into shares, considering the date of the subscription, would be subject to mandatory notification (to that effect, the abovementioned rules on the acquisition of control or a minority acquisition apply), and if, in addition, the title or security at issue entitles the acquirer to nominate a member for management or monitoring bodies or confers veto rights over competitively sensitive matters – except if the rights at issue are already prescribed by law.[14]

Transactions through public offerings of shares or securities convertible into shares are also subject to mandatory notification. However, such transactions may be closed prior to notification and/or clearance, and the exercise of decision-making rights (e.g., participation at shareholders' meetings) is prohibited prior to clearance. The notification of the subscription of the securities dispenses with the potential future notification of the conversion into shares to CADE.[15]

"Association agreements", consortia and joint ventures

The definition of "association agreements", consortia and joint ventures has been a controversial topic. Resolution CADE No. 17/2016

[11] Article 10, I, b, Resolution CADE No. 02/2012.

[12] Article 10, II, a, Resolution CADE No. 02/2012.

[13] Article 10, II, b, Resolution CADE No. 02/2012.

[14] Article 11, I and II, Resolution CADE No. 02/2012.

[15] Article 11, ParagraphParagraph 2nd and 3rd, Resolution CADE No. 02/2012.

defines reportable association agreements as agreements that last at least two years (if undetermined or shorter than two years, the agreement will become notifiable if and when it will reach such a term), in which the contract establishes a common undertaking for exploring economic activity, provided that there is a sharing of risks and results of such economic activity and that the economic groups of the parties compete in the relevant market that is the object of the contract. As pointed above, association agreements, consortia and joint ventures specifically destined to public bids and agreements deriving therefrom are exempt from notification.

3. Territoriality

Although international transactions where the double revenues' threshold and the definition of an act of concentration are met will normally be subject to mandatory notification; Brazilian Antitrust Law only applies to acts taking place in whole or in part in Brazil or which produce or at least have the potential to produce effects in Brazil.[16] Consequently, a foreign to foreign transaction cannot be subject to mandatory notification if it is not at least able to produce effects in Brazil. This issue often arises in joint ventures between foreign parties the economic groups of which perform activities and generate significant revenues in Brazil. In these cases, the assessment of the notification obligation should take into account whether the transaction might actually or potentially produce effects in the country. Basically, if the joint venture will not have activities in Brazil and if the affected relevant market does not include any part of the Brazilian territory beyond reasonable doubt, according to CADE's practice, the transaction may not trigger the application of Brazilian Antitrust Law and, as a result, of the notification requirement therein. [17]

[16] Article 2, Law No. 12,529/2011.

[17] See, e.g., Concentration Acts No. 08700.001204/2013-13; 08700.008819/2014-43; 08700.009898/2015-91.

However, it is important to notice that CADE's prior practice is not necessarily determinative of future decisions. Moreover, there is no *de minimis* rule in terms of potential effects. Generally, the law is considered to capture situations such as a target's or joint venture's presence in Brazil or sales to Brazil; or even a plan to be active in the country. Since the entry into force of Law No. 12,529/2011, market jurisdictional thresholds no longer apply. As a result, notification is mandatory whenever potential effects in Brazil are identified.

4. Conclusion

An international transaction will be subject to antitrust review in Brazil provided that: (i) it meets the double revenues' threshold; (ii) it falls under the definition of an "act of concentration"; and (iii) it takes place in whole or in part, or it produces or may produce effects in Brazil.

WHEN THE PARTIES MUST NOTIFY STOCK ACQUISITIONS?

Ednei Nascimento da Silva[1]

The notification of transactions involving the acquisition of equity interest, if the turnover thresholds are met, is set forth in Article 90, item II, of Law N. 12,529/2011. According to the Law, transactions that result in the acquisition of control or of parts of a company by means of the purchase or exchange of shares, bonds or securities convertible into shares, must be filed for approval. For the purpose of notification, the format of the transaction is irrelevant; it can be carried out "by contractual means or by any other means or form".

It is worth mentioning that the Brazilian Antitrust Law refers to the term “company”, which under Brazilian Law is essentially defined as the organized economic activity for the production or circulation of goods or services. Therefore, the obligation to notify does not refer precisely to an acquisition of equity interest in companies of any nature, but in companies that develop an economic activity. Accordingly, the filing requires the existence of operational and business activity in the acquired company, even if this acquisition occurs indirectly. For example, when an entity (or an individual) acquires shares in a holding company with no business activities other than holding equity interests in other companies, CADE verifies the percentage of interest the holding company holds in its subsidiaries. In Concentration Act N. 08700.005381/2012-80, CADE considered that the acquisition of the total capital of two holding companies was not a transaction subject to merger control review, stating that such companies had no operational or

[1] This article represents the opinions of the author. It is not meant to represent the position or opinions of CADE or its Members, nor the official position of any staff members. Any errors are the fault of the author.

business activity, only minority interest in another company.[2] Recently, CADE confirmed this understanding in a filing involving the direct acquisition of a holding company and, indirectly, three other companies. Even though one of these companies had business activity, it did not meet the criterion set forth in Article 10 of Resolution CADE 02/2012 (which will be discussed below).[3]

After this initial introduction, the question that arises is "which transactions involving the acquisition of equity interest in a company should be notified to CADE?"

Due to the wide scope of the abovementioned Article 90,[4] and due to the need to limit antitrust control over transaction that may rise competitive concerns, CADE enacted Resolution N. 02, on May 29, 2012 (later modified by Resolution CADE N. 09, enacted in October 2014). This statute regulates, among other issues, the hypothesis of acquisition of equity interest subject to merger control, set forth in Article 90, item II, of the Brazilian Antitrust Law.

According to the aforementioned resolution, the notification of equity interest is compulsory under two circumstances: (i) when they result in acquisition of control of the company[5] or (ii) when they meet certain conditions set forth by CADE, explained below, even if they do not result in the acquisition of sole or shared control.

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[2] In this case, CADE considered that the holding companies were not operational (with no economic activity) and that the indirect participation acquired in the company was carried out by its controller, according to Article 11 of Resolution CADE N. 02/2012. The Article 11 was replaced by Article 9, Sole Paragraph, in the same Resolution, when Resolution CADE N. 09/2014 came into force, but the understanding about the acquisitions held by the controller or involving not operational companies was maintained even after the Resolution CADE N. 09, as explained below.

[3] Concentration Act N. 08700.001345/2018-32.

[4] The Law did not define the percentage of shares that should trigger the filing, or any other criteria, such as acquisition of control or dominant influence in the market decisions of the acquired company.

[5] According to Article 9, item I.

The first situation involves transactions in which an entity intends to acquire the shared control of another company as well as transactions that grant the acquirer the ability to take sole control of the company (also called in CADE's case law as unitary control). In this regard, it is worth mentioning that acquisitions of equity interest held by unitary controllers are exempt from antitrust control, pursuant to Article 9, Sole Paragraph, of Resolution CADE 02/2012, and there have been several transactions like this reviewed by CADE.[6] CADE's case law defines a unitary controller (sole shareholder) as one who can define all the competitive relevant issues of a company, including its business plans and operating activities, without the interference of the other shareholders. In other words, when the remaining shareholders of a given company have only investment protection rights, and the controlling shareholder can control the company's main economic variables from the competitive point of view (quantity supplied and price), it is said that this majority shareholder is its unitary controller.

The second situation reflects the acquisitions of equity interest in the target company, regardless of whether such participation gives control to the acquirer. In these situations, CADE has adopted a refining filter for the cases in which the acquiring group and the invested company are competing or acting in vertically related markets, and another less restricted filter for the hypotheses in which there is neither horizontal nor vertical relationship between target company and acquiring group. The equity interest to be considered in all of these cases will be the one directly or indirectly acquired.

In transactions involving companies that are neither horizontal nor vertically related, the parties should consider to notify a transaction when an economic group acquires at least 20% of the capital or voting capital of the acquired company.[7] In cases in which the acquiring

[6] For example, see Concentration Acts 08700.000301/2015-42, 08700.010317/2015-63 and 08700.004121/2017-00.

[7] According to Article 10, *caput*, item I, sub-item "a", of Resolution CADE No. 02/2012.

economic group already owns 20% or more of equity interest in the investee company, if there is a new acquisition of an equity interest equal to or greater than 20% of the capital stock or voting capital of the acquired company, it is mandatory to notify CADE if the percentage of equity interest acquired (equal to or greater than 20%) belongs to at least one seller considered individually.[8]

In transactions involving an economic group with a horizontal or vertical relationship with the acquired company, notification becomes mandatory whenever there is an acquisition of at least 5% of the capital stock or the voting capital of the acquired company.[9] Similarly to the case abovementioned, when the acquiring economic group already holds 5% or more of the capital stock or voting capital of the acquired company, whenever there is a new acquisition of equity interest by that group in said company that, individually or in combination with others, results in an increase of more than or equal to 5% in the capital stock or voting capital of the target company, this new transaction shall be of mandatory notification.[10]

Regarding this notification rule, when an entity acquires less than 5% of the capital or voting capital of another company, would this transaction be notifiable?

There is only one possibility for such a transaction to be of mandatory notification: if the acquirer shareholder already holds at least 5% of the capital stock of the investee company and has been made other acquisitions of the capital stock or voting capital in that company recently. For example, having acquired 1% per year over the last five years, resulting in the fifth year in a 5% increase in the share that this acquirer originally held (in this example, the acquirer company would increase its stake from 5% to 10% of the stock or voting capital of the acquired company at the end of successive acquisitions). Additionally,

[8] As stated in Article 10, item II, sub-item "a", of Resolution CADE No. 02/2012.

[9] See Article 10, item II, sub-item "b", of Resolution CADE No. 02/2012.

[10] As stated in Article 10, item II, sub-item "b", of Resolution CADE No. 02/2012.

the acquirer must have a horizontal or vertical relationship with the target company.

In both situations mentioned above, CADE intends to evaluate whether the evolution in the shareholding of a particular economic group in the investee company may alter its economic incentives to adopt anticompetitive practices. This assessment is, of course, more rigid in cases where the acquiring group and the investee company are competitors or vertically related. This is because a minority stake may represent a relevant economic interest in the profits of a competitor or in an acting player in the same productive chain. Or even grant access to competitively sensitive information.

It should be noted that these filters created by Resolution CADE No. 02/2012 are not related in any way to the acquisition of control of the acquired company, i.e., it is not being discussed here whether the acquisition of a minority equity interest represents control acquisition or not. The established criteria are objective and direct, functioning as a filter, and focus on the acquisition of equity interest of more than 5% or 20%, depending on whether or not the parties involved have a horizontal or vertical relationship, as already explained. Some important lessons and guidance may be drawn from a number of CADE's decisions that have dealt with this matter, and it is appropriate to appoint them, especially due to depiction of special situations that combine such rules.

The first case relates to transactions in which the buyer and the seller have a common shareholder, so that the transaction could be characterized as a corporate reorganization within the same economic group – which would not require a notification under the Brazilian antitrust legislation. However, this apparent corporate reorganization may not be harmless in competitive terms, especially when the transaction may affect other shareholders, whether they be new or shareholders already present in the capital stock of the investee company. In such situations, CADE verifies: (i) whether the transaction may

generate the entry of new stockholders in the investee company[11] or (ii) if the equity interest acquired by the other shareholders of the investee company meets the objective criteria for filing (5% or 20%, depending on the situation). Therefore, in the occurrence of one of these two situations, the transaction will need to be filed; even if the acquirer shareholder is in simultaneously the buyer and the seller sides. This is due to the fact that the entry of a new shareholder through a transaction with such characteristics may generate new analyzes of overlap or vertical integration, and the increase in the stakes of current shareholders may lead to reinforcement to the pre-existing horizontal overlap or vertical integration. CADE's rulings in Concentration Acts No. 08700.000378/2018-65, 08700.006429/2015-10 and 08700.009472/2014-56 well illustrate such situations.

Another CADE's important ruling regards the acquisition of equity interest occurred in Concentration Act No. 08700.005265/2017-75. The definition of the relevant market in that case was essential for its decision to consider such transaction not of mandatory notification. In that case, the adoption of the relevant market definitions usually used in CADE's case law led to the conclusion that there was neither horizontal overlap nor vertical integration between the parties in Brazil. As long as there was an acquisition of less than 20% of the capital stock of the investee company, CADE decided that the transaction was a non-mandatory notification. It should be noted, however, that CADE, when faced with uncertainties, may choose to adopt alternative, more conservative relevant market scenarios. In such situations, CADE may consider the transaction as of mandatory notification, always keeping in mind the criteria established by Article 10 of Resolution CADE No. 02/2012. Such situations may occur especially when there is no case law that could be used for defining the relevant market proposed by the parties, or, e.g., when the market is characterized by great asymmetries

[11] Case which demands the framing within the criteria determined in Article 10 of Resolution CADE No. 02/2012.

of information. In such cases, it is advisable to notify such transaction, even if *ad cautelam*.

Additionally, the accurate verification of the activities of the companies belonging to the acquiring economic group, as regulated in Article 4 of Resolution CADE No. 02/2012, is decisive for the conclusion whether the acquiring group competes or is vertically related to the target company. Such situations can be seen in Concentration Acts No. 08700.007119/2012-70, 08700.008570/2012-12, 08700.000925/2013-06, 08700.001423/2014-75 and 08700.009569/2014-69. Thus, the analysis of the accurate description of the group will indicate whether the acquisition of equity interest (between 5% and 20% of the stock capital or voting capital)[12] will be of mandatory notification or not. In such situations, it should be mentioned whether there is horizontal overlap or vertical integration in all possible relevant market scenarios – if so, the parties should notify the transaction to CADE, even if *ad cautelam*.

[12] The acquisition of equity interest over 20% is always of mandatory notification when the economic groups involved in the transaction meet the turnover thresholds.

WHEN DOES THE ACQUISITION OF SECURITIES TRIGGER MERGER FILING?[1]

Barbara Rosenberg
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Provided the turnover thresholds are met[2] and the transaction has effects (or potential effects) in Brazil[3], the acquisition of securities convertible into shares are subject to merger control review by the Brazilian antitrust authority ("CADE") if it grants political rights to the acquirer and if it results in one of the following possibilities[4]:

- *Acquisition of joint or sole control*

[1] The information provided in this chapter is based on the provisions of Law No. 12.529/2011 (the "Brazilian Antitrust Law"), CADE's Internal Regulation and Resolution CADE No. 02/2012 (together refereed as "Brazilian Antitrust Rules"), as well as cases involving the acquisition of shares in the stock exchange market.

[2] With respect to the turnover threshold, a transaction is reportable in Brazil if one of the corporate groups involved in the transaction had a gross turnover (revenues) or a volume of business in Brazil, in the most recent year, greater than BRL 750 million; and the other corporate group involved in the transaction had a gross turnover (revenues) or a volume of business in Brazil, in the most recent year, greater than BRL 75 million. The concept of "group of companies" is particularly important in this context for the calculation of the applicable turnover thresholds rules. A group of companies, according to CADE, comprises: (i) all companies subject to "common control" (control not being defined in statute); and (ii) any other companies in which the companies subject to a common control structure hold a direct or indirect interest higher than 20%.

[3] Article 2 of the Brazilian Antitrust Law, which provides that CADE has jurisdiction over acts that have effects in Brazil or that could potentially have effects in the country.

[4] Article 90, II, of the Brazilian Antitrust Law, and Articles 10 and 11 of Resolution CADE No. 02/2012.

- *When there are no horizontal overlaps or vertical relationship between the parties' activities*:

(i) The acquisition of 20% or more of the voting rights or share capital of the target;

(ii) If the acquirer already holds 20% or more of the voting rights or share capital of the target, all subsequent acquisitions of 20% or more of the voting rights or share capital of the target from a single shareholder.

- *When there are horizontal overlaps or vertical relationship between the parties' activities:*

(i) The acquisition of 5% or more of the voting rights or share capital of the target;

(ii) If the acquirer already holds 5% of the voting rights or share capital of the target, all subsequent acquisitions of 5% or more of the voting rights or share capital of the target.

The time of when the acquisition of securities has to be filed will largely depend if the transaction involves a public offer or not. In case it involves a public offer, the Brazilian Antitrust Rules allow the subscription of the securities with no need of a pre-merger filing before CADE. However, the exercise of the political rights related to the securities being acquired are subject to pre-merger control by CADE.[5] On the other hand if the transaction does not involve a public offer, the filing before CADE shall occur before the subscription takes place. Once the subscription is filed, the conversion of the securities into shares is no longer subject to merger filing.

The rule above also applies to acquisitions of shares in the stock exchange market. The Brazilian antitrust rules provide that the pre-merger clearance is condition precedent for the exercise of the political rights related to the amount of interest (shares) acquired, but not condition precedent for the consummation of the acquisition itself. In other words, the acquisition of shares in the stock exchange market does

[5] See Concentration Act No. 08700.003843/2014-96 (Companhia Brasileira de Cartuchos and Forjas Taurus S.A.).

not depend on CADE's prior approval, but the exercise of the political rights related to the shares acquired does have to receive clearance from CADE if it triggers one of the possibilities indicated above. CADE has recently reviewed some cases involving the acquisition of shares in the stock exchange market and confirmed this understanding.[6]

One of the positive aspects of being able to subscribe the securities (acquire the interest) without the need of a pre-filing approval is the possibility to expedite the injection of funds into the target without having to wait for CADE's review and approval. Generally, companies that need to fundraise their accounts can benefit from this rule when there is a public offer and investors subscribing their issued securities with no antitrust clearance as condition precedent for the subscription.

If the acquisition of securities is subject to merger filing, the level of information required to complete the filing form regarding the target and affected markets can sometimes be a challenge for the acquiring party if the acquisition in the stock exchange market is hostile or if the acquirer does not yet have access to the target's data (when it is a mere investor with no political rights, for example). If the case does not involve significant overlaps between the parties' activities and it is subject to the fast track procedure[7], publicly available information of the target could be sufficient for CADE's review. However, in non-fast track

[6] See, for example, Concentration Acts No.: 08700.004128/2017-13 (Thermo Fisher Scientific Inc. and Patheon N.V.); No. 08700.004012/2017-84 (Atlantia S.p.A. and Abertis Infraestructuras S.A.); 08700.001501/2017-84 (Vivendi S.A. and Bolloré Group); 08700.005843/2016-92 (Vivendi S.A. and Ubisoft Entertainment S.A.); 08700.005524/2016-87 (Gategroup Holding AG and HNA Group Co., Ltd.); 08700.011629/2014-03 (SHV Investments Limited and Nutreco N.V.) and 08700.003843/2014-96 (Companhia Brasileira de Cartuchos and Forjas Taurus S.A.), among others.

[7] The fast track procedure is a simplified filing procedure that is reviewed by CADE within 30 days as of the complete filing and overall when it involves combined market shares in the affected product markets below 20%, low increment of shares (HHI below 200 points) and market shares below 30% in vertical related markets.

cases, where a more in depth analysis is needed, the process of gathering information from the target can be difficult and time sensitive.

Based on the above, depending on when the acquirer wants to exercise its political rights over the target it is important to assess how long a review from CADE will take to avoid gun jumping fines related to the exercise of political rights before CADE's decision. The Brazilian Antitrust Law provides that any transaction that meets the reportability thresholds shall not be consummated prior to CADE's approval. The fines for gun jumping can range from BRL 60 thousand to BRL 60 million. Additionally, CADE may declare the transaction void and initiate an administrative investigation for anti-competitive behavior against the involved parties (to the extent that a gun jumping violation implies the coordination between players that are supposed to behave as competitors).

WHAT IS NEW IN THE NOTIFICATION OF ASSET ACQUISITION?

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Introduction

When the Lava Jato corruption case began, in 2013, there was little doubt that Brazil was facing an unprecedented scandal that could tear apart more than a handful of important corporations. After almost five years, one by-product of the Lava Jato is clear: the sale of companies and assets of companies involved in corruption scandals. According to an article of October 2017, since 2015 companies involved in the Lava Jato sold over USD 30 billion in assets, representing almost 50 businesses.[1] While the state owned oil giant Petrobras is the leader in sales, with transactions representing USD 12 billion, private companies such as J&F (USD 8 billion), Odebrecht (USD 4 billion), Camargo Corrêa (USD 2.6 billion) and BTG Pactual (USD 3.1 billion) were also involved in important transactions. At this point, the tip of the iceberg has already been scratched, but what lies underneath is yet to be seen.

Some of the transactions were structured as a sale of shares of companies. In others, the parties structured the transaction as an asset sale. One of the purposes of such structure was protection: buyers were trying to limit their exposure and to avoid links to the entity that was involved in corruption.

In this new scenario, the questions related to notification of acquisition of assets seem often accompanied by the ones on the potential

[1] See https://g1.globo.com/economia/negocios/noticia/lava-jato-levou-empresas-a-vender-mais-de-r-100-bilhoes-em-ativos-desde-2015.ghtml.

liability, from a competition perspective, that the asset acquisition may entail.

1. The criteria for submission of asset acquisitions to CADE

Transactions involving asset acquisitions are subject to merger review by most competition authorities around the world. Brazil is no different. Indeed, Article 90 of the Brazilian Antitrust Law (Law No. 12,529/2011) explicitly mentions that a notifiable "concentration act" occurs when "one or more companies directly or indirectly acquire – by purchase or swap of shares, membership units (quotas), securities or share convertibles, or tangible or intangible assets."

Therefore, an asset acquisition is currently subject to mandatory notification to CADE, according to the Brazilian Antitrust Law, when **(i)** the acts inherent to the transaction are wholly or partially performed within the Brazilian territory, or their effects are or may be suffered in Brazil (Article 2); and **(ii)** the economic groups of the parties involved in the transaction meet the turnover thresholds (Article 88).[2]

International experience seems to indicate that the crucial aspect when assessing the notifiability of asset acquisitions is the competitive significance of the assets being acquired and if they are able to generate "*an appreciable economic concentration in the marketplace.*"[3] According to the International Competition Network, this "*notion is*

[2] At least one of the groups involved in the deal has posted, on the latest balance sheet, an annual gross turnover or overall volume of business in Brazil that is equal to or above BRL 750 million, in the year before that of the deal; and at least another group involved in the deal has posted, on the latest balance sheet, an annual gross turnover or overall volume of business in Brazil that is equal to or above BRL 75 million, in the year before that of the deal. The threshold values were adjusted by Article 1 of Interministerial Ordinance No. 994/2012.

[3] ICN. Defining "Merger" Transactions for Purposes of Merger Review. Available at: http://www.internationalcompetitionnetwork.org/uploads/library/doc327.pdf.

often captured by reference to whether the assets comprise an 'enterprise' or business activity to which turnover may be attributed."

In Brazil, however, there is no *de minimis* rule. The acquisition of assets may have to be notified regardless of its significance. In fact, the Brazilian experience is that if the assets being acquired have or may have a market impact, the transaction is notifiable to CADE. For reference, from 2015 to 2017, approximately 16% of transactions notified to CADE were related to asset acquisition.[4]

In this sense, the crucial aspect in determining whether an asset acquisition qualifies for notification seems to be whether such assets are directly used as means of production. In some instances, CADE's approach was straightforward: considering that the target asset was being used as means of production, the parties should file the transaction.[5] In other cases, the transaction was not very straightforward and CADE decided to adopt a conservative approach. This happened, for example, in the transaction involving the sale of concrete mixer trucks by Silcar to Polimix.[6] Even though the parties argued that the transaction was not subject to notification, considering that the concrete mixer trucks were not being used by Silcar and Polimix could buy such trucks directly from the truck manufacturer, CADE decided that the transaction should be notified because it was increasing the production capacity of the buyer. CADE understood that the acquisition could have a market impact.

In view of these precedents, it is possible to state that CADE's criteria are still considerably inflexible and the parties should be careful before ruling out the notification of assets, even if such assets may seem

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[4] Based on publications of notices giving publicity to concentration acts by CADE.

[5] For example, in Concentration Act No. 08700.008343/2016-11, CADE cleared the acquisition of the assets of Magna by Lear. Magna produces seats for certain Volkswagen cars. Lear won the private bidding to supply such seats do Volkswagen and consequently bought the assets for such production from Magna. In Concentration Act No. 08700.009624/2015-00, Flextronics acquired a plant from Microsoft. The transaction was cleared by CADE.

[6] Concentration Act No. 08700.008315/2016-95.

to be "not productive". In fact, we have identified only one instance in which the parties may be less concerned on whether the acquisition of assets is subject to notification: cases involving the sale of non-productive real estate. For example, CADE refused to assert jurisdiction over the acquisition, by Biomm, of real estate from Novartis, considering that, as informed by the parties, Novartis had never used such real estate in any economic activity.[7]

Finally, we should also stress that it is necessary to notify the acquisition of both tangible and intangible assets. In the latter category, CADE has reviewed, for example, transactions involving the sale of (i) intangible assets (including intellectual property) of analgesic[8] and medicines;[9] (ii) portfolio of clients (specifically, portfolio of auto insurance clients);[10] and (iii) brands.[11]

2. The rule for transfer of liability in cases of asset acquisitions

The Brazilian Antitrust Law has no specific rules on the transfer

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[7] Concentration Act No. 08700.006524/2016-02. The transaction was similar to Concentration Act No. 08012.009064/2009-95, in which Companhia Brasileira de Distribução bought real estate from APL.

[8] See, for example, Concentration Act No. 08700.007226/2016-21 (Aspen Pharmacare/Glaxosmithkline).

[9] See, for example, Concentration Act No. 08700.008059/2016-36 (Grünenthal do Brasil/Schering-Plough), Concentration Act No. 08700.002782/2017-92 (Mylan/Novartis); Concentration Act No. 08700.006736/2017-62 (Cellera/Novartis); Concentration Act No. 08700.005172/2017-41 (Mylan/Novartis).

[10] See, for example, Concentration Act No. 08700.006655/2016-81 (AIG Brasil/Porto Seguro).

[11] See, for example, Concentration Act No. 08700.007662/2017-81 (Atlas/AB Electrolux - Atlas bought the brand "Dako"); Concentration Act No. 08700.000308/2017-26 (Dabi Atlante/Q2 Tec - Q2 Tec purchased the brand "Gnatus"); and Concentration Act No. 08700.009226/2015-85 (Henkel/The Procter & Gamble – Henkel exercised its option to buy certain commercial brands and domain of Procter & Gamble).

of liability in case of asset acquisition. Therefore, it is yet unclear whether the acquisition of assets would, *per se*, transfer liability to the acquirer.

In fact, CADE has not yet built a robust set of rulings on the transfer of liability to the acquirer of assets involved in anticompetitive practices. In one instance, where CADE examined this situation for the purposes of including a company as defendant in an investigation of cartel conduct, CADE held that the mere acquisition of assets does not transfer liability for past acts. Transfer of liability would only occur when there is an actual succession of firms, by way of merger, for example.[12]

However, we understand that companies should be cautious when acquiring assets belonging to companies that are involved in antitrust investigations, for at least two reasons.

First, it is important to take the necessary precautions to mitigate the risk of an asset acquisition being seen as a sham or fraud to avoid liability otherwise imputable to the seller. If this is the case, the acquisition may be voided; or the courts may consider that the acquiring company succeeded the seller and, as such, is liable for the acts of the latter. Cases in which the transfer was viewed as a sham included those in which there were family ties between the partners of the acquirer and of the seller,[13] or those in which the selling partner held an interest in the acquirer.[14]

Second, the Brazilian courts have given a broad interpretation to the transfer of liability in case of asset acquisition. In Case No. 00096056820108190210, for example, the Rio de Janeiro courts decided that the acquirer of the assets of a drugstore was liable for the acts of the seller, considering that the acquirer continued to perform the same economic activity as the seller. A similar decision was taken by the Superior Court of Justice, which held that an acquirer of assets (real

[12] Technical Note 144/2017 issued on Administrative Proceeding No. 08700.001486/2017-74.

[13] Case No. 2008.04.00.012761-8, Federal Court of the 4th Region.

[14] Case No. 0000763-88.2007.807.0000, Court of Appeals of the Federal District.

estate and related furniture, equipment and machinery, as well as transfer of employees) remaining in the same business was *per se* succeeding the seller and should be held liable for the latter's acts.[15]

These cases did not specifically relate to antitrust liability. In this sense, it could be arguably defended that antitrust liability should not be transferred to a mere acquirer of assets. However, it is important to be careful so as to avoid problems in the future.

Final remarks

Considering the Brazilian Antitrust Law and CADE's recent decisions, it seems important to evaluate carefully the transactions involving the acquisition of tangible or intangible assets that could generate effects on the Brazilian markets. This is so because, as explained in some other chapters of this book, failure to notify a reportable transaction leads not only to the imposition of fines ranging from BRL 60,000 to BRL 60 million but also to annulment of such transaction by CADE.

In the current scenario and given the lack of decisions by CADE's Tribunal on the matter, irrespective of whether a transaction is subject to notification, the parties should keep in mind the potential liability that they may inherit in case they acquire assets of companies that are being investigated by CADE.

[15] AgRg on AREsp No. 120.909/SP, Reporting Justice Sidnei Beneti, Third Panel, ruled on March 27, 2012, published on April 19, 2012.

ASSOCIATIVE AGREEMENT: WHAT ARE ITS GREY ZONES?

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According to article 90, IV of the Law No. 12,529/11, "an act of concentration shall be carried out when (…) IV – two or more undertakings enter into an **associative agreement**, consortium or joint venture". Specifically regarding "associative agreements", after repeated criticism by legal practitioners and other undertakings, Resolution CADE No. 10/14 was repealed by Resolution CADE No. 17, in October 2016. Briefly, according to this new resolution, vertical agreements were no longer defined as "associative agreements".

This "Q&A" intends to explain the new definition of "associative agreement" and its notification thresholds set forth by Resolution CADE No. 17. We also briefly point out and discuss grey zones that are still not answered by CADE's precedents related to associative agreements.

What is the definition of an associative agreement under Resolution CADE No. 17?

According to Resolution CADE No. 17/16, an "associative agreement" is defined as any agreement (a) executed by competitors, individuals or companies, that operate in the same relevant market subject to the agreement; **and** that, **cumulatively**, (b) creates a "common enterprise" to explore an "economic activity"; **and** (c) results in "risks and results sharing" in reference to the economic activity subject to the agreement.

When should the associative agreement be notified to CADE under Resolution CADE No. 17?

The "associative agreement" should be notified whenever (a) it meets the revenues thresholds (the gross revenue of the economic group of one party, in Brazil, in the year before the execution of the agreement is equal or higher than R$ 750 million **and** the revenue of the other involved party is equal or higher than R$ 75 million) set forth in article 88 of Law No. 12,529/11; **and** (b) its term is equal or higher than 2 years; **or** (c) its term is extended to a period equal or higher than 2 years.

What should be considered "competitors" under Resolution CADE No. 17?

Resolution CADE No. 17 expressly sets forth that the term "competitor" comprises both the parties directed involved in the "associative agreement" and any undertaking that belongs to the parties' economic group operating in the same economic activity and relevant market subject to the "associative agreement". Resolution CADE No. 17 does not expressly set forth the undertakings that should be considered as belonging to the "economic group", however it is reasonable to say that the concept of "economic group" sets forth in "Resolution CADE No. 2" (amended by Resolution CADE No. 9) should be applied for this purpose. It is also important to stress out that, in the analysis of the Concentration Act No. 08700.003575/2017-55, CADE's General Superintendence extended the concept of "competitor" to also include the idea of "potential competitor".

What is an economic group?

The term "economic group" is set forth in article 4 of Resolution CADE No. 2 (amended by Resolution CADE No. 9). However, it is important to note that such article expressly states that such definition should only be applied for purposes of calculating the gross revenue of the economic group. In this sense, paragraph 3 of the aforementioned article 4 establishes that CADE is not bound by this definition when it

analyzes the merits of the notified concentration act. Thus, for the purposes of reviewing the merits of the notified transaction, Resolution CADE No. 2 sets forth a broader concept of undertakings that belong to the economic group.

In addition, in the analysis of Concentration Act No. 08700.007119/2012-70 and of Concentration Act No. 08700.000925/2013-06, the General Superintendence expressly stated that the term "control" set forth in Resolution CADE No. 2 should be strictly read as synonymous of majority shareholder. However, there are older cases decided by CADE (*e.g.*, Concentration Act No. 53500.012487/2007), where the term control is interpreted in a broader way, in the sense that for the purpose of the Brazilian Antitrust Law, it should be read as any right that grants to the undertaking a relevant, decisive and/or dominant influence over operational and/or strategic commercial behavior ("competitively-sensitive matters").

What should be considered a "common enterprise" under Resolution CADE No. 17?

The concept "common enterprise" is not defined by the Brazilian Antirust Law, by Resolution CADE No. 17, or any other antitrust provision or regulation. Therefore, this term should be analyzed on a case-by-case basis until there is a consensus by CADE.

For instance, in the analysis of Concentration Act No. 08700.002529/2017-39, that involved a "Codeshare Agreement", the General Superintendence expressly explained that the term "common enterprise" should be understood as "the joint control over an economic activity that is not formally constituted and operated through a company, but through an agreement". The General Superintendence also explained that, "generally speaking, in a codeshare agreement the parties do not coordinate their respective activities in relation to price and output capacity". The General Superintendence also mentioned that the concept "risks and results sharing" should be considered as an intrinsic part of the concept "common enterprise", in the sense that the agreement should also set forth that the parties would jointly "share risks and results" when

operating the economic activity subject to the agreement. The General Superintendence concluded its legal opinion stating that the notified "Codeshare Agreement" should not be classified as an "associative agreement", although the involved parties are considered as competitors, because after the execution of such agreement the "parties would have plenty of freedom to, unilaterally and independently, constitute or discontinue new routes or flights"; "there is no management influence on the activities and/or operations from one company to the other"; and "the agreement does not set forth or allow the parties to jointly fix their respectively tickets price".

This new interpretation overruled older cases involving "Codeshare Agreements" reviewed by the General Superintendence. Briefly, according to the General Superintendence's previous understanding, "codeshare agreements should be considered as commercial cooperation, that can increase the parties' profits, since they allow the parties to rationalize their costs, increase and maximize their flights network; and obtain *feeder traffic* in locations where they do not operate", as well as it "may decrease the competition among the signatory parties, close market, reduce output without creating economic efficiencies, create tacit or explicit collusion for fixing price and discriminatory prices" (See Concentration Acts No. 08700.010858/2012-49 and 08700.006488/2013-26).

In the analysis of Concentration Act No. 08700.008484/2016-25, that involved the execution of a "Distribution, License and Supply Agreement" between two competitors, the General Superintendence understood that it should not be classified as an "associative agreement", because there was no "right or obligation set forth therein that should be implied as a joint control over the economic activity subject of the agreement". According to the General Superintendence, after the execution of the "Distribution, License and Supply Agreement", the parties' activities remained independent, and, therefore, this agreement should be classified as a mere "distribution agreement", in which an additional distributor is added to the distribution channel of one of the parties.

On the other hand, in the analysis of the Formal Consultation No. 08700.008081/2016-86, involving a "Vessel Share Agreement" ("VSA") and in which the parties should share cargo space in their ships, CADE's Tribunal considered that such agreement should, indeed, be treated as a "common enterprise". In the analysis of the VSA, CADE's Commissioner, João Paulo de Resende, verified that the parties should adopt some joint decisions related to "(i) number of ships that must be provided by each ship-owner and, therefore, their respective space in each travel; (ii) minimal requirements of the ships to be used in the route; (iii) harbors that will be used in the route, travel time and possible changes of schedule; (iv) rules to the temporary withdrawal of ships for maintenance and repairs; and (v) terminals to be used in each harbor, although each ship-owner establishes, initially, individual agreements". According to the Commissioner, the price charged for the maritime cargo service would continue to be defined independently by the involved parties. Based on such explanation, it is possible to infer that a "common enterprise" is verified whenever there are "joint decisions" or "joint control" over the economic activity subject of the VSA.

In light of this, we believe that there are still some grey zones that should be explored by the legal practitioners and CADE's representatives in future "associative agreement" cases.

What should be considered an "economic activity" under Resolution CADE No. 17?

"Economic activity" is defined as an "acquisition or supply of goods or services on the relevant market, even if no profit is aimed, whenever the activity subject of the agreement can, in theory, be profitably explored by a private undertaking".

What should be considered "risks and results sharing" under Resolution CADE No. 17?

The concept of "risks and results sharing" not defined under the Brazilian Antirust Law, Resolution CADE No. 17, or any antitrust

provisions or regulations. Therefore, this term should be analyzed on a case-by-case basis until there is consensus by CADE.

For instance, in the analysis of the aforementioned Formal Query No 8700.008081/2016-86, the Commissioner João Paulo Resende considered that should be considered "risks and results sharing", the VSA's clauses that established "sharing of common costs", "delay costs", "force majeure and possible damages caused by weather" that set forth that the parties would "jointly define the (relevant or the entire) supply amount and quality on the market".

Moreover, in the analysis of the Concentration Act No. 08700.002529/2017-39, the General Superintendence understood that the absence or prohibition of joint price fixing in the "Codeshare Agreement" would prevent the characterization of "risk and results sharing" between the undertakings. The General Superintendence expressly stressed out that "each signatory party could freely define their prices and would be responsible for their own results".

However, after reviewing the General Superintendence's decisions on cases involving the execution of standard codeshare agreements notified to CADE under Resolution CADE No. 17, it is not clear whether the General Superintendence has or not been considering the indirect "risks and results" shared by the parties in this kind of agreement. It is clear in those agreements, the parties indirectly coordinate their individual and independent decisions regarding, for example, the constitution or not of a new route, the number of seats that they are able to sell, cost's reduction – and, consequently, the reduction of "risks" and the increase of "results" – of their flight operations and tickets' sale; as well as, the maximization of their respective sales and profits/results. Therefore, we understand that, indeed, there is in standard "codeshare agreements", at least, an indirect "risks and results sharing".

CADE has also not been considering in its most recent decisions on this matter that, technically speaking, the term "risk" is, directly and indirectly, included in the term "result", once this last one comprises the sum of all revenues and costs, which have a close relationship with the economic concept of "risk".

WHICH INFORMATION AND DOCUMENTS MUST BE SUBMITTED?

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According to the Article 88 of Law No. 12,529/11, every act of economic concentration in which one of the involved parties of the correspondent transaction presented total annual gross revenue or business volume equivalent or superior to BRL 750 million in the previous year in Brazil, and at least one of the other involved parties registered total annual gross revenue or business volume equivalent or superior to BRL 75 million in the previous year as well in the country, shall be submitted to CADE for previous approval.[1]

Such approval is preceded by CADE's analysis of the acts of economic concentration, whose parameter is the preservation of the competition among Brazilian agents, as well as the maintenance of the diversity and quality of the products and services provided to Brazilian customers.

In order to comply with its functions as the Brazilian competition guardian, CADE must be provided with reasonable information regarding the operation, so it can assess and anticipate the competition risks that may arise from it. In this sense, Resolution CADE No. 2/2012, which regulates the notification of acts of economic concentration to CADE, establishes that such notification shall be done through two different procedures: the ordinary and the summary.

Although the latter is a much simpler and faster procedure, applicable for transactions with little chance to harm competition, both procedures include the submission of various documents and a great

[1] These values were updated by Interministerial Ordinance No. 994/2012.

quantity of information regarding the operation and even the involved parties. Most of the information provided to CADE is disclosed to public access. Only some sensitive information is treated as confidential, such as, for example, the value of the transaction, the payment procedure and the revenue of the involved parties.

Therefore, parties shall be aware that, due to the requirements contained in Resolution CADE No. 2/2012, some important information concerning the operation and themselves will be disclosed. In this context, this paper aims to describe which information and documents must be submitted to that agency.

Information regarding the involved parties

Besides some basic information – as their General Taxpayers' Registry, address, website, telephone number and representatives –, the parties shall inform their economic groups and provide a list of all its members, together with the relevant corporate organization charts and the economic activities performed by each of the members.

Additionally, they must provide CADE with the gross revenues of their economic groups, yet such information may be treated confidential. The gross revenues earned with each economic activity performed by the involved parties shall also be informed. Although there is no requirement to disclose the gross revenues of the other members of the economic groups, the economic activities of all of them shall also be disclosed.

Furthermore, all the transactions executed in the previous five years by any member of the parties' economic groups must be informed to CADE.

Finally, to what regards information about the parties, it is necessary to provide CADE with two additional lists: (i) one with all the companies that perform economic activities in Brazilian territory related (horizontally or vertically) to the one concerning the operation in which at least one of the members of the parties' economic members holds 10% or more of its share or voting capital, as well as the corporate

organization chart of the company; and (ii) other with the members of the management of the parties' economic groups' companies or of the companies mentioned in item (i) that are likewise members of the management or the supervision of any other company that perform the same economic activities.

Information related to the transaction

After disclosing some information regarding themselves, the parties must inform CADE about specific aspects of the transaction. In this sense, the transaction must be briefly described with specific details required by the Resolution CADE No. 2/2012, such as (i) its form (e.g., merger, company acquisition or control acquisition); (ii) if it involves the totality or just some part of the parties' economic activities; (iii) the financial value of the transaction and its payment methods; (iv) if the operation includes assets acquisition, a list of all the assets, tangible of intangible; (v) if the operation was or will be submitted to the analysis of other countries; and (vi) if it must be approved by other Brazilian of foreign regulatory agency (other than CADE). Such description must demonstrate how it will affect the company which is being sold. For this purpose, the parties shall demonstrate, with graphics, charts or diagrams, the corporate structure of the relevant company before and after the operation.

Moreover, an economic and/or strategic justification of the operation must be provided to CADE. The parties shall explain, for instance, the objective of the buyer with the company's acquisition and how it would improve its performance.

Lastly, CADE must be informed if the operation contemplates non-competition or exclusivity clauses, or any other clauses that may, in anyway, narrow competition. In case such answer is positive, the text of the clauses and their location in the documents of the transaction, as well as their economic justification, must be presented.

Concerning this information, confidential treatment must be given exclusively to (i) the financial value of the transaction; (ii) its

payment method; and (iii) the clauses described in the previous paragraph. The rest of the operation's description will be available for public access.

Documents of the transaction

The documents drafted and signed due to the transaction must be presented to CADE. A copy of the final version (or at least the most recent one) of all the agreements settled to the execution of the operation must be submitted to CADE, as well as their relevant attachments. If existent, copies of non-competition and shareholders' agreements, along with a list of all the other documents created, shall also be presented. The agreements settled to the execution of the transaction may be kept confidential.

Copies of the most recent audited financial statements and/or annual financial reports of the parties and their economic group must be submitted to CADE as well.

In cases where the proceeding follows the ordinary procedure, in addition to the abovementioned documentation, the parties shall provide copies of any studies and presentations relating to the transaction that have been submitted to the management of the parties or other persons in charge of the assessment of the transaction, related to competitively relevant issues. CADE shall be provided, for example, with any documents related to the competitive behavior of the parties and their competitors.

Information regarding the parties' products and/or services

The parties involved in the transaction must inform and describe all their lines of commercialized products and/or provided services in Brazil. The same information must be given concerning the other companies of their economic groups. Based on this information, the parties shall identify all the lines of commercialized products and/or provided services in which there could be overlap, specifying all the geographic areas reached and attended by each of the companies that

offer these lines of products and/or services. And shall define the relevant market of the operation under the dimensions of product and territory.

Information regarding the relevant market's supply structure

Some additional data concerning the supply structure of the relevant market must be provided to CADE, such as (i) the total dimension of the market, considering the gross revenue presented by its agents and the volume of sales in the previous fiscal year; (ii) an estimative of the relevant market share of each of the involved parties; (iii) an estimative of the market shares of all the parties' competitors who holds more than 5% of the mentioned share; and (iv) the trade associations to which the parties are associated regarding the relevant market.

Additional information requested in the ordinary procedure

If the operation is to be analyzed through the ordinary procedure, some extra information shall be provided to CADE, which includes:

(i) the description of the relevant market's demand structure (the parties shall, for example, (a) list their five biggest clients and the percentage they represent in the parties' gross revenue; (b) inform the level of concentration of the clients in the relevant market; (c) describe some supply agreements with their most important clients, providing a copy of some examples; (d) classify some characteristic elements of the market, such as brand loyalty, network effects, etc.);
(ii) an analysis of monopsony power (the parties shall, among other data, (a) inform their biggest suppliers and such suppliers' alternative clients; (b) describe and provide copies of some supply agreements with their most important suppliers, providing a copy of some examples; (c) inform alternative customers and channels available to suppliers on each relevant market; etc.);

(iii) an analysis of the conditions of entry and competition in the relevant market (the parties must inform, for example, (a) legal or regulatory entry barriers, (b) barriers arising from trademarks, know-how or patents, informing if the parties are owners, licensors or licensees of industrial property rights; (c) detailed analysis of the relevant market, including estimates of total market production, idle capacity, etc.);
(iv) an analysis of the coordinated exercise of power; and
(v) a counterfactual analysis, through the description of a likely future composition of the relevant market in the scenario the operation does not occur, for any reason.

Conclusion

In light of the above stated, before settling an agreement regarding an operation that must be previously approved by CADE, it is important that the parties be aware about the obligation of presenting a sum of information concerning the transaction and even their businesses. In addition, the parties must be aware that, except for certain sensitive information, almost every material provided to CADE will be disclosed to the public, what may put in risk both the transaction and the parties' businesses.

WHAT IS AN ECONOMIC GROUP FOR MERGER ANALYSIS?

Pedro Henrique Araújo Santiago[1]

When interpreting the legal provisions for merger control, CADE considers "the entities directly involved (...) and their respective economic groups" as the parties of a transaction that effectively concentrate market power. This is set out in Article 4 of Resolution CADE No. 2/2012. Moreover, in practice, CADE also considers competing companies that are part of the same economic group as one single entity.[2]

1. Definition of economic groups for turnover calculation

Resolution CADE No. 2/2012 gives a generic definition of economic group for turnover calculation (Article 4, Paragraph 1), followed by a special definition for turnover calculation in the case of investment funds. This is important as the Brazilian Antitrust Law (Law No. 12.529/2011) stipulates that the duty of submission of "concentration acts" depends on the "annual gross sales or total turnover in the country" of the *groups* involved in the transaction (Article 88, I and II).

[1] The views expressed here are solely those of the author in his private capacity and do not in any way represent the views of CADE or any other entity of the Brazilian government.

[2] Although not always clear in the merger decisions themselves, this practice is visible throughout the investigation procedures conducted by CADE. The Internal Guidebook of CADE's General Superintendence for Concentration Acts Notified under the Ordinary Procedural Rules, for example, contains the following notice in the templates of questionnaires sent to third-parties during the investigation: "If your company belongs to an economic group, as described by Resolution CADE No. 2, this questionnaire must be answered on behalf of the whole group (...)".

It is important to notice that the definition of the economic group must consider the facts at the time of submission of the merger for approval by CADE. In Concentration Act No. 08700.000478/2016-20 (HNA/Azul), CADE considered that one of the groups did not have enough turnover for the existence of a duty of submission of the transaction because the company that would make it exceed the minimum turnover threshold had only recently been acquired in a transaction that was still pending approval elsewhere in the world.

1.1 Economic groups in general

The current text of Article 4, Paragraph 1 of Resolution CADE No. 2/2012 defines economic groups as: "I: The companies which are under internal or external common control; and II: The companies in which any of the companies of subparagraph I is the owner (directly or indirectly) of at least 20% of the voting or share capital".

Item I explains that the companies which are part of the same group are those under the same (*ie*, "common"[3]) "internal or external (...) control".

Firstly, it is important to notice that item I refers to indefinite controlling entities and controlled companies. The controlling entities do not have to be proper corporate companies. In Concentration Act No. 08700.001525/2013-18 (Yasuda/Marítima), Marítima Seguros S.A. was considered as part of the same economic group as its shareholders - all of them natural persons. It is worth noting that none of the shareholders held more than 20% of the company's stock - nevertheless, they were all connected by a shareholders' agreement.

On the other hand, there is no clear concept for "companies" in item I, *ie*, the controlled entities of the economic group.[4]

[3] The matter of common control was discussed in Concentration Act No. 08700.009881/2012-91 (ABN-AMRO/CR2).

[4] In Concentration Act No. 08700.001345/2018-32 (JPSP/Parthica), CADE considered "company" in Article 90, II of the Brazilian Antitrust Law as "the economic activity organized for the production or movement of goods or services",

Secondly, a distinction must be made between internal and external control. This was indirectly made in Concentration Act No. 08700.006238/2015-58 (PwC Contadores Públicos/Strategy& Brasil). The decision from the General Superintendence (GS), which recognized the existence of external control between the merging companies, quoted a decision in another merger (Concentration Act No. 08012.006706/2012-08 - Monsanto/Nidera[5]), where it was said that

> *[...] it is possible that corporate domination may be exercised "ab extra", with no participation from one company in the capital of another and with no need that the representative of the dominant company has a seat in any administrative body of the subordinate company. That's the so-called phenomenon of external control.*[6]

Therefore, the external control would be the dominance over a company on non-corporate basis, *ie*, on reasons unrelated to the corporate structure of the companies themselves.[7] Conversely, the

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the same definition of Article 966 of the Brazilian Civil Code (our translation). In its analysis, CADE only evaluated the activities of the legal entities at hand and did not consider the application of Article 982, Sole Paragraph of the Civil Code, which provides for the existence of a "company" when the entity in question is an "anonymous society" (a specific form of a limited company), as it was the case in the merger. It is not clear if CADE's concept could be applied in interpretation of Article 4, Paragraph 1, of Resolution CADE No. 2/2012.

[5] The number of this merger in the PwC Contadores Públicos/Strategy& Brasil case is incorrect.

[6] This quote is in itself a direct quotation of COMPRATO, Fabio Konder. Grupo societário fundado em controle contratual e abuso de poder do controlador. In: _____. **Direito Empresarial**. São Paulo: Saraiva, 1995, p. 270-291, our translation.

[7] In the PwC Contadores Públicos/Strategy& Brasil case, external control was recognized on basis of: "(...) dependency, for the development of the business, between the member company of the PwC network and the internal bodies established by PwCIL, being it compulsory that each member company comply with the standards and the policies established inside the network, with a system that monitors the compliance of these duties by the Leading Team [of the network]. There is even a requirement of approval by the Leading Team of certain acts

internal control could be related to influence over the subordinated company's internal structures (such as its administrative bodies).

On the other hand, internal control (control of the internal corporate bodies of a company) was analyzed mostly in cases which dealt with the existence of "sole control" of a company.[8-9] Sole control is not analyzed in the definition of the economic group for turnover control, but in the assessment of existence of the duty of submission of the transaction to CADE, as stock acquisitions made by the "sole controller" of a company must not be submitted for approval (Article 9, Sole Paragraph, of Resolution CADE No. 2/2012).

In these cases, many aspects of the corporate structure of a company were analyzed, such as: voting rights, right to appoint officials to corporate boards and the responsibilities of the officials, characteristics of preferred and ordinary shares, among others. These aspects are mostly found by CADE among the provisions of the parties' by-laws and existing shareholders' agreements. "Sole control" was defined as the "power to establish the directives of the business and manage the social activities, besides guiding the operation of the governing and decision-making bodies in regards to the matters of prominent competitive nature" of the controlled company independently of other existing partners.[10] "Power to establish the directives of the business and manage the social activities" is a possible indication of what CADE considers to be the internal control of a company. "Matters of

practiced by the member firms, such as structural changes or decisions that might impact the performance, quality, economical interests, or reputation of the local business and, therefore, of the network".

[8] Concentration Acts No. 08700.007492/2016-54 (Multiplan/Carvalho Hosken), 08700.010317/2015-63 (Cielo/Interprint), 08700.012339/2015-68 (Vale/JFE), 08700.000301/2015-42 (Sodrugestvo/Carol), among others.

[9] Particularly in Concentration Act No. 08700.005524/2016-87 (HNA/Gategroup), control of the internal corporate bodies of a company was analyzed for the purpose of Article 4 of Resolution CADE No. 2/2012.

[10] *See* Concentration Acts No. 08700.007492/2016-54 (Multiplan/Carvalho Hosken) and 08700.010317/2015-63 (Cielo/Interprint).

prominent competitive nature" excludes what CADE considers to be rights related simply to "investment protection."[11]

After the definition of the companies "under internal or external common control", a final addition is made to the economic group. According to item II of Article 4, Paragraph 1, of Resolution CADE No. 2/2012, the companies in which all the already identified item I companies own, either directly or indirectly, "at least 20% of the voting or share capital" are also part of the economic group. There is no relevant controversy regarding the interpretation of this second item, as the ownership of shares is a clear application of corporate law.[12]

Article 4, Paragraph 1 does not limit the economic group to a relation between controlled companies and one single controller. Item II, for example, considers only 20% of capital stock as indicative of participation in the same economic group, which might put a company and its three shareholders with stakes of 20%, 20% and 60% all in the same group. Because of this, one company may be considered as part of more than one economic group - both the groups of the seller firms and the acquiring firms, for example.[13] This was firstly made clear in the

[11] In the Vale/JFE case, CADE recognized most of the rights given by JFE's preferred shares as "investment protection". These rights were voting rights on: changes in the corporate objective; modification in the rights attributed to the preferred shares themselves; creation of preferred shares; issuance of debentures convertible into shares; changes in the preferences, advantages and conditions for the redemption of shares; changes in the policy of destination of the business results; merger, division, extinction, declaration of bankruptcy, dissolution or liquidation of the company; changes of the by-laws regarding all these previous topics.

[12] *See*, for example, Concentration Acts No. 08700.000378/2018-65 (Cielo/CBSS), 08700.006429/2015-10 (EDPR Brasil/EDP Brasil/EDP Renováveis), 08700.009472/2014-56 (Neoenergia/Iberdrola), 08700.004594/2014-56 (SMSA/LOP/Santa Cruz/Boa Vista), 08700.000258/2013-53 (Singida/Data Solutions).

[13] In Concentration Acts No. 08700.000258/2013-53 (Singida/Data Solutions) and 08700.006518/2016-47 (QGOG Participações/QGOG), CADE interpreted Article 88, II of the Brazilian Antitrust Law to provide for that a merger must involve at least two different economic groups that exceed the minimum turnover thresholds.

aforementioned Concentration Act No. 08700.001525/2013-18 (Yasuda/Marítima).

1.2 Investment funds

Article 4, Paragraph 2, of Resolution CADE No. 2/2012 extends the economic group of investment funds even further.

Investment funds are a "type of collective investment" regulated by the Brazilian authority on securities markets.[14] CADE, nevertheless, may not follow the definitions from the securities regulator. In Concentration Act No. 08700.001595/2015-20 (Bain Capital/TIFS), the fund manager established an "alternate investment vehicle" ("AVI"), a separate entity different from the investment fund concerned (Fund XI), but which could invest in substitution of the fund, even though the fund does not invest directly in it.[15] However, CADE analyzed the AVI under the same definition adopted for the assessment of investment funds, ultimately putting the fund in a different economic group because the common investors in Fund XI and in the AVI did not reach the threshold that puts a fund investor in the same economic group as the fund itself.

This threshold makes the first part of the current definition of economic group for investment funds under Resolution CADE No. 2/2012: the investors in the fund that hold 50% or more of the fund's shares (either directly or indirectly, either individually or through a shareholders' agreement).

The second part of the definition includes, in the economic group: (i) the companies controlled by the investment fund; and (ii) the companies in which the fund owns, either directly or indirectly, "at least 20% of the voting or share capital". Resolution CADE No. 2/2012 differentiates (i) and (ii), and it would be possible to consider that (i)

[14] *See* COMISSÃO DE VALORES MOBILIÁRIOS. **Fundos de Investimento**, [n. d.]. Retrieved from <http://www.cvm.gov.br/menu/regulados/fundos/consultas/fundos.html>. Accessed on 4 Apr. 2018.

[15] This information was not shown in CADE's decision, but is found in the case filing form.

actually has the same meaning as "internal or external common control" in item I of the definition for economic groups in general (Article 4, Paragraph 1).[16]

2. Definition of economic groups in other parts of merger control

Merger control in CADE has three steps: (i) identification of the merger in the concept of "concentration act" of Article 90 of the Brazilian Antitrust Law and CADE's regulations;[17] (ii) verification of fulfillment of the minimum turnover thresholds of the concerning economic groups (Article 88, I and II); and (iii) competitive analysis of the effects of the merger.

Article 4 of Resolution CADE No. 2/2012 is clear in that its definition of the economic group is considered only for the second step above. In fact, the mandatory merger filing form (Appendixes I and II of Resolution CADE No. 2/2012) stipulates that the parties must consider an even wider economic group upon the filling if there is an investment fund involved.[18]

Albeit particular decisions might arise,[19] CADE adopts the definitions of Article 4 throughout all merger analysis most of the

[16] Not many cases deal with the structure of an investment fund's economic group. Some examples are Concentration Acts No. 08700.009945/2014-15 (CAX/CEOF/AXT) and 08700.005850/2016-94 (Gotemburgo/Grupo Fortbras).

[17] The main regulations are: Article 9 to 11 of Resolution CADE No. 2/2012, which interpret the meaning in the Brazilian Antirtust Law of stock share acquisition (Article 90, II); and Resolution CADE No. 17/2016, which interprets the meaning of "associative contracts" (Article 90, IV).

[18] According to topic II.5.2 of the filing form, the fund manager; the funds with the same manager, other firms controlled by the manager, and firms in which the manager has 20% or more of the voting or share capital (either directly or indirectly); and the economic groups of the shareholders which hold *20%* (not 50%) or more of the fund's shares (either directly or indirectly), all are part of the same economic group, in addition to the entities already defined in the definition for turnover calculation purpose.

[19] In Merger No. 08700.012564/2015-02 (Sirama/VC), CADE considered the transaction to result in a change of control over the acquired firm from shared

times,[20] unless if a merger concerns investment funds, in which case CADE might require information based on topic II.5.2 of Appendixes I and II of Resolution CADE No. 2/2012.[21] CADE has also broadened the group of a company to include not only firms in which the concerning companies hold at least 20% of stock, but also those in which they hold at least 10% of stock,[22] information requested in topic II.10 of the Appendixes.

control to sole control, even though only one shareholder would hold more than 20% of the total stock of the acquired company and a control over the company could only be recognized if the buyers were considered in aggregate - all with 77,73% of the total stock. This was important for the first step defined above. CADE based its decision in statements from the parties, which highlighted the family relationship between the many buyers, among other particularities about the company's management. In Merger No. 08700.007553/2016-83 (JBJ/Mataboi), CADE's Tribunal considered that "substantially exacerbated" "incentives for collusion resulting from the family relationship between JBJ's president and JBS's shareholders and, particularly, JBS's president" meant JBJ and JBS could be part of the same economic group. This was important for the third step defined above. At the same time, CADE recognized that Article 4, § 1 did not apply to include both firms in the same group, with no further explanation about the possibility of the case in question be the application of the "external control" concept mentioned above. After appeal to the Federal Regional Court for the First Circuit, the companies had judicial recognition that the evidence used by CADE was not enough to include them in the same economic group. This decision is not final.

[20] This is seen in the decisions of the same cases mentioned about the lack of controversy in the Article 4, § 1, II provision for 20% of stock ownership to be part of the same economic group.

[21] See, for example, questionnaires sent in Mergers No. 08700.012592/2015-11 (SPE Kinea/Bucaramanga), 08700.007315/2015-97 (LP Group/LeasePlan/GMH), 08700.005672/2015-11 (FIPS Vetorial/ALL/TPI), and 08700.003830/2015-06 (FII Cenesp/CCP Cerejeira).

[22] This was done in Merger No. 08700.000658/2014-40 (Minerva / BRF), in which "joint control" was recognized based on 16.3% of stock share together with rights to appoint board members and a shareholders' agreements for joint deliberation on certain matters.

WHAT PARTIES SHOULD AND SHOULD NOT DO WHEN FILING TRANSACTIONS ELIGIBLE TO THE FAST TRACK PROCEDURE?

Mário Sérgio Rocha Gordilho Jr.[1]

Before answering this question, it is worth mentioning the issues that raise more doubts by the GS CADE's General Superintendence (SG in its acronym in Portuguese) and have been requiring more amendments to filings recently. In 2017, these issues were: (i) market share of alternative scenarios of the relevant market (about 50% of cases which required amendments); (ii) list of the main customers (28%); (iii) data related to vertical integration (or its reinforcement – see explanation below) (28%), and (iv) doubts about the definition of the relevant market (17%).[2]

In summary, the issue that most often raises doubts in the fast-track procedure is undoubtedly the relevant market definition and the market share of the parties in all the possible relevant market scenarios, which are not presented by them. In order to avoid this kind of uncertainty, the parties should focus on the following main points when notifying fast track-mergers: (i) eliminate or mitigate asymmetries of information regarding the markets affected by the transaction; (ii) clearly define the economic groups involved in the transaction; (iii) present internal documentation supporting the hypothesis of approval defended by them; (iv) present the surveys that support the market share

[1] This article represents the opinions of the author. It is not meant to represent the position or opinions of CADE or its Members, nor the official position of any staff members. Any errors are the fault of the author.

[2] In some cases, the GS required the amendment to two or more issues at the same information request.

calculations and; (v) provide a complete economic justification for the transaction.

One of the main challenges in the fast-track mergers is the asymmetry of information between the parties (which are the greatest experts in their markets), the lawyers and the antitrust authority. This is particularly relevant because the lawyer who serves as a bridge between the parties and the authority is not a market expert and, hence, suffers from the inherent asymmetries of information. The same applies to the antitrust authority. Thus, many do's and don'ts can be highlighted here.

In the definition of the relevant market, the parties must not only provide technical information on their markets, but also focus on the antitrust aspects concerning the relevant market definition. Focusing only on technical issues may even increase existing asymmetries of information between the parties and the authority. In this case, the parties should treat technical issues as ancillary to the logic employed in a competitive analysis. The definition of the relevant market must be focused on the demand side and, subsidiarily, on the supply side, as provided by the Brazilian Guidelines for the analysis of Horizontal Mergers.

Concerning this issue, the parties should discuss all the aspects related to the relevant markets affected by the transaction. They could start by explaining: (i) the products or services they are offering; (ii) how these products or services are traded in the market; (iii) who are their current and potential customers; (iv) what are the closest substitutes for their products or services (and why), etc. The parties should complement this explanation with any other information that could help the authority to understand better the reasons that led them to define the relevant market regarding the scope of the hypothesis presented in the notification of the transaction requesting the approval under the fast track procedure.

Aiming at a better presentation of the relevant market definition, another simple and efficient way to mitigate asymmetries of information is to illustrate the hypothesis presented with actual examples. For example, the parties can demonstrate, with its internal documents (e.g.,

business reports), that their competitors in the relevant market have been attracting their customers in recent months; their customers have been migrating to alternative products because of a more aggressive competitor's strategy (e.g., marketing reports). From the supply side perspective, the parties can provide examples of competitors who have changed their production processes to enter the relevant market in recent years, attracted by higher profits, without incurring significant costs and in a reasonable time.

In addition, the parties should illustrate their hypotheses, avoiding focusing only on a theoretical discussion. They should provide their filings supported by their internal documents, such as business and marketing reports (among others), preferably prepared before the notified transaction, or even external market surveys that support their approval hypothesis under the fast track procedure. Even though it is not required by Annex II to Resolution CADE No. 02/2012 (short form), item IV.2 of the form for standard merger notifications (Annex I) may be useful in a number of cases submitted under the fast-track procedure. This is a practice the parties must improve when filing a merger under the fast track procedure in Brazil.

Similarly, the parties should use both national and international case law regarding the relevant market under assessment in order to mitigate information asymmetry. Such practice is highly recommended. Nevertheless, when compiling information on case law, the parties should avoid confusing individual decisions with jurisprudence, since there may have been conflicting decisions involving the same relevant market, or even decisions based on different relevant market scenarios designed to a specific situation. In such cases, it is worth to point out such apparent conflicts by weighing their differences regarding the approval hypothesis advocated by the parties, as well as all the relevant market scenarios already assessed by the authority in similar transactions, with due contextualization.

Still regarding the relevant market definition, another efficient way of dealing with asymmetries of information in notifications under

the fast-track procedure (which may even be true for notifications not eligible for the fast-track procedure) is to provide all possible relevant market scenarios, both from the product and geographic standpoint. That strategy is highly recommended and has been widely used especially in decisions under the fast-track procedure. However, this issue is still the one that receives most of amendments by GS, as seen above. It is worth noting that Resolution CADE No. 02/2012 emphasizes that the hypothesis advocated by the parties for a transaction approval under the fast-track procedure should be clear, as it does not leave doubts regarding its simplicity in competition aspects. Hence, the use of relevant market scenarios, in addition to mitigating possible information asymmetries, increases the likelihood of GS assessing the transaction under the fast-track procedure.

Obviously, the relevant market scenarios provided by the parties must be followed by market share estimates. The sources (surveys/market studies etc.) used for these estimates should always be provided by the parties, with due explanation of the calculation methodology employed. The parties should explain the calculation methodology used to estimate the market shares in a way that enables the GS to easily replicate these calculations. When submitting market share estimates, whenever possible, the parties should include these estimates for all competitors with more than 5% of participation in all relevant market scenarios provided.

Another aspect worth mentioning is the definition of the economic groups involved in a transaction, following the provisions of Resolution CADE No. 02/2012. In transactions involving acquisitions of companies or productive assets, the focus should be on the acquiring group. In all other cases, the parties must clearly define all the involved economic groups. It should start from the parties directly involved in the transaction, including all their shareholders and subsidiaries, considering those whose equity interest exceeds 20% of the total or voting capital. In transactions involving investment funds, the parties must follow the rule inserted in item II.5.2 of the forms (short and standard) in Resolution CADE No. 02/2012 Annexes II and I, respectively. The presentation of

the economic groups should be done in the most didactic way as possible, indicating separately all the members of the economic group (shareholders and subsidiaries) and respective equity interest, as well as the specific organizational charts of each group. Even in transactions where the parties disagree with CADE's rules for the formation of economic groups, they must strictly follow them, highlighting the reasons for their disagreements. In addition, the parties must submit all relevant internal documents to the GS, especially in cases where the parties' corporate governance is essential for the analysis of the effects of the notified transaction.

Regarding the description of the transaction, it should be as objective and clear as possible, focusing on the competitively relevant issues of the parties' agreement. In operations involving the acquisition of equity interest, it is advisable for the parties to provide an organization chart of the target company before and after the transaction.

With respect to item III.5 of the notification forms, the parties should present the economic and/or strategic justification of the transaction as clearly as possible, preferably supported by their internal documents, to help mitigating possible competitive concerns with the transaction. In general, providing a good rationale for the operation may help the authority to understand the reasons that led the parties to close the deal. On the other hand, the presentation of very general justifications may lead the authority to suspect the real reasons for the closing of the transaction, which may in some cases even lead the GS to withdraw the transaction from the fast-track procedure.

Another issue that has been the subject of several amendments is the non-presentation of a list of the parties' main customers in Brazil and its contacts. This information request, although not included in the short form, in many cases helps the authority to mitigate possible competitive concerns of operations notified under the fast-track procedure. Especially in cases where the parties need to demonstrate that there is neither overlap nor vertical integration between them, but their markets are not so easy to understand. This is the case, for example, of the

chemical industry, among others, where the understanding of related markets is not always trivial for the competition authority. The simple indication that the parties have as main customers industries from different sectors of the economy or different sizes can help the authority to mitigate its doubts about the real impact of the transaction under analysis. Therefore, in such cases, it is highly recommended that the parties provide lists with their main customers in Brazil (with complete contact data), preferably indicating their representativeness in the parties' revenues (in the year prior to the transaction) regarding the affected relevant markets.

Finally, there are two topics to be highlighted in cases notified under the fast-track procedure to CADE: (i) transactions where the parties have a combined share of more than 20% (and less than 50%) in the affected relevant market, but the HHI variation is low (less than 200 points –Resolution CADE No. 02/2012, Article 8, V) and; (ii) transactions that result in the transfer of shared control to sole control of the acquired company by the acquiring economic group (for example, a breakup of a joint venture, where one party acquires the participation of the other).

Concerning the first, although Resolution CADE No. 02/2012 recognizes it as one of the cases eligible for the fast-track procedure, the GS uses this hypothesis very sparingly (in 2017, for example, only 3.5% of all fast track mergers were decided using this hypothesis). This is because such operations may involve transactions (and companies) with special characteristics. For example, where target companies may be considered as mavericks in their markets, presenting disruptive strategies, or involving a potential or recent entrant in the market. Other examples of such transactions are those that can increase the portfolio power of the acquiring economic group or involve a two-sided market with network externalities. CADE's Guidelines for the analysis of Horizontal Mergers makes it clear all these issues regarding the low HHI variation. In short, the parties should use this fast-track procedure hypothesis only in some specific transactions, where there are other considerations that may clearly indicate the transaction harmlessness to

the affected relevant markets. Hence, although accepted by the GS as a fast-track procedure hypothesis, the parties must consider such transactions with a low HHI variation with caution and, if they choose to notify them under the fast-track procedure, any doubts should be thoroughly clarified by the parties.

Finally, Resolution CADE No. 02/2012 governs the acquisitions of equity interest that are subject to mandatory notification. Some of these transactions involve the acquisition of equity interest in a particular company by one of its shareholders. Except for the acquisitions made by the sole controller, which are exempt from notification in Brazil, all others are subject to notification, even if carried out by a shareholder who already has shared control of the target company. Although they may be usually simpler to assess than other mergers, the GS analyses them to assess whether the increase in the shareholding of a company by one of its controllers may lead to a reinforcement of any horizontal overlap or vertical integration in the affected relevant market. This assessment focus on the possible changes in the economic incentives for a firm to start abusing its dominant position in the relevant market after the transaction. Thus, the parties should notify such transactions with the same care of the others, regardless of the apparent absence of competitive effects. Many amendments to notifications involving such a situation have already occurred since Law No. 12,529/2011 came into force in 2012.

HOW CAN THIRD PARTIES PARTICIPATE IN AND CONTRIBUTE TO MERGER REVIEW CASES?

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Introduction

The Brazilian Antitrust Law and the regulations issued by CADE set out certain rules which govern the participation of third parties in merger review cases. Merger review procedures in Brazil are publicized and most of the documents and information submitted by the transaction parties and the analysis carried out by CADE are accessible to the public in general, except for certain confidential information and documents which may be considered as commercially sensitive and that are restricted to the transaction parties and to CADE. Under applicable regulations, CADE must publish a notice in the Federal Official Gazette to disclose the transaction to the market, indicating the name of the parties involved, the type of transaction and the affected markets. A public version of the merger notification form is made available in CADE's website to allow interested third parties to better understand the details of the transaction and evaluate if and how the transaction may impact competition. This is the starting point for the discussion of third party participation and contribution to the merger review analysis.

The Brazilian merger control system was designed to facilitate the access to information to third parties and to encourage them to present their concerns and contributions to the competition assessment of transactions. CADE generally welcomes contributions of third parties with legitimate interest to intervene in the cases and considers this type of contribution valuable in identifying potential competition concerns that a given transaction may present, to double-check the data provided

by the applicants and to obtain market information that could that to that presented by the applicants.

Who may request to be admitted as a third interested party in a merger review process?

Any individual or legal entity (including companies, associations, unions or governmental agencies or authorities) that may have rights affected by a certain transaction is eligible to request to be admitted as a third interested party in a merger review case. Third interested parties are required to demonstrate at least some minimal legitimate right or interest that may be affected by the transaction. The fact that a third party has activities in the same relevant markets (i.e. a competitor) or in vertically related markets (i.e. clients or supplier) is usually considered as sufficient by CADE to be admitted to intervene in a case.

Moment and procedure for third-party participation

The procedure to intervene in merger review cases is governed by article 50 of the Brazilian Antitrust Law and by CADE's Internal Regulations (Resolution CADE No. 20/2017). CADE's case law also plays a role in developing and shaping some aspects on this matter and provides useful guidance on the rights and limits for the participation of third parties in merger cases.

CADE's Internal Regulations establish a 15-day term for third parties to request CADE to be admitted in the case. This term is counted as of the date of publication of the notice to disclose the transaction in the Federal Official Gazette. If a third party fails to present its admission request to CADE within this 15-day period, it may still present its comments and contribute with the competition assessment of the case, but it will not have the same rights as a third party who is formally admitted as such. In particular, a third party who was not formally admitted will not have the right to filed an appeal against the decision of the General Superintendence of CADE to approve a transaction.

As a rule, third parties must file their requests with the General Superintendence, which is the body in charge of reviewing and clearing transactions eligible for the fast-track procedure and for challenging complex cases. However, in the cases in which the General Superintendence's decision is rendered before the expiration of the 15-day term afore-mentioned, third parties may timely submit their requests for intervention directly to the President of CADE's Tribunal.[1]

The reason for this 15-day term is to encourage third parties to request their admission in the cases and to contribute with the competition assessment of the transactions from the outset, making their participation more helpful and more efficient and, therefore, minimizing the risk of possible disruptions at a later stage of the process. There has been some debate, however, on whether CADE could establish in its internal regulations this type of time limit, considering that this is not foreseen under the Brazilian Antitrust Law. Despite this limitation, CADE has been open to receive useful contributions from third parties even if they present themselves after this 15-day period.[2]

According to the applicable regulations, in their request for intervention, third parties must present from the outset all information, documents and arguments to prove their allegations. Upon the request of the interested third party, the General Superintendence or the President of the Tribunal, at their discretion, may grant an extension of up to 15

[1] Under Resolution CADE No. 16/2016, the General Superintendence will analyze transactions eligible for the fast-track procedure within 30 days, counted as of the date of the filing or of the amendment of the notification form. In many cases, however, the General Superintendence renders a decision in a shorter period of time, and CADE's Internal Regulations establishes that fast-track transactions may be decided regardless of the expiration of the 15-days period established for third-parties' intervention requests.

[2] Concentration Act No. 08700.006723/2015-2 (TVSBT Canal 4 de São Paulo S.A., Radio e Televisão Record S.A., and TV Ômega Ltda.) and Concentration Act No. 08700.002155/2017-51 (Companhia Ultragaz S.A. and Liquigás Distribuidora S.A.). Concentration Act No. 08700.002398/2017-90 (Hotelaria Accor Brasil S/A, GPCP4-Fundo de Investimento em Participações and L.A. Fundo de Investimento em Participações).

days for the submission of additional information and documents, if necessary, considering the complexity of the case. In any case, CADE is also usually open to receive additional comments and inputs from third parties until a final decision is rendered.

Rights granted exclusively to third interested parties formally admitted by CADE in merger review cases

Third parties that timely submit their requests and that are formally admitted by CADE to intervene in a case have the right of appealing from the decision by the General Superintendence that approves a transaction and also of presenting oral arguments to CADE's Tribunal before it renders its final decision on a case. Formally admitted third parties will also have their names and the name of their counsels included in the decisions issued by CADE that are published in the Federal Official Gazette.

Arguments that may be submitted by third parties in merger review cases

Considering the scope of the merger review procedure and of CADE's jurisdiction to review and approve transactions under the Brazilian Antitrust Law, third interest parties are expected to submit information and arguments that are related to the competition analysis of the transaction. Private conflicts between third parties and the applicants to a transaction that have no relevance for its competition assessment are usually disregard by CADE.

Accuracy of information presented by third parties

The submission of false or misleading information to CADE may subject third parties to fines that may vary from BRL 5 Thousand to BRL 5 Million. Therefore, it is very important that third parties present accurate and complete information to CADE.

Possible benefits that third interested parties could expect from intervening in merger review cases

As indicated, the participation and contribution of third interested parties in merger review cases can be important to help CADE identify competition concerns that may arise from transactions and to double-check the market data and the arguments presented by the parties to the transaction, therefore, reducing the problem of information asymmetry regarding the affected markets.

Third parties may also help CADE build stronger decisions and to design effective remedies to neutralize possible competition concerns. By actively participating as third interested parties in the merger review procedures, competitors, distributors, clients, suppliers or associations representing these entities may contribute to avoid the approval of transactions that could harm competition or at least mitigate their anticompetitive effects. As a positive side effect, this kind of intervention may also result in remedies and consequently present opportunities for acquisitions of companies or assets that may be divested as a condition for the approval of the transaction by other parties.

The success of an intervention by a third interested party depends mostly on its timing and on the quality and credibility of the arguments presented. For this reason, companies should be attentive to possible transactions that may affect the markets in which they operate and to be prepared to make a decision on whether they could benefit from intervening as a third interested party.

GUN JUMPING: WHAT MAY BE SEEN AS PRIOR CONSUMMATION OF CONCENTRATION ACTS?

Cristianne Saccab Zarzur
Marcos Pajolla Garrido

- *Does the Brazilian merger control regime impose a standstill obligation? Has CADE issued internal or external guidelines or regulations detailing the scope of such standstill obligation?*

Law No. 12,529/11[1] (the "Brazilian Antitrust Law") provides for a standstill obligation[2], under which a reportable transaction cannot be implemented prior to CADE's clearance, on pain of breaching the law and incurring in the so-called gun jumping violation.

In May 2015, after ruling a few cases concerning gun jumping practices[3], CADE issued the gun jumping guidelines ("Gun Jumping

[1] An English version of the Brazilian Antitrust Law is available at http://en.cade.gov.br/topics/legislation/laws/law-no-12529-2011-english-version-from-18-05-2012.pdf/view.

[2] In this respect, Article 88, Paragraph 3, of the Brazilian Antitrust Law, as further detailed by Articles 108 and 112, of CADE's Internal Regulations.

[3] CADE's precedents that served as a basis for the Gun Jumping Guidelines involve: Concentration Act No. 08700.008289/2013-52. Notifying Parties: UTC Óleo e Gás S.A. and Aurizônia Petróleo S.A. Settlement agreement approved by the Tribunal on February 5, 2014; Concentration Act No. 08700.008292/2013-76. Notifying Parties: Potióleo S.A. and UTC Óleo e Gás S.A. Settlement agreement approved by the Tribunal on February 5, 2014. Concentration Act No. 08700.002285/2014-41. Notifying Parties: FIAT S.P.A. and Chrysler Group LLC. Settlement agreement approved by the Tribunal on May 14, 2014. Procedure to Investigate Concentration Act No. 08700.007160/2013-27 – Parties: JBS S.A., Tinto Holding Ltda., Unilav Industrial Ltda., Flora Produtos de Higiene e Limpeza Ltda. and Tramonto Alimentos S.A., judged by the Tribunal on August 17, 2016. Concentration Act No. 08700.010394/2014-32. Notifying Parties: Goiás Verde Alimentos Ltda., Brasfrigo Alimentos Ltda. and Brasfrigo S/A. Settlement agreement approved by the Tribunal on April 22, 2015. Concentration Act. No. 08700.000137/2015-73. Notifying Parties: GNL Gemini

Guidelines") aiming at providing greater legal certainty to investigations and introducing best practices to be followed by parties entering into M&A transactions.[4]

In the context of this standstill obligation and given the risk of penalties for gun jumping violations, several questions are posed about the Brazilian current competition law regime; some of which are addressed below.

- *What activities may characterize prior consummation of concentration acts according to the Gun Jumping Guidelines?*

The Gun Jumping Guidelines are mainly divided into three sections. The first section deals with activities that may raise concerns from the standstill obligation perspective. These activities are distributed in three main groups: (i) exchange of sensitive information; (ii) definition of contractual clauses that govern the relationship between the parties in an M&A transaction, and (iii) activities carried out by the parties before and during implementation of the transactions.

As for the first group, the Gun Jumping Guidelines seek to prevent that commercially sensitive information be exchanged between the parties before final clearance by CADE. Such information is defined by the Guidelines as those that may contain specific data about costs; capacity level and plans for expansion; marketing strategies; product pricing (prices and discounts); main customers and suppliers, including contractual terms and conditions; secured discounts; payroll; non-public information about trademarks, patents and research & development; plans for future acquisition; and competitive strategies.

The second group refers to contractual provisions, meaning the

Comercialização e Logística Ltda. and Companhia de Gás de Minas Gerais. Settlement agreement approved by the Tribunal on June 24, 2015.

[4] An English version of the Gun Jumping Guidelines is available at http://www.cade.gov.br/acesso-a-informacao/publicacoes-institucionais/guias_do_Cade/guideline-gun-jumping-september.pdf

content of the rules governing the private relationship between the economic agents before CADE finalizes its assessment. Accordingly, the authorities aim at preventing that the parties cease to continue to act independently in the market before a final decision is issued. Conducts that may lead to gun jumping issues include: full or partial advance payment (except for typical down payments, deposits in escrow accounts, or break-up fees); clauses establishing that the contract effective date precedes its closing (implying interactions between the parties); prior non-compete obligations; clauses providing for influence of one party on the strategic and sensitive business aspects of the other; as well as any clauses establishing activities that cannot be reversed at a later date or whose reversal would require significant expenditures.

Finally, and following that same objective of keeping the parties independent until final clearance is granted, i.e., preventing effective or partial consummation of the transaction, the latter group is defined by the Gun Jumping Guidelines as activities related to the receipt of profits/ear-outs; transfer and/or usufruct of assets; exercise of voting rights or relevant influence; development of joint sale or marketing strategies for products; joint management; integration of sales force; exclusive licensing of intellectual property to the other party; joint development of products; nomination of members for decision-making bodies, and interruption of investments.

Even though one should recognize the valuable efforts of CADE in addressing the standstill obligation and providing for an overall description of activities that may characterize gun jumping, in practice there are several details in the course of a M&A transaction that are not clearly dealt with by the Gun Jumping Guidelines and demand a specific and cautious analysis, on a case-by-case basis. Therefore, it is essential to have an assessment by experts, especially in complex transactions, so as to prevent misleading interpretations.

- *Are there any exceptions to the standstill obligation, for instance through carve-out agreements in the context of foreign-to-foreign merger filings?*

According to CADE's Internal Regulations (Article 155), the parties notifying a merger may request a precarious and preliminary authorization for the consummation of the merger (i.e., prior to CADE's final clearance), in cases where, on a cumulative basis (i) there is no danger of irreparable damages for the competition conditions in the market; (ii) the measures whose authorization is requested are fully reversible; and (iii) the notifying party is able to evidence the imminent occurrence of substantial and irreversible financial damages for the purchased company if the precarious authorization for the consummation of the merger is not granted.

In December 2017, CADE adopted a preliminary authorization for the first time in the context of *Excelence B.V./Rio de Janeiro Aeroportos S.A.* (Concentration Act No. 08700.007756/2017-51). The authorization was granted to allow for the payment of the first installment established by the Brazilian National Civil Aviation Agency (ANAC) concerning the Antonio Carlos Jobim Airport concession, what, according to the parties, could otherwise interrupt the activities of the airport. This is not an alternative routinely used by companies in Brazil.

As regards carve-out agreements, CADE had the opportunity to voice its formal opinion on them in the context of the *Technicolor/Cisco*[5] case, a global transaction concerning the acquisition of Cisco's customer premises equipment (CPE) business by Technicolor, which was consummated by the parties worldwide without CADE's prior approval, relying on a carve-out agreement. In considering the situation, presented by the parties as a "*fait acompli*" CADE ultimately concluded that most competition agencies worldwide are reluctant to accept such agreements to exclude or even mitigate gun jumping practices, considering the uncertainty of their effectiveness (especially regarding all the difficulties to control/prevent the exchange of sensitive information). Therefore, CADE's stand was that the parties should have waited for its clearance and that the carve-out agreement would not prevent the characterization

[5] Concentration Act No. 08700.011836/2015-49. Notifying Parties: Technicolor S.A. and Cisco Systems, Inc. Settlement agreement approved by the Tribunal on January 20, 2016.

of a situation of gun jumping. As a result, a fine of R$ 30 million was imposed on the parties.

- *In cases involving alleged violations of the standstill obligation under the Brazilian Antitrust Law, has CADE also considered the application of antitrust laws (based, for instance, on the understanding that the conducts performed before clearance would represent anticompetitive acts)?*

Even though the commencement of an administrative process to investigate possible anticompetitive practices arising from violation of the standstill obligation is allowed by the Brazilian Antitrust Law (e.g. when there is the exchange of sensitive information by the parties of a transaction whose filing is mandatory before clearance by CADE), CADE's case law on gun jumping mostly refers to cases in which parties entered into a settlement with CADE, under which they acknowledge they had taken measures that were not allowed before obtaining CADE's approval, therefore paying a financial contribution to get the investigations on gun jumping closed.

WHAT ARE THE PERILS FOR GUN-JUMPING?

Adriana Giannini
Denise Junqueira

The Brazilian Merger Control Regulation, like many jurisdictions, prohibits the closing of a notifiable transaction until the Administrative Council for Economic Defense ("CADE") grants its antitrust approval. Non-compliance with the suspensory obligation is a violation of the Brazilian Antitrust Law (Law No. 12.529/11), also known as ''gun-jumping''

Since the Brazilian pre-merger control regime entered into force, in June 2012, CADE has published the *Gun-Jumping Guidelines*[1], repeatedly pursued gun-jumping violations, and imposed a substantial high fine of BRL 30 million, which indicates that gun-jumping policy is a priority for it.

This article will briefly revisit the concept of gun-jumping under the Brazilian Antitrust Law before providing a closer look into the perils of such practice.

What is "Gun-Jumping"? The stand-still obligation in Brazil

The Brazilian Antitrust Law establishes in its Article 88:

> *"(...) Paragraph 3. The acts that fall under the notification criteria established in this section's caput* ***shall not be consummated before their analysis*** *(...) under penalty of nullity, and without prejudice to a pecuniary fine (...) and (...) to the commencement of an administrative proceeding (...)*

[1] *Guidelines for the Analysis of Previous Consummation of Merger Transactions*, Sept. 2016. Available at: <http://www.cade.gov.br >.

> *Paragraph 4. Until a final decision on the transaction,* ***the competition conditions among the companies involved shall be preserved,*** *under penalty of application of the sanctions (...)" (our highlights)*

Therefore, according to the law, parties to transactions that are reportable to CADE must comply with a two-fold stand-still obligation until CADE's approval: (i) refrain from consummating the transaction and (ii) keep the existing competition conditions.

Gun-Jumping Perils

CADE can impose three types of sanctions for gun-jumping: (a) fines, (b) opening of an antitrust investigation, and (c) declaration that the closing and posterior acts are null and void -- Annex 1 below lists all gun-jumping sanctions applied by CADE to date. With respect to the latter, to avoid over-deterrence or under-deterrence, CADE may also settle with the Parties other non-monetary sanctions considering the trade-offs related to the particular case and the aim of imposing optimal sanctions – see item (d) below. We provide further details on each sanction below.

(a) Fines

- Gun-jumping fines vary from BRL 60,000 to BRL 60 million.
- After CADE concludes for a violation, it will calculate the final amount of the fine and the parties may try to mitigate the value of the potential fine based on certain arguments. Indeed, in most gun jumping cases decided to date, the parties and CADE entered into a settlement on the value of the fine and payment conditions. However, such negotiations are essentially confidential and thus the exact full parameters used by CADE to calculate the fine for each specific case remains unclear[2].

[2] The parameters provided by the law to calculate the fine are the following: seriousness of the violation, good faith; advantage obtained or envisaged; whether the violation was consummated; whether the violation harmed or threated to harm

- Most gun-jumping fines applied to date ranged from BRL 60,000 to BRL 3 million.
- The only exception was Concentration Act No. 08700.011836/2015-49, Technicolor S.A. and Cisco Systems, in which CADE imposed a substantially higher fine of BRL 30 million. This amount is explained by the following circumstances: the parties closed the transaction, carving-out Brazil, while the transaction was still under CADE's review - without informing CADE in advance - and CADE found out about it independently. Also, the parties carved-out the Brazilian operations while arguing in the notification form that the relevant markets were global in scope, thus CADE questioned the effectiveness of a carve-out agreement for global markets. Finally, the higher fine was also used by CADE to signal that it will not accept carve-outs as a manner to exclude or mitigate possible gun-jumping sanctions.

(b) Opening of an antitrust investigation

- If CADE understands that closing prior to its clearance could have amounted to anticompetitive conduct, it can open an administrative procedure to investigate and punish such conducts, applying the corresponding sanctions.

- Corporate fines for anticompetitive conduct range from 0.1% to 20% of the company's turnover in the affected industry

the free competition, national economy, consumers or third parties; the potential antitrust concerns resulting from the transaction; financial situation of the parties; and recurrence, as per Article 45 of the Brazilian Antitrust Law. Also, CADE's Internal Rules of Proceeding establishes the following: size of the applicants; their intent; bad-faith; and the potential anticompetitive effects resulting from the transacting, among others. Finally, CADE's Gun-jumping Guidelines adds the following factors: (i) status of the transaction and of the notification by the time CADE detects a possible gun-jumping violation, *i.e.*, whether the transaction was consummated prior or during CADE's review, and as a result of an investigation by CADE or not, and (ii) time (it is unclear what exactly CADE means with that, but possibly the time from closing CADE's decision on the transaction).

sector in the year preceding the opening of the proceeding[3]. Other sanctions might also apply.

- CADE never opened an antitrust investigation under these circumstances, but anticompetitive investigations are confidential in their initial stage, thus it is possible that there are on-going investigations that we are not aware.

(c) Declaration that the closing and posterior acts are null and void.

- CADE may also determine that all closing and following acts performed by the parties are declared null and void.
- This only happened once: in Concentration Act No. 08700.004167/2016-30, RR Participações Ltda., Douek Participações Ltda. and Shimano Inc., part of the acts formalizing the creation of the JV included an exclusive distribution agreement between the JV and Shimano, one of the JV shareholders, which was declared void by CADE until final review of the transaction.
- In fact, in other precedents CADE either understood that declaring the transaction null and void was deemed disproportionate in furthering CADE's policy objectives – e.g. Concentration Act No. 08700.008289/2013-52, UTC Óleo e Gás S.A e Aurizônia Petróleo S.A.; Concentration Act No 08700.000137/2015-73, GNL Gemini Comercialização e Logistica de Gás Ltda. and Companhia de Gás de Minas Gerais; Concentration Act No. 08700.008292/2013-76, Potióleo S.A. and UTC Óleo e Gás S.A; Concentration Act No. 08700.005775/2013-19, OGX Petróleo e Gás S.A. and Petróleo Brasileiro S.A., Concentration Act No. 08700.002285/2014-41, FIAT S.P.A. and Chrysler Group LLC., in which CADE found that essentially because the transactions did not result in anticompetitive concerns --, or was not possible – e.g. Concentration Act No. 08700.006284/2016-38, JBS Aves Ltda. and Tramonto Agroindustrial S/A., in which CADE concluded such sanction

[3] Administrators fines may vary between 0.1% and 20% of the fine imposed to the company and for other individuals the fine may vary between BRL 50,000 to BRL 2 billion.

could not be applied as Tramonto was in bankruptcy procedures.

(d) Other non-monetary sanctions

- CADE may also settle with the Parties other non-monetary sanctions considering the trade-offs related to the particular case and the aim of imposing optimal sanctions.
- This has happened twice:

- In Concentration Act No. 08700.010394/2014-32, Goiás Verde Alimentos Ltda., Brasfrigo Alimentos Ltda and Brasfrigo S.A., CADE imposed a commitment against the acquirer to stop using an acquired brand for 2 years. The latter condition was required even though the transaction did not raise any antitrust concern, and was aimed at deterring merging parties from illegally obtaining profits (i.e. to implement and benefit from the transaction before clearance). In this case CADE considered that declaring the transaction null and void would be too extreme and result in social losses, given that the transaction had been concluded over two years before the gun jumping ruling, and Brasfrigo was no longer active in the market;

- In Concentration Act No. 08700.007553/2016-83, Mataboi Alimentos Ltda. and JBJ Agropecuária Ltda., CADE settled certain behavioral commitments until the conclusion of its merger review to hold off potential major antitrust concerns. In this respect, given that there could be a pre-existing relationship between the acquirer JBJ Agropecuária and a leading meat competitor, JBS[4], the parties committed to shield any interaction between themselves and JBS[5] at least until the conclusion of the transaction.

Moreover, failure to observe CADE's gun jumping rules and guidelines could also have other indirect consequences. Indeed, if CADE concludes that the parties omitted or provided misleading information to it, CADE may also impose a fine for such practice. This is not a gun-

[4] JBJ Agropecuária executives held stakes in JBS.

[5] Including the parties major shareholders could not hold positions at JBS´s executive board and management board, the parties could not acquire participation in JBS related to activities of certain relevant markets, the parties could not share commercially sensitive information with JBS group.

jumping sanction, but a sanction that CADE can apply. In this respect, Parties to a transaction reportable to CADE have a general obligation to keep the authority updated of any changes in the transactions or in market conditions involved in the transaction during the review process. Thus, failure to inform CADE that closing (or acts amounting to closing) took place during or prior its review could result in fines[6].

As far as we are aware, CADE never applied a separate fine for omission / providing misleading information in prior gun-jumping cases (not even in Concentration Act No. 08700.011836/2015-49, Technicolor S.A. and Cisco Systems). However, this could have been considered a aggravating factor to increase the overall gun-jumping fine.

Finally, failure to observe CADE´s gun jumping rules may also lead to substantial delays in the merger review, as CADE's decision on the merits of the transaction will be suspended until the Gun-Jumping Investigation is concluded.

Conclusions

The aggressive prosecution of gun-jumping violations in Brazil emphasizes the importance of understanding and carefully following gun jumping principles. The perils are substantive: casual adherence or outright failure to comply can lead to substantial fines and non-monetary sanctions (including the nullity of the performed acts), as well as substantial delays in the merger review. It is therefore advisable to work closely with antitrust counsel early in the negotiation process to avoid gun jumping concerns.

[6] Ranging from BRL 5 thousand to BRL 5 million or approx. USD 1.5 thousand to USD 1.5 million.

Table 1 – Summary of CADE's Gun-Jumping Sanctions

Concentration Act No.	Judgment Date	Fine (BRL)	Fine for Omission of Information	Final Sanction of Suspension or Voiding of Contract	Other non-monetary sanction	Negotiation of Settlement Agreement	Voluntary Notification
08700.005775/2013-19	28/08/2013	3 million	No	No	No	Yes	Yes
08700.005775/2013-19	05/02/2014	60 thousand	No	No	No	Yes	Yes
08700.008289/2013-52	05/02/2014	60 thousand	No	No	No	Yes	Yes
08700.002285/2014-41	14/05/2014	600 thousand	No	No	No	Yes	Yes
08700.010394/2014-32	22/04/2015	3 million	No	No	Stop using an acquired brand for 2 years.	Yes	No - CADE found out about the transaction through a press release published by the Parties. The authorities found out the gun-jumping through press release published in Technicolor' website.
08700.000137/2015-73	24/06/2015	90 thousand	No	No	No	Yes	Yes
08700.011836/2015-49	20/01/2016	30 million	No	No	No	Yes	N/A - the gun-jumping occurred during CADE's analysis of the case, after the Parties' attempt to carve-out the Brazilian operations.

Concentration Act No.	Judgment Date	Fine (BRL)	Fine for Omission of Information	Final Sanction of Suspension or Voiding of Contract	Other non-monetary sanction	Negotiation of Settlement Agreement	Voluntary Notification
08700.007553/2016-83	09/12/2016	664,983.32	No	No	Behavioral commitment	Yes	Yes
08700.004167/2016-30	27/10/2016	1,500,000	No	Voided the Contract	No	No	CADE found out about the transaction through a complaint filed by a third party (individual). After being inquired by CADE on the reason why the transaction was not notified, the parties recognized that they were not aware of mandatory pre-merger regime and filed immediately a notification form.
08700.006284/2016-38	28/09/2016	388,718.45	No	No	No	No	No
08700.011294/2015-12	23/11/2017	1,000,000.00	No	No	No	Yes	No

WHAT IS THE STATUTE OF LIMITATIONS ON CADE'S PUNITIVE ACTIONS UNDER MERGER REVIEW PROCEEDINGS?

Daniel Douek
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Introduction

As mergers and acquisitions heat up the business environment in Brazil, a number of corporations are bound to face themselves before the CADE at some point of their economic life. When that happens, parties to merger and acquisition transactions have to be constantly careful with CADE's diligent watch on their future endeavors, especially if they meet legal notification requirements.

The mere idea of having to deal with the heavy sanctions (*e.g.* declaration of a certain transaction as legally void) and costly fines that CADE pedagogically imposes on infringing companies – parties to a merger – seems enough to raise attention. The present article explores one of many concerns identified by entrepreneurs doing business in Brazil in the context of merger review: what is the statute of limitations on CADE's punitive actions under its merger review proceedings?

1. What are the applicable sanctions under CADE's merger review proceedings?

According to Article 88, Paragraph 3, of Law No. 12.529/2011 (the "Brazilian Antitrust Law"), any transaction that fits the requirements for mandatory filing obligation cannot be consummated (i.e., executed) before CADE's appraisal under a formal merger review proceeding. Failure to comply with this obligation, which would be considered gun

jumping[1], results in the imposition of monetary fines ranging from BRL 60 thousand to BRL 60 million, without limitation to the opening of an administrative proceeding to investigate the involved parties, and may result in a declaration of the operation being legally void[2].

In order to enforce this legal provision, CADE issued Resolution CADE No. 13/2015, which provides for the special procedure applicable to all Administrative Proceedings for Merger Investigation – or "APACs"[3] (the "APAC Resolution"). As per such Resolution, CADE's General Superintendence may initiate an APAC if it identifies premature consummation of a merger in three different situations[4]: *(i)* if the transaction was duly filed to CADE, but was consummated previously to CADE's approval; *(ii)* if the parties failed to comply with the obligation to notify a mandatory filing transaction; and *(iii)* the exceptional case of mergers that the filing is not mandatory, but CADE demands the notification[5].

The present article will focus solely on situation number *(ii)* above, as the first usually involves a more complex, detailed-oriented and case-by-case analysis of the acts that lead the authority to conclude

[1] According to CADE's "Guidelines for the analysis of previous consummation of merger transactions" gun jumping can be defined as "[t]*he consummation of mergers before the antitrust authority reaches a final decision*" (p. 5), but, since "*it is not possible to make abstract generalizations that could apply to all situations*", "*any gun jumping must at all times be considered and verified in light of the particularities of each case*" (p. 6). Available at: <http://www.cade.gov.br/acesso-a-informacao/publicacoes-institucionais/guias_do_Cade/guideline-gun-jumping-september.pdf>.

[2] It is also worth noting that article 88, §7 of the Brazilian Antitrust Law grants CADE the prerogative to require the submission even of transactions that does not fit into mandatory notification requirements. Nevertheless, given the nature of the present article, such scenario will not be analyzed herein.

[3] This is a free translation of the definition set forth under Article 1 of CADE's Resolution No. 13/2015, and stands for "*procedimento administrativo para apurações referentes a atos de concentração ("APAC")*".

[4] Resolution CADE No. 13/2015, Article 1, I, II and III.

[5] In that case, considering that the filing is not mandatory, it is not possible for CADE to impose the fines set forth under article 88, §3 of the Brazilian Antitrust Law.

that the transaction was prematurely completed and the latter cannot result in any type of sanctions related to gun jumping violations.

As applicable, after its investigation, the General Superintendence may issue the following decisions on an APAC proceeding: a) for the dismissal of the APAC[6]; b) for the premature consummation of the notified transaction[7]; c) for the parties to be compelled to file the transaction[8]; and d) for the initiation of an administrative proceeding in order to investigate possible anticompetitive practices deriving from the premature consummation of the transaction[9]. If the APAC is sent to CADE's Administrative Tribunal (the "Tribunal"), CADE's Commissioners may yet impose penalties and monetary fines[10] for a violation of Article 88, Paragraph 3, of the Brazilian Antitrust Law.[11]

2. How does CADE define the consummation of a transaction?

CADE's Internal Regulation[12] provides in its article 147, §§1 and 2, that transactions subjected to mandatory filings must be notified preferably *after* a formal binding instrument is signed and *prior* to the consummation (or completion) of any acts related to the transaction. In addition, it determines that the parties should maintain their physical

[6] Resolution CADE No. 13/2015, Article 5, I, and article 9, I.

[7] Resolution CADE No. 13/2015, Article 5, II.

[8] Resolution CADE No. 13/2015, Article 9, II

[9] Resolution CADE No. 13/2015, Article 5, III, and Article 9, III.

[10] Resolution CADE No. 13/2015, Article 7, II, and Article 10, II, "a" and "b".

[11] As gun jumping encompasses a wide range of practices, the premature integration of structures may give rise to specific infringements, such as a stand-alone exchange of sensitive information or interference in decisions of a competitor (the target company). These violations, however, are subject to specific administrative sanctions under the Brazilian Antitrust Law, without limitation to civil and criminal liability under the applicable law. In that way, since applied outside of CADE's merger review proceedings, such sanctions will not be addressed herein.

[12] As approved by CADE's Resolution No. 20/2017, and amended by CADE's Internal Regulations Amendments No. 01/2017, 02/2017 and 03/2018.

structures unchanged and remain competitors until the authority's final assessment, and considers as particularly problematic, *v.g.*, the transfer of any assets between the parties, any kind of influence of one party over the other and the exchange of sensitive information[13].

In practice, CADE's recent precedents indicate that the failure to comply with the obligation to file mandatory notification transactions is an *instantaneous* infraction[14]. Given that the Brazilian Antitrust Law established a pre-merger review regime, when parties fail to notify a transaction in advance, CADE tends to consider that the illegal action (i.e. failure to notify) reaches completion at the exact same moment of the execution date of its transaction documents[15]. From that moment on, considering that all contractual agreements are duly signed and executed,

[13] Regarding the exchange of sensitive information, CADE considers that non-gun jumping exchanges should limit the information flow to a strictly necessary basis for the signing of transaction documents.

[14] The term "instantaneous infraction" is hereby adopted equivalently to the definition of "instantaneous crime", which, according to Black's Law Dictionary, means "*a crime that is fully completed by a single act, as arson or murder, rather than a series of acts*" (Garner, B. A., editor, *Black's Law Dictionary*, rev. 9th ed. St. Paul, Minn.; West: 2009, p. 428). Thus, for purposes of the present article, *instantaneous infractions* should be understood as infractions that are fully completed by a single act.

[15] Please refer to Concentration Acts: *(i)* No. 0800.01172/2016-91 (Applicants: TAM Linhas Aéreas S.A. and Azul Linhas Aéreas Brasileiras S.A.); *(ii)* No. 08700.006290/2016-95 (Applicants: Xinguleder Couros Ltda. and JBS S.A.); *(iii)* No. 08700.006903/2016-94 (Applicant: Amil Assistência Médica Internacional S.A.); *(iv)* No. 08700.003802/2017-42 (Applicants: Brookfield Energia Renovável S.A. and Vulcabrás Azaleia-RS, Calçados e Artigos Esportivos Ltda.); and *(v)* No. 08700.006904/2016-39 (Amil Assistência Médica Internacional S.A.). In Merger Case *(i)*, above, Reporting Commissioner Cristiane Alkmin Junqueira Schmidt considered the date in which each one of the 18 analyzed contracts were signed in order to determine whether the transactions were fulfilled within the limitation period or not. In a similar way, in the Concentration Act *(ii)*, Reporting Commissioner Alexandre Cordeiro Macedo stated in his vote that the limitation period starts to count as from the transaction's signing date. For purposes of the revoked Antitrust Law No. 8.884/94, it is also worth noting that in Concentration Act *(iii)*, Reporting Commissioner Cristiane Alkmin Junqueira Schmidt stated that the limitation period should be counted as from the 16th day after the transaction's execution.

the infringement is deemed completed as the transaction takes immediate effect for all legal purposes.

This understanding was expressed by Commissioner Cristiane Alkmin Junqueira Schmidt when analyzing the notification of thirty-three (33) codeshare agreements untimely filed after a decision issued by the General Superintendence under an APAC.[16] In her reasoning, she stated that the obligation to notify is due in relation to each single contractual instrument, counted from their individual signing dates (as opposed to the parties' understanding that the 33 codeshare agreements should be jointly considered as a single transaction).[17]

This way, under a conservative approach, the signing and execution date of the merger's legal instruments should be considered as the point in time in which the parties should have discharged their obligation to notify the transaction.

3. What is the statute of limitations on CADE's punitive action under its merger review proceedings?

As a special independent agency tied to the Ministry of Justice, CADE is subject not only to the Brazilian Antitrust Law, but also to other administrative legislation applicable on a subsidiary basis. In this respect, Laws No. 9.784/1999 and 9.873/1999, that regulate certain aspects of the Federal Administrative Procedures governing all Brazilian Federal Administration entities, hereby demands particular attention.

According to the applicable legislation and CADE's precedents on the matter, in order to correctly assess the statute of limitations on CADE's punitive actions, it is first necessary to verify if such term may

[16] Concentration Act No. 08700.01172/2016-91. Applicants: TAM Linhas Aéreas S/A and Azul Linhas Aéreas Brasileiras S/A. Reporting-Commissioner: Cristiane Alkmin Junqueira Schmidt. Date of Judgement: May 25, 2015.

[17] Worthy of note in this regard is the fact that such assessment may give rise to important questions, especially under APACs initiated after a given transaction has already been notified. As mentioned before, in this situation, the signing date may not be sufficient and other case-by-case aspects are ought to be analyzed by the authority.

be extended by the existence of criminal provisions regarding the same conduct.[18] As this is not the case for merger review and APAC proceedings, the statute of limitations on such punitive actions expires in five (5) years, counted *(i)* from the date of the infraction/violation, for *instantaneous* practices, or *(ii)* from the date in which the infraction/violation ceased, for *permanent and/or continued* practices.[19]

Thus, for assessing the statute of limitations on CADE's punitive actions under merger review proceedings, CADE's recent experience demonstrates that the point in time in which the parties should have discharged their obligation to notify the transaction is the same as the signing and execution date of the contractual agreements. In light of that, it seems safe to say that the infraction set forth under Article 88, Paragraph 3, of the Brazilian Antitrust Law is deemed as an instantaneous practice by CADE.[20]

[18] Law No. 9.873/99, Article 1, Paragraph 2. In addition, please refer to Reporting Commissioner Marcio de Oliveira Junior's Vote under Administrative Proceeding No. 08012.010932/2007-18, judged by CADE's Tribunal on the 59th Ordinary Judgement Session, in February 25, 2015.

[19] As provided under Article 46, of the Brazilian Antitrust Law, and Article 1, of Law No. 9.873/1999. Moreover, if the administrative proceeding is initiated by CADE but remains idle for more than three (3) years without the expedition of any order or judgement, CADE's punitive action can no longer be exercised (as provided under Article 46, Paragraphs 1 and 3, of the Brazilian Antitrust Law; and Article 1, Paragraphs 1, and 2, of Law No. 9.873/1999). This special limitation period is referred to in Brazil as the interim statute of limitations.

[20] Even though such definition is more directly assessed under transactions that were never submitted, it is worth noting that the situation is very different for mergers already notified before CADE. As previously stated, in this case the assessment will depend on a case-by-case analysis to identify actions carried out by the parties that could effectively contribute to the transaction's premature consummation. For that matter, apart from the signing and execution date, CADE is bound to consider aspects such as advance payments, transfer of assets between the parties and dismissal of employees in order to properly define the moment of completion.

Conclusion

Although virtually any transaction or deal may be subject to CADE's scrutiny, merging companies are liable to sanctions only to the extent that they fail to comply with the obligation set forth under article 88, §3 of the Brazilian Antitrust Law. As transactions that fits the requirements for mandatory filing obligation may not be completed before CADE's approval, it is very important to understand what "completion" means for merger review purposes.

Particularly when analyzing mergers filed after an APAC decision, recent precedents on the matter indicate that the authority adopts a conservative approach, deeming the signing and execution date as the moment from which companies are in fault with their duty. In light of that, such practice may be considered as an instantaneous infraction and, consequently, the statute of limitations on CADE's punitive actions under merger review proceedings expires in five (5) years counted from the signing date of the documents governing the unfiled transaction.

Even though the joint interpretation of the applicable law and CADE's experience on the matter surely seems to allow such conclusion, there is still some level of doubt, especially regarding the methodology adopted to define completion (consummation) of a transaction. CADE has yet to provide companies and legal professionals with a more narrow and defined approach on these subjects.

For the moment, the understanding expressed proves sufficient to properly assert the reigning interpretation of the authority on the matter; for the future, however, CADE still has the pending task of rendering the market with a tangible, final and reliable answer to the problem.

DOES CADE HAVE TOOLS TO INVESTIGATE TRANSACTIONS NOT FILED FOR ITS APPROVAL?

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Enrico S. Romanielo
Fernanda Garibaldi
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1. Regulating the matter: Resolution CADE No. 13/2015

On June 23, 2015, CADE enacted Resolution No. 13, regulating the Administrative Proceeding to Investigate Concentration Acts ("APAC").

According to such Resolution, APACs may be initiated in the following situations:

- Transactions that meet the filing thresholds and are filed before CADE, but implemented before antitrust clearance.
- Transactions that meet the filing thresholds, not filed and implemented before CADE's approval.
- Transactions that do not meet the filing thresholds, but whose submission may be required by CADE in view of their potential effects to competition.[1]

APACs can be initiated by both the GS and the Tribunal (the latter, when the case is already being reviewed by the Tribunal), *ex officio* and after requests by a Commissioner or a complaint filed by interested parties.

[1] According to the Competition Law (Article 88, Paragraph 7), CADE is entitled to review transactions that do not meet the legal filing thresholds within one year as from the implementation of a given transaction.

If an APAC is initiated in relation to a transaction filed with CADE but implemented before the approval, the review on the merits shall be suspended while the *gun jumping* investigation is pending.[2]

At the end of the APAC, CADE may decide for the (i) closing of the investigation without the imposition of penalties; (ii) imposition of penalties for *gun jumping*; (iii) declaration of nullity; and/or (iv) opening of an independent procedure to investigate potential antitrust infringements.

In relation to APACs opened to investigate transactions not filed and implemented without CADE's review, the authority may also request the parties to file the transaction within 30 days.

Finally, CADE may also initiate an APAC to assess whether it is necessary to review a transaction that does not meet the legal filing thresholds. In these cases, CADE may either close the procedure and decide that such review is not necessary, or request the parties to file the transaction within 30 days. No fines are applicable in this case.

In all the scenarios described above, the GS and the Tribunal may enter into agreements or adopt preliminary injunctions to guarantee that the transaction remains reversible and that free competition is preserved until a final decision on the merits is rendered.

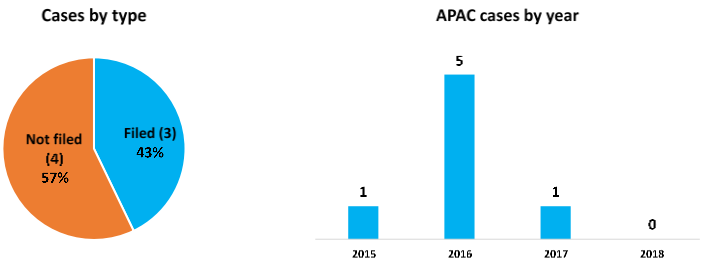
2. CADE's case law

The authors identified seven APAC cases since the enactment of Resolution No. 13/2015: (i) Technicolor/Cisco Systems (APAC No. 08700.011836/2015-49), (ii) Reckitt Benckiser/Hypermarcas (APAC No. 08700.005408/2016-68), (iii) JBS/Tramonto (APAC No. 08700.007160/2013-27), (iv) R.R./Douek/Shimano (APAC No. 08700.002655/2016-11), (v) Carrefour/BRF (APAC No. 08700.000258/2015-15), (vi) Mataboi/JBJ (APAC No.

[2] In exceptional occasions, CADE may review the merits of the case at the same time the APAC is analyzed (see Article 3, Sole Paragraph, of Resolution CADE No. 13/2015).

08700.007612/2016-13), and (vii) União Transporte Interestadual de Luxo/Expresso Gardênia (APAC No. 08700.011294/2015-12).[3]

In four APACs (57%),[4] the Parties implemented the transaction without filing it with the authority; the other 3 (43%)[5] are cases in which the parties filed the transaction but implemented it before CADE's approval, as shown in the graphs below.



Source: authors, with public data from CADE's website

As to the imposition of penalties, CADE (i) settled in 3 of the cases (42.86%), collecting fines in the total amount of BRL 31,664,983.32,[6] (ii) convicted the parties in 2 cases (28.57%), imposing fines in the total amount of BRL 1,888,718.45,[7] and (iii) closed the investigation with no charges in the other 2 (28.57%), as shown in the chart below.[8] There is no public information as to the initiation of an

[3] The research on CADE's public database was limited to cases with final decisions. There might be other cases kept confidential that were not identified by the research.

[4] Namely: (i) JBS/Tramonto, (ii) R.R./Douek/Shimano, (iii) União Transporte Interestadual de Luxo/Expresso Gardênia and (iv) Carrefour/BRF.

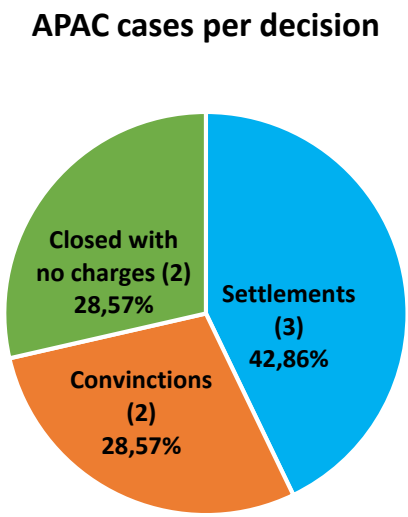
[5] Namely: (i) Technicolor/Cisco, (ii) Reckitt Benckiser/Hypermarcas and (iii) Mataboi/JBJ (this one was notified untimely to CADE on November 12, 2016, since the transaction was closed on December 22, 2014. On December 7, 2017 CADE's Tribunal recognized there was a *gun jumping* practice and imposed a fine to the parties).

[6] Namely: (i) Technicolor/Cisco, (ii) Mataboi/JBJ and (iii) União Transporte Interestadual de Luxo/Expresso Gardênia.

[7] Namely: (i) JBS/Tramonto and (ii) R.R./Douek/Shimano.

[8] Reckitt Benckiser/Hypermarcas.

independent procedure to investigate an antitrust infringement as from an APAC.



Source: authors, with public data from CADE's website

The authors also identified one case in which CADE requested the filing of a transaction involving Guerbet S.A. and Mallinckrodt Group S.à.r.l. Although the parties did not meet the turnover thresholds, GE Healthcare do Brasil Comércio e Serviços para Equipamentos Médico-Hospitalares Ltda. filed a complaint, arguing that CADE should review the potential anticompetitive effects of the deal. CADE requested the parties to file the transaction,[9] and after a long procedure with several fact-finding acts, concluded that there was not major potential risk, and approved it without restrictions in June 2017.

[9] Concentration Act No. 08700.005959/2016-21.

REVERSE BREAKUP FEES: A RECENT TREND IN M&A STRATEGIC DEALS?

Fabricio A. Cardim de Almeida

Reverse breakup fees have been increasingly used in M&A transactions in Brazil at least over the past four years. The aim of this article is to provide a brief overview of the legal framework, relevant precedents and the practice of how reverse breakup fees have been used in M&A strategic deals in Brazil recently. The general perception of increasing enforcement of antitrust laws by the CADE in merger cases may have contributed for reverse breakup fees to become a trend when allocating antitrust risk-shifting provisions in merger agreements in Brazil.

The Guidelines for the Analysis of Previous Consummation of Merger Transactions ("Gun jumping Guidelines"), issued by CADE on May 20, 2015,[1] excludes breakup fees clauses as typical contractual provisions that could result in gun jumping violation under the Brazilian antitrust laws.[2] According to the Gun jumping Guidelines, the following contractual provisions, among others, can result in "premature integration of the activities of the merging parties"[3]:

> *"c) clause for full or partial payment, non-reimbursable, in advance, in consideration for the target, **except** in case of (c.i.)*

[1] CADE, GUIDELINES FOR THE ANALYSIS OF PREVIOUS CONSUMMATION OF MERGER TRANSACTIONS (2016) [hereinafter *Gun jumping Guidelines*], *available at* http://en.cade.gov.br/topics/publications/guidelines/guideline-gun-jumping.pdf.

[2] According to Article 88, Paragraphs 3 and 4, of Law No. 12,529/2011 (the "Brazilian Competition Act"), in the event of gun jumping violation, the Parties are subject to fines ranging from R$ 60,000.00 to R$ 60,000,000.00, as well as to the annulment of the acts performed by the Parties and the opening of an administrative proceeding to investigate potential antitrust violations.

[3] *Gun jumping Guidelines*, *supra* note 1, at 8.

> *typical down payment for business transactions, (c.ii.) deposit in escrow accounts, or* ***(c.iii.) breakup fee clauses (payable if the transaction is not consummated)****."*[4]

By excluding breakup fee clauses as a potential gun jumping violation, these guidelines are, in contrast, admitting the use of such contractual provisions in M&A transactions in Brazil. The definition adopted under the Gun jumping Guidelines is that breakup fees are "payable if the transaction is not consummated."[5]

The Gun jumping Guidelines do not differentiate breakup fees to reverse breakup fees. Breakup fees are payments from a seller to a buyer if the seller terminates the transaction for reasons specified in the agreement. Reverse breakup fees flows in the opposite direction – from a buyer to a seller – if an acquisition does not close for specified reasons set forth in the agreement, usually associated with private equity transactions or to regulatory (antitrust) approval in strategic deals.[6] It is our understanding that the Gun jumping Guidelines accept both types of breakup fees.

Although the Guidelines contain non-binding provisions only, they are used by CADE as an important mechanism of orientation when reviewing actual cases.

In the Administrative Proceeding to Investigate the Merger (*Procedimento Administrativo para Apuração de Ato de Concentração* - "APAC" - No. 08700.005408/2016-68, CADE analyzed the issue on whether a payment made by Reckitt Benckiser (Brasil) Ltda. to Hypermarcas S.A. in the total amount of R$ 135 million (*i.e.*, correspondent to 20% of the total value of the transaction) as set forth in the agreement should be construed as (i) "partial payment, non-

[4] *Id.* at 8.

[5] *Id.* at 8.

[6] *See* Darren S. Tucker & Kevin Yingling, *Keeping the Engagement Ring: Apportioning Antitrust Risk with Reverse Breakup Fees*, 22 ANTITRUST MAGAZINE 70, 70-71 (2008) (discussing the differences between breakup fees and reverse breakup fees), *available at* https://ssrn.com/abstract=1306453.

reimbursable, in advance", thus in violation to gun jumping rules or (ii) as one of the exceptions provided in the Gun jumping Guidelines: (ii.a.) "typical down payment for business transactions"; or (ii.b) "breakup fee".[7]

The General Superintendence ("SG") at CADE understood that the payment was made in violation to the gun jumping rules and recommended to CADE's Tribunal the imposition of the penalties set forth in the applicable legislation.[8]

CADE's Tribunal, by unanimous decision, held that, according to the specific provisions of the agreement, the down payment could be construed as "typical for business transactions" and that it could automatically be compensated into a reverse breakup fee in case CADE blocked the deal, without the need of the Parties paying further amounts among themselves. Therefore, CADE's Tribunal rejected SG's opinion and determined the shelving of the investigations without imposing any penalties on the Parties.[9]

In its opinion on the case, the Reporting Commissioner at CADE, Paulo Burnier da Silveira, provided a few guidelines for Parties willing to include down payments and breakup fee clauses in their transactions: "[...] high amounts, which are not typical down payments for business transactions in the market involved, could lead to the understanding that such amount would not be correspondent to down payment. It is recommended, therefore, that companies be very cautious when implementing down payments and that they should use amounts that could not be understood as illegal payments under the applicable gun jumping legislation. Specific references in the agreements that such

[7] CADE, APAC No. 08700.005408/2016-68, Reporting Commissioner Paulo Burnier da Silveira, 17.8.2016.

[8] SG's Opinion, APAC No. 08700.005408/2016-68, *available at* https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_documento_consulta_externa.php?DZ2uWeaYicbuRZEFhBt-n3BfPLlu9u7akQAh8mpB9yO8jHez1UFNXDK-fOPhZUasm5YkRzoYf3-ci982xavM-gsYZGXRXDeCazPtFwxr6eMLsKY_Sg_Dpuu4ZeiMtdrj.

[9] *Id. supra* note 7.

obligations refer to typical down payment for business transactions, or to breakup fees, may be considered as evidence on the inexistence of illegal payments, and the companies shall have this in mind when drafting the language of their agreements."[10]

In practice, reverse breakup fees have been increasingly used in strategic deals in Brazil over at least the past four years and the amount of such fees have also been raising since then. According to an article published by Valor on March 20, 2018,[11] the following transactions involving Brazilian companies have relied on reverse breakup fees:

[10] Opinion of Reporting Commissioner Paulo Burnier da Silveira, APAC No. 08700.005408/2016-68, *available at* https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_documento_consulta_externa.php?DZ2uWeaYicbuRZEFhBt-n3BfPLlu9u7akQAh8mpB9yO7WrDNfTyXKqdogDjx7JGD_77fpfUlk-a90DoDdfDfgXU2ufMofGPrnRwMhlXSb4gK3sQyF6Z-RRBnQL4ubbuY.

[11] Maria Luíza Filgueiras, *Breakup fees start emerging in Brazil's M&A market*, Valor, Mar. 20, 2018, http://www.valor.com.br/international/news/5395141/breakup-fees-start-emerging-brazils-ma-market.

Transactions with reverse breakup fees in Brazil

Year	Seller	Buyer	Economic sector[1]	Total amount of the reverse breakup fee	Result
2015	Whitney do Brasil	Ânima Educação	Education	R$ 46 million	Buyer desisted from the transaction due to regulatory changes in the industry and paid the fee to the Seller in 2017.
2015	Cetip	BM&F Bovespa	Stock exchange; futures and commodities exchange	R$ 750 million	The transaction was closed, and payment of the fee was not necessary.[2]
2016	Magnesita	RHI	Refractories	R$ 70 million	The transaction was closed, and payment of the fee was not necessary.
2016	Vale Fertilizantes	Mosaic	Fertilizers	R$ 407 million	The transaction was closed, and payment of the fee was not necessary.

[1] The column "Economic sector" has been added by the author to the original chart prepared by Valor. *Id. supra* note 11.

[2] Although the BM&F Bovespa / Cetip was not referenced in the original chart prepared by Valor, the article included relevant information on the transaction which allowed the author to add it to the chart. *Id.*

Year	Seller	Buyer	Economic sector[1]	Total amount of the reverse breakup fee	Result
2016	Estácio	Kroton	Education	R$ 150 million	Buyer paid the fee to the Seller in 2017, after CADE blocked the deal.
2017	Liquigás (Petrobras)	Ultragaz (Grupo Ultra)	Liquefied petroleum gas (LPG)	R$ 280 million	Buyer paid the fee to the Seller in 2018, after CADE blocked the deal.
2018	Fibria[3]	Suzano	Pulp and paper	R$ 750 million	Antitrust approval of the transaction is pending.

Source: Valor.[4]

[3] According to articles published by the press, Fibria rejected an offer made by Paper Excellence, which included a reverse breakup fee in the total amount of R$ 4 billion. *See e.g.*, Stella Fontes, *Paper Excellence makes competing offer for Fibria*, Valor, Mar. 13, 2018, http://www.valor.com.br/international/news/5380295/paper-excellence-makes-competing-offer-fibria.

[4] *Id. supra* note 11.

The average amount of the reverse breakup fees in Brazil would correspond to 8.2% of the total value of the transaction, according to the article published by Valor,[1] which is higher to the 5.3% average amount currently in place in the United States.[2] Notwithstanding this, the number of deals considered in each case are largely different: while the United States had 142 transactions (12.5% of the total) with antitrust reverse termination fees out of 1140 strategic negotiated transactions announced between January 1, 2005, and December 31, 2017,[3] Brazil had only 10 transactions (0.5% of the total) with antitrust reverse breakup fees out of more than 2,000 deals (not necessarily strategic transactions) announced between 2003 and 2015.[4]

As indicated in the chart above, 7 out of the 10 transactions with antitrust reverse termination fees in Brazil were announced between 2015 and 2018, which may indicate that they have been increasingly used in M&A transactions in Brazil only over the past few years.

Since 2016, CADE has blocked 4 transactions and approved 16 others with restrictions or imposing remedies.[5] The general perception of increasing enforcement of antitrust laws by CADE may have also contributed to the dissemination of reverse breakup fees in M&A transactions in Brazil. It is likely that this trend will continue over the

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[1] *Id.*

[2] Dale Collins, *Antitrust Reverse Termination Fees--2017 Q4 Update*, SHEARMAN & STERLING ANTITRUST UNPACKED – ANTITRUST LAW BLOG (Jan. 10, 2018), http://www.shearmanantitrust.com/?itemid=57.

[3] *Id.*

[4] *Id. supra* note 11.

[5] CADE, CADE EM NÚMEROS, https://cadenumeros.cade.gov.br/QvAJAXZfc/opendoc.htm?document=Painel%2FCADE%20em%20N%C3%BAmeros.qvw&host=QVS%40srv004q6774&anonymous=true (last update on Mar. 1, 2018). The data made available by CADE had been updated only with respect to cases reviewed by CADE's Tribunal until the Plenary Session No. 116, held on December 13, 2017. The author has updated relevant data until the Plenary Session No. 119, held on March 14, 2018.

next years and that CADE may review other cases in the near future dealing with potential issues involving allocation of antitrust risks and the adoption of reverse breakup fees.

WHAT IS THE PROVISIONARY AND URGENT AUTHORIZATION PROVIDED BY THE BRAZILIAN ANTITRUST LAW?

Joyce Midori Honda
Ricardo Lara Gaillard
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Law No. 12.529/11 ("Brazilian Antitrust Law") established as a rule the premerger review system for transactions that are notifiable to the Administrative Council for Economic Defense ("CADE") (also referred to as acts of economic concentration). Based on such system, corporate transactions subject to CADE's approval require prior authorization from the antitrust agency, that is, they must be analyzed and approved before their implementation, otherwise the agency may impose penalties for violation of the premerger rules (which is also known as gun jumping[1]).

The prior analysis adopted by the Brazilian Antitrust Law, on the one hand, prevents transactions that generate market concentrations harmful to competition from being implemented and closed and, subsequently, annulled by the authority, resulting in legal uncertainty in the market. On the other hand, in the premerger system the parties assume the burden of awaiting the approval of the transaction by CADE.

[1] Article. 88. Economic concentration acts shall be submitted to Cade by the parties involved in the transaction, in which, cumulatively: (...) § 3 The acts which are subject to the provision in the caput of this article cannot be implemented before appreciation, under the terms of this article and the procedure established in Chapter II of Heading VI of this Law, under penalty of annulment, in addition to pecuniary fine in a minimum amount of R$ 60,000.00 (sixty thousand reais) and a maximum amount of R$ 60,000,000.00 (sixty million reais), to be applied under the terms of regulation, without prejudice to bringing an administrative proceeding, pursuant to art. 69 of this Law.

In this sense, CADE has 240 days (which can be extended in 60 or 90 days to a limit of 330 days[2]) to analyze merger filings. In the event of transactions eligible for the fast track procedure the term shall be of 30 days[3]. In addition to that, there is a period for appeal of 15 days, within which the parties still cannot close their transaction[4].

In practice, CADE has been effectively analyzing cases on a very expeditious way, particularly non-complex cases. Notwithstanding that, the Brazilian Antitrust Law established the need for a special procedure for cases requiring an urgent analysis, for involving irreversible risks to the parties in the event of any delay by the antitrust agency.

Article 59, Paragraph 1, of the Brazilian Antitrust Law[5], provides for the provisionary and urgent authorization, as a measure which is an exception to the general rule for prior analysis of merger filings subject

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[2] Article 88. (...)

Paragraph 2. The control of merger filings mentioned in the caput of this article shall be previous and performed within 240 (two hundred and forty) days, from the registration of the request of its amendment.

(...) Paragraph 9 The term mentioned in § 2 of this article shall solely be extended:

I – for up to 60 (sixty) days, non-extendable, upon request from the parties involved in the transaction; or

II – for up to 90 (ninety) days, upon reasonable decision from the Tribunal, in which the reasons for the extension are specified, the extension, which cannot be renewed, and the measures required to render a decision regarding the proceeding.

[3] Article7, Paragraph 2, of Resolution CADE No. 2/2012*:* **The General Superintendence shall comply with the term of 30 (thirty) days, from the registration of the request or its amendment, to decide on the** *merger filing* **subject to fast track proceedings and which are not reclassified for analysis in non-fast track procedure.**

[4] Article 172 of CADE's Internal Ruling: After the approval of the merger filing by the General Superintendence, the transaction shall solely be implemented after the end of the term for appeals or certiorari.

[5] Article 59, Paragraph 1. The Reporting Commissioner may authorize, as the case may be, in a provisionary and urgent manner, the merger filing, imposing conditions aimed at the preservation of the transaction's reversibility when the conditions of the case under discussion recommend so." (Law No. 12,529/2011)

to CADE's approval. Thus, the law grants the parties the possibility of fully or partially implementing a transaction in an urgent manner without having to wait for CADE's final decision. However, the transaction needs to comply with all the requirements set forth in CADE's Internal Regulation on a cumulative basis.

The conditions to obtain the provisionary and urgent authorization

CADE's Internal Regulation, in its Article 155[6], establishes that the provisionary and urgent authorization shall be granted in a merger filing when: (i) there is no danger of irreparable damage; (ii) the transaction is fully reversible; and (iii) there is imminent occurrence of substantial and irreversible financial losses. As an exceptional measure, all requirements must be cumulatively met in the case under discussion.

The first conditions addressed the analysis of market structures, usually developed by the antitrust body, however in the provisionary and urgent authorization this analysis is a preliminary analysis of the merits of the case. Thus, the transaction must not, firstly, result in irreparable damages to competition, such as, for example, by means of abusive exercise of market power. This does not refer to the approval of the merger filing in its merits, and, therefore, does not bind CADE to a final positive decision. It is merely an analysis to verify that the parties cannot cause any damage between the granting of the provisionary authority and the final merit decision. Another conclusion results therefrom: it is only possible to ensure the inexistence of damage to competition in cases

[6] Article 155. The party which requested approval of a merger file may request, at the time of the notification or after the challenge by the General Superintendence, a provisionary and urgent authorization for the merger file, in events in which, cumulatively: I. there is no danger of irreparable damage to market competition conditions; II. The measures subject to authorization request are fully reversible; and III. The requesting party manages to prove the imminent occurrence of substantial and irreversible financial losses for the acquired company if the provisionary authorization for the merger filing is not granted. (CADE's Internal Regulation)

without any competition complexity, as complex cases require time to reach such conclusion by means of an in-depth analysis.

According to this rationale, in order to prevent the antitrust agency to approve merger filings which may affect competition and possibly consumers welfare, the second criterion set forth in CADE's Internal Regulation deals with the reversibility of the transaction. As such, CADE needs to assess if, in the event of rejection or approval with restrictions, it is possible to reverse the transaction to its *status quo*, without causing damages to the market.

The third condition, finally, is usually the very reason to request the provisionary and urgent authorization itself. The parties need to unequivocally show that, in the event a special authorization is rejected, there shall be substantial and irreversible damages resulting from a delayed final decision from CADE. As such, CADE requires that the parties, jointly with the request for provisionary and urgent authorization, provide documents which confirm the urgency of the need to close the transaction or to implement certain steps, as the case may be[7], under the risk of substantial losses for the acquired company[8].

[7] Article 155, Paragraph 1. To demonstrate the imminent occurrence of substantial and irreversible financial losses for the acquired company, the requesting party shall attach to its request with all documents, financial statements and certificates indispensable to provide an unequivocal evidence for the facts claims.

[8] In the transaction between Bayer S.A. and Monsanto do Brasil Ltda. (Concentration Act No. 08700.004957/2013-72) a request for provisionary approval was filed due to the fact that the Tribunal asked the case to review the decision of the GS, which had decided not to acknowledge the transaction. At the time, Bayer requested an urgent measure, in order to produce and sell soybean seeds in the crops of 2013 and 2014, with a certain technology. Commissioner Alessandro Octaviani, however, did not identify the occurrence of an irreparable damage or of a damage of difficult reparation due to CADE's delay, reason why the request was denied.

The proceedings that the parties must follow when submitting their request

The request for provisionary and urgent authorization can be submitted to CADE in two separate occasions, namely: (i) at the time of the notification of the merger filing; or (ii) right after the transaction has been challenged by the GS and forwarded to the Tribunal. It is important to note that there are cases in which the urgent request shall be processed concurrently with the analysis of the merger filing at the antitrust agency. This is so because the GS has up to 30 days to issue a statement about the request, and to subsequently send its opinion to the Tribunal, which does not exclude the possibility of continuing with the fact-finding.

Once the opinion from the GS is received, the Tribunal shall also have 30 days for appreciation of the case. Thus, once the decision is rendered by CADE, there can be no request for review, and the transaction shall remain under analysis by the lower unit according to their own proceedings.

CADE's case law, however, shows it is possible for the fact-finding stage to be closed concurrently with the request for provisionary and urgent authorization, as seen in the acquisition, by Excelente B.V. ("Excelente"), of shares held by Odebrecht Transport Aeroportos S/A ("Odebrecht") in Rio de Janeiro Aeroportos S/A ("RJA") [9]. RJA, by means of Concessionária Aeroporto Rio de Janeiro S.A. ("CARJ"), operates in the development, maintenance, and operation of Aeroporto do Galeão, in the City of Rio de Janeiro. In such case, the GS, in addition to sending its opinion to the Tribunal regarding the feasibility of the request, also decided, immediately, that the transaction should be approved without restrictions, which was later confirmed by the Tribunal.

In cases of provisionary and urgent approval in which the merit remains under analysis by the antitrust body, CADE's Internal

[9] Concentration Act No. 08700.007756/2017-51, decided by CADE's Tribunal, on December 13, 2017.

Regulation establishes, in Article 156[10], the possibility for the Tribunal to reverse its decision, related to cases in which it finds that the transaction must be approved with the application of remedies or even rejected.

Case law

CADE's case law has few cases in which the parties requested provisionary and urgent approval for a merger filing.

In the merger filing involving OpenGate Capital Group Europe Sárl[11], the company requested from CADE a provisionary and urgent approval, but later withdrew its request due to the approval of the transaction within 18 (eighteen) days.

In the merger filing related to the associative agreement regarding the sharing of ships to transport containers[12], the Tribunal rejected the request for provisionary and urgent approval due to the fact that the parties did not file their request with the notification of the transaction, as well as due to the inexistence of imminent financial losses.

Moreover, CADE's case law also confirms the importance that the provisionary authorization for cases meet the requirements established in CADE's Internal Regulation. In December 2017, CADE, for the first time since the enactment of the new Brazilian Antitrust Law, granted the measure in question. It referred, as previously mentioned, to

[10] Article 156. The provisionary and urgent authorization for the merger filing maintains its effectiveness until the end of the trial for the merit of the merger filing or until its revocation or amendment by the Tribunal, which may, at any time, review the authorization, submitting its decisions to the Full Bench of the Tribunal in the first session after its issuance.

[11] Concentration Act No. 08700.007417/2012-60, approved without restrictions by the GS on September 28, 2012, which addressed the purchased, by OpenGate, of businesses owned by companies controlled by Grupo Carlyle.

[12] Concentration Act No. 08700.002699/2017-13, approved without restrictions by the GS on September 01, 2017.

the purchase of shares by Excelente in the company that operates the Galeão Airport.

The matter originally reached CADE in July 2017, when the purchase of shares held by Odebrecht in RJA by HNA Infrastructure Investment Group Co., Ltd. ("HNA"), a Chinese company, was analyzed. Although the transaction was approved by the GS[13], HNA did not obtain the approvals required in the People's Republic of China. This fact resulted in adverse consequences for RJA and CARJ, seeing the new shareholder was supposed to inject funds for the payment of the concession. For this reason, Excelente decided to purchase the shares which would be purchased by HNA, and that needed to be performed until December 20, 2017, according to the payment term agreed with the Brazilian National Civil Aviation Agency (ANAC).

Although the approval decision was rendered by the GS on December 11 (only two days after the notification of the transaction), there still remained the appeal period of 15 days, during which the parties could not close the transaction. As such, CADE, on December 13, analyzed the parties' request and considered all requirements met in order to grant the provisionary and urgent approval of such merger filing for the first time in CADE's history.

Reporting-Commissioner Mauricio Bandeira Maia pointed out in his vote that: (i) regarding the inexistence of irreparable damage, there would be no horizontal overlaps, vertical integrations or non-compete clauses resulting from the transaction; (ii) regarding the reversibility of the transaction, he pointed out that it would be possible to sell the equity shareholding of Excelente to a third party; and, finally, (iii) regarding the imminence of substantial and irreversible financial losses, if CARJ did not receive the required capitalization to comply with the payment of the concession and its rescheduling, such company would not be able to continue with the concession of Galeão Airport. In such case, services could only be provided by means of a new bidding process, which would

[13] Concentration Act No. 08700.004105/2017-17, approved without restrictions by the GS on August 01, 2017.

require a certain time, in addition to the creation of transition rules to continue offering the public service. Such measures would be clearly burdensome not only for the parties but for the public administration.

Finally, the Commissioner mentioned that the parties did not act in bad faith when they notified the transaction on a date close to the deadline for the payment of the concession.

Therefore, although this is an exceptional measure, there are cases that justify its application, provided it is requested in good faith and in compliance with all the requirements established by CADE's Internal Regulation.

WHAT ARE THE MAIN ISSUES RELATED TO THE DECLARATION OF COMPLEXITY?

Kenys Menezes Machado[1]

Definition

The declaration of complexity is a formal instrument through which CADE informs the parties involved in a merger that it will be necessary to deepen the instruction beyond what is normally required in cases analyzed under the ordinary procedure.

For the declaration of complexity, a technical note is elaborated that justifies the request and indicates the complementary instruction to be carried out. The technical note must be approved by the General Superintendent and the correspondent decision is published in the Official Journal.

The declaration of complexity is set forth in Article 56 of Law No. 12,529/2011 and Article 160 of the CADE's Internal Regulation.

Timeframe

Transactions have been declared complex within approximately 90 days as of the filing, when the information presented is not sufficient for putting away securely that the merger will not derive potential damage to the competition. In this case, the transaction is declared complex so the complementary investigation is performed.

[1] This article represents the opinions of the author. It is not meant to represent the position or opinions of CADE or its Members, nor the official position of any staff members. Any errors are the fault of the author.

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In the declaration of complexity, the authority indicates the complementary investigation to be carried out and informs if it will, at that procedural moment, request the extension of the period referred to Article 88 of Law No. 12.529/2011, Paragraph 2 (240 days).

The instruction to be performed depends on the analyzed case. However, some of the following information and documents are usually requested:

(i) presentation of efficiencies;
(ii) preparation of an economic study by CADE's Department of Economic Studies.
(iii) complementary information on the conditions of entry and rivalry in the markets indicated in the technical note;
(iv) information that enables the construction of a structural or behavioral remedy.

Extension of the review period

The transaction can be declared complex without the request for extension of the analysis period. By the way, the GS has never declared a complex transaction and requested the extension of the review period. Extension applications have always been made by the Tribunal.

Outcome

The declaration of complexity presents the points of concern of the GS and the need for additional investigation. These points can be overcome with the instruction information - which would result in unrestricted approval - or lead to the need to negotiate competitive remedies. In such cases, the GS will challenge the transaction and submits it to the Tribunal's review and decision.

Since Law No. 12,529/2011 came into force, 37 cases were declared complex. From these, 7 were not challenged by the GS.[2]

Finally, the GS may challenge transactions not declared complex. Until 2017, this happened in two situations:

(i) the transaction was challenged only because of the existence of a non-compete clause in disagreement with CADE's case law. In this case, the transaction was simple, and there was no need to declare complexity.[3]

(ii) upon filing, the notifying parties submitted remedies that eliminated the competitive concerns raised by the GS during the pre-notification period. In addition, the preliminary market analysis and negotiation of the terms of the settlement agreement were completed within 90 days.[4].

[2] The following cases were declared complex and not challenged: Concentration Acts No. 08700.010224/2014-58 (The Dow Chemical Company, Univation Technologies and ExxonMobil); 08700.005683/2016-81 (Unipar Carbocloro S.A., Solvay Indupa S.A.I.C. and Solvay Indupa do Brasil S.A); 08700.005959/2016-21 (Guerbet S.A. and Mallinckrodt Group S.à.r.l.); 08700.007629/2016-71 (General Electric Company and LM Wind Power Holding A/S); 08700.007556/2016-17. (Rede D'Or São Luiz S.A.; Hospitais Integrados da Gávea S.A. – Clínica São Vicente); 08700.001145/2017-07 (Mosaic Company; Vale Fertilizantes); 08700.002350/2017-81 (Maersk Line A/S; Hamburg Südamerikanische Dampfschifffahrts-Gesellschaft KG).

[3] See Concentration Act No. 08700.008751/2012-31 (Proair Serviços Auxiliares de Transporte Aéreo Ltda. and Seaviation Serviços Aeroportuários Ltda).

[4] For example, see Concentration Acts No. 08700.007621/2014-42 (Holcim Ltda. and Lafarge S/A); 08700.009731/2014-49 (Telefónica S.A., Assicurazioni Generali S.p.A., Intesa Sanpaolo S.p.A.; Mediobanca S.p.A.); 08700.009732/2014-93 (Telefônica Brasil S.A. and GVT Participações S.A. Tim-Telefônica).

HOW DOES CADE ANALYZE GLOBAL TRANSACTIONS?

Marcio Soares
Lauro Celidonio Neto
Ana Carolina Bittar

Since the entering into force of the Brazilian pre-merger control regime in 2012[1], the Brazilian antitrust authority (*Conselho Administrativo de Defesa Econômica* – "CADE") has had several opportunities to affirm and reiterate its jurisdiction over global transactions that meet the applicable filing thresholds set forth in the Brazilian merger control regulation. Every year, a significant number of foreign-to-foreign and cross-border deals, including global transactions, are submitted to CADE's prior approval. The experience shows that, depending on the level of potential harm to competition in Brazil or affecting, directly or indirectly, the Brazilian market, global deals can face a rather strong level of scrutiny on the part of the Brazilian antitrust authority, and may go through a challenging review process in Brazil, both in terms or substance and timing.

One common feature in every global transaction that may give rise to potential competition concerns in Brazil is CADE's willingness to coordinate their review with other antitrust authorities worldwide. This has been the case since the early stages of the Brazilian pre-merger control regime. For instance, in the very first two merger cases concerning global transactions that went through in-depth reviews and required remedies in Brazil – namely, *WP Roaming/Syniverse*[2] and

[1] Law No. 12,529/11 was enacted on November 30, 2011 and became effective on May 30, 2012.

[2] *See* Concentration Act No. 08700.006437/2012-13 (*WP Roaming III S.à.r.l and Syniverse Holdings, Inc*.).

Munksjö/Ahlstrom[3] –, CADE coordinated its review with the European Commission from the outset, with both authorities reaching similar conclusions on the merits and negotiating similar remedies packages with the notifying parties given the worldwide features of the affected markets.[4] Since then, there has been a number of other global deals in which CADE's review was coordinated with parallel reviews in other jurisdictions, not only in the European Union but also in the U.S., Canada, Mexico, Chile, amongst others. This trend is further reinforced by the growing number of cooperation agreements that CADE has entered into with a number of antitrust agencies in various jurisdictions, including the European Union, India, Mexico, Russia, South Africa, South Korea, the U.S., among others.[5]

This close coordination between CADE and foreign antitrust authorities in other jurisdictions in the merger area, however, cannot be interpreted as a suggestion that CADE would defer to a foreign regulator to decide on which are the issues revolving a given global transaction. Quite the opposite, the experience shows that CADE will take an independent view on the potential effects of any global deal *vis-á-vis* the Brazilian market, and will not refrain from applying a very strong level of scrutiny on those transactions that may, in CADE's opinion, potentially harm competition in Brazil.

For instance, to date, almost one third of all remedies cases in

[3] *See* Concentration Act No. 08700.009882/2012-35 (*Munksjö AB and Ahlstrom Corporation*).

[4] Indeed, in both cases, the remedies packages and the implementation procedures were virtually the same, both in Brazil and Europe, with CADE making use of trustees and other mechanisms (e.g. suitable buyer requirements and prior approval) to ensure the fulfillment of all the commitments undertaken by the notifying parties.

[5] According to CADE's President Alexandre Barreto de Souza, from May 2012 to September 2017, CADE had cooperated with foreign competition authorities in connection with 27 merger cases. *See* https://globalcompetitionreview.com/insight/the-antitrust-review-of-the-americas-2018/1147409/brazil-administrative-council-for-economic-defence.

Brazil concerned cross-border/global deals.[6] And in the vast majority of those cases CADE required Brazil-specific commitments to address the concerns raised by the Brazilian authority in relation to the potential negative effects arising from the notified transaction in Brazil.

For example, the remedies negotiated with CADE in *Ball/Rexam* were tailor-made for the Brazilian market and consisted, mainly, in the divestment of plants located in Brazil and the transfer of local client contracts, while the parties agreed to divest certain plants in the Europe as a condition to obtaining approval from the European Commission. Similarly, in *Continental/Veyance*, part of the remedies negotiated with CADE addressed concerns in both the Brazilian and the US markets and mirrored the commitments undertaken by the parties with the Department of Justice in the U.S., but the Brazilian package also included an element related solely to concerns in Brazil: the divestiture of a plant located in São Paulo. The combination of remedies coordinated with other jurisdictions and remedies specific to the Brazilian market also happened in *Dow/DuPont* and *Holcim/Lafarge*.

In the recent *Bayer/Monsanto* case, although the transaction was ultimately cleared in Brazil subject to the selling of Bayer's soybeans and herbicides units to BASF combined with a series of behavioral commitments, two dissenting Commissioners voted for the total block of the transaction. In their view, the global divestment would not

[6] See Concentration Act No. 08700.006437/2012-13 (*WP Roaming III S.à.r.l and Syniverse Holdings, Inc*.); Concentration Act No. 08700.009882/2012-35 (*Munksjö AB and Ahlstrom Corporation*); Concentration Act No. 08700.007621/2014-42 (*Holcim and Lafarge*); Concentration Act No. 08700.004185/2014-50 (*Continental Aktiengesellschaft and Veyance Technologies Inc.*); Concentration Act No. 08700.008607/2014-66 (*GlaxoSmithKline PLC. and Novartis AG*); Concentration Act No. 08700.006567/2015-07 (*Ball Corporation and Rexam PLC*); Concentration Act No. 08700.004211/2016-10 (*TAM Linhas Aéreas S.A., Iberia Líneas Aéreas de Espana, S.A., Operadora Sociedad Unipersonal, and British Airways Pico*); Concentration Act No. 08700.001097/2017-49 *(Monsanto Company and Bayer Aktiengesellchaft)*; Concentration Act No. 08700.001390/2017-14 *(AT&T Inc. and Time Warner Inc.).*and Concentration Act No. 08700.005937/2016-61 (*Dow and DuPont*).

sufficiently address all the antitrust concerns that would arise from that transaction specifically in relation to the Brazilian market. This is clear evidence of how CADE's review of global transactions can be as strict as in any other jurisdiction.

That said, one should not take the view that any global transaction that may give rise to remedies either in the U.S. or Europe will inevitably result in remedies being also required in Brazil. As mentioned above, CADE's focus on the potential effects of global transactions in Brazil works both ways, and there have been various cases in which CADE concluded that a transaction should be unconditionally cleared in Brazil despite remedies being required in other jurisdictions. A recent example is ChemChina's acquisition of Syngenta. The case was subject to a very lengthy review in Brazil, but ultimately CADE concluded that no remedies were necessary, while other authorities required substantive commitments from the parties.[7] Another example is Eli Lilly's acquisition of Novartis' worldwide animal health business, which was unconditionally cleared in Brazil but required the divestment of a product line of medications for treating heartworms in dogs in the US. In the same sense, the *Time Warner/AT&T* deal was cleared in Brazil with behavioral remedies, the transaction was challenged by the US Department of Justice. All these cases further demonstrate CADE's independence and focus when analyzing complex global transactions.

As we can see, CADE's track-record on cross-border/global transactions make it very clear that the parties should always assess very carefully what the potential implications that any global deal may have in the Brazilian market. If the deal gives rises to potential concerns in Brazil, the parties should carefully define the strategy for the Brazilian filing and take into account the specific procedural aspects of the Brazilian merge control regulation so as to avoid unexpected pitfalls in terms of both substance and timing that may affect the transaction as a whole.

[7] See Concentration Act No. 08700.006269/2016-90 (*China National Agrochemical Corporation and Syngenta AG*).

INTERNATIONAL COORDINATION: HOW TO DEAL WITH THE DIFFERENT DEADLINES AND PROCEDURES OF EACH NATIONAL AUTHORITY?

Marcelo Nunes de Oliveira

Transnational merger and acquisition (M&A) transactions require additional challenges beyond the merits, both for the antitrust authorities and for the parties and lawyers. Such procedural challenges are not trivial and can have a major impact on the final outcome of the business, in addition to enhancing the already high level of uncertainty and anxiety in the parties involved inherent in any merger and acquisition process, which requires particular attention to the specific procedures of each jurisdiction in which a transaction is to be notified.

There are, in particular, two main reasons which justify this greater attention of the parties as to the specific aspects of each jurisdiction. The first reason refers precisely to the uncertainties to which the parties are subject when decisions are made in a disconnected manner over time. Such uncertainties often provoke evasion of employees and executives, and deterioration of the assets of the companies involved in the transaction, and ultimately serve as an input to the increased pressure on the authorities whose decisions remain outstanding. A second reason is more related to the effectiveness of decisions: unbalanced analyzes make it difficult to negotiate remedies, especially when there is a need for asset divestments that require cooperation between the authorities to guarantee the effectiveness of the decision.

That being said, the question that arises is: what measures can be taken to mitigate the problems that arise from multiple jurisdictions? The answer is not trivial, nor does this article attempt to exhaust possible solutions, but it is possible to point out some measures and responsibilities. From the notifying parties, it is expected that there will be prior knowledge about the transaction of the various national antitrust

systems and an effective collaboration in providing information that is consistent with each other. On the part of the authorities, whose efficient functioning depends to a large extent on the level of commitment of the parties, close cooperation with their international peers is required.

As far as the notifying parties are concerned, knowledge of the transaction of the national antitrust authorities in which the transaction is to be notified is essential if the filings are to be made in a timely manner in order to avoid unbalanced and possibly contradictory decisions. Obviously, given the peculiarities of each system, it is inevitable that, in each country, the analysis will follow a particular course and with little capacity for interference by the companies. In this sense, observing the legal deadlines of each authority is essential so that the schedule of notifications and follow-up can be planned.

Another fundamental point in international mergers is the need for consistency (sometimes not observed) in the information, arguments and documentation provided in each country, avoiding possible contradictions and omissions that can be easily proven through international cooperation among the authorities. This is a fact that businesses should be aware of: the global antitrust community may be one of the most cooperative networks at the transnational level, with a number of information exchange forums that allow for the sharing of ideas and closer ties between authorities, such as the International Competition Network - ICN and the Organization for Economic Co-operation and Development - OECD (among others), facilitating communication among regulators. This process of cooperation and exchange of information is increasingly natural and part of the routine of national authorities, and being unaware of such intense cooperation can bring problems for the parties involved in a merger.

In Brazil, before Law 12,529/2011 came into force, in 2012, the parties could file a transaction within 15 working days from the first binding documents executed by them. Although such a criterion required speed for notification, the structure analysis system was *a posteriori*, allowing the parties to consummate the transaction before the final

decision. The current Antitrust Law does not fix deadline for the parties to submit the transaction to CADE, provided that it is made "before any transaction is consummated[1]."

In practice, Brazilian merger control has aligned itself with the best international practices and should be carried out prior to the consummation of any act involving joint action by the parties. Such an amendment gave more freedom for the parties to submit the notification at the time they deem most appropriate, however, it brought with it a need for greater international coordination, which, through the experience of almost six years of current legislation, still requires improvement.

A recurring problem in the notifications received by CADE in cases of international mergers is the delay, in relation to the other jurisdictions, in which such transactions are submitted. In several situations, CADE becomes aware of a certain merger after it has already been approved - and not just notified - in other countries.[2] It is a situation that makes any effective cooperation unfeasible, either for the analysis of merits and especially in cases requiring the adoption of remedies.

In addition, CADE has, in accordance with Law 12,529/2011, 240 days to analyze the transaction, with possible extension of 90 days, if necessary, totaling a maximum of 330 days. However, cases eligible for the fast track procedure are analyzed in less than 30 days (average of

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1 Article 147, Paragraph 1, of the CADE's Internal Rules.

2 For example: Concentration Acts No. (i) 08700.006243/2016-41, between UASC and HL AG, approved in the USA in July 2016 and notified to CADE only in September 2016; (ii) 08700.009173/2015-01, between Amadeus and Navitare, approved in the USA in July 2015 and notified to CADE in September 2015; (iii) 08700.004446/2017-84, between Essilor and Luxottica, notified in the USA, Canada, Australia and Mexico (among other countries) between April and June 2017 and in Brazil in September 2017; (iv) 08700.000206/2015-49, between Merck and Sigma, notified in Serbia, USA, China, Russia, Japan, among other countries, between October and December 2014 and in Brazil only in March 2015.

approximately 17 days), while ordinary cases have an average of 79 days (data for 2017). Knowledge of such information allows for greater planning capacity for those responsible for the notification process in the various national authorities.

In addition to the knowledge of the procedures of each national authority, it is of great importance that the parties provide complete and coherent information to each other in the various authorities which will examine the operations. International cooperation in operations involving other jurisdictions since the beginning of the procedural examination is routine in CADE. It has sometimes been found that information, arguments and documentation have been omitted or provided in a conflicting manner in different countries for the same operation, which, in addition to other implications, require additional requests for information and clarification, which, of course, implies adding time - unnecessary - to procedural instruction.

The pursuit of a reasonably simultaneous notification of the provision of complete and consistent information in the various jurisdictions ultimately contributes to the proper conduct of the antitrust review by the authority and, with CADE, is no different. First, simultaneous cooperation promotes the exchange of information that can be used by both authorities. However, perhaps the main reason why concomitant analysis is desirable is the possibility of working on non-conflicting decisions. Merger control decisions are necessary to carry out acts of consummation of mergers and acquisitions transactions, such as payments, shares transference, integration of teams, assets processes, among others. A negative decision among other effects is enough to prevent the consummation of a transaction, generating enormous legal insecurity to the parties.

In addition to avoiding conflict of decisions, cooperation between authorities allows the construction of more effective remedies both from the point of view of consumers and the companies themselves. The construction of solutions in a cooperative way avoids possible overlaps or redundancies in the remedies to be adopted, allowing to

address the competitive risks raised by each jurisdiction without overcharging the parties. However, temporal simultaneity is again required for single solutions to be feasible.

As stated at the beginning of this article, it was not objected here to exhaust the theme regarding measures that make it possible to optimize the examination of transnational mergers and acquisitions, on the contrary, the intention is much simpler: just to raise the question and bring some notes useful for the parties. Notification in multiple jurisdictions is a major challenge for the parties as it demands specific knowledge often unavailable internally. However, the benefits of seeking the attention of the various national authorities in a timely manner are not only relevant from the point of view of the authority but are assessed by the parties themselves in terms of greater predictability and legal certainty on the results of the antitrust review for the resulting organization.

HOW ARE CARVE-OUTS TREATED?

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1. Summary

This paper discusses the recent developments in Brazil regarding the possibility of the use of carve-out agreements in multijurisdictional mergers. The subject is still incipient in Brazil, but some recent decisions do shed light and provide relevant lessons that may serve as guidelines that should be observed by companies and legal practitioners in Brazil when designing a merger in stages.

2. The Brazilian legal framework and enforcement experience

Since Law No. 12,529/2011 came into effect in Brazil (2012), 20% of the mergers submitted before CADE required some kind of international cooperation among National Competition Authorities (NCAs)[1], being this one of the core reasons CADE has increased international cooperation agreements[2].

[1] See Jota. Como atua o Cade em fusões internacionais? November 5, 2017. Available at: https://www.jota.info/tributos-e-empresas/concorrencia/como-atua-o-cade-em-fusoes-internacionais-05092017. Access on March 29, 2017.

[2] Accordingly, during the past five years CADE concluded more than 10 (ten) cooperation agreements with different authorities around the world. The most recent of them are the cooperation agreements with the Russian Antimonopoly Agency and with the Competition Commission from South Africa (information available at: http://www.cade.gov.br/assuntos/internacional/cooperacao-bilateral-1. Access on March 31, 2018).

Carve-outs are a recurring theme involving multijurisdictional mergers, focused on avoiding delays for closing in various jurisdictions due to some specific jurisdiction that may be delayed in its review of the case. Thus, in the context of merger reviews, a carve-out agreement would aim at preventing the actual effects of a transaction, both in the legal and economic sense, to certain territories and jurisdictions indefinitely or for a certain period of time.

In this context, by limiting the effectiveness of the deal within the jurisdictions where the merger analysis is still pending, such agreement can be used as a way of accelerating the consummation of a cross-border merger in those jurisdictions where (i) there is no antitrust analysis; (ii) there is a post-merger antitrust analysis; and (iii) there is a pre-merger analysis, but the transaction has already been cleared in other jurisdictions.

From these possibilities derives the most relevant question authorities and legal experts have been facing in this context: are this sort of contractual provisions sufficiently hermetic in order to allow the consummation of the merger in stages and countervail the pre-merger notification system form several states, including Brazil?

According to the Brazilian Antitrust Law, an act of economic concentration (e.g. merger, acquisition, joint venture, etc.) that fulfills certain thresholds[3] must be cleared by CADE before the deal produces

[3] According to Article 88 from Law No. 12,529/2011, and Article 1 from Interministerial Ordinance (Ministries of Justice and Finance) 994/2012, a merger shall be subjected to CADE's review when: **(i)** it constitutes one of the act of economic concentration set by Article 90 from Law No. 12.529/2011; and **(ii)** the annual gross turnover of at least one of the economic groups involved in the transaction exceeds BRL 750 million in Brazil in the previous financial year while the annual gross turnover of the other economic group involved in the transaction exceeds R$ 75 million in Brazil in the previous financial year. Moreover, the turnover thresholds are not limited solely to the acquiring company and to the target company. Article 4 of Resolution CADE No. 02/2012 clarifies that the parties of the transactions are defined as any entities directly involved in the notified transaction and their respective economic groups. The definition of "group"

its legal and economic effects[4-5]. Such effects involve, for example, the transfer of technology, people, facilities closure and, more importantly, the merging of the economic strategy and competitive behavior into one single player. The Brazilian Antitrust Law is very clear and provides relevant gun jumping penalties: up to USD 30 million in fines,[6] the total merger setback to its former stage, and the opening of an investigation for any plausible horizontal antitrust infringement[7-8].

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includes all company under common control and any other companies in which above 20% equity is held, with some specificities when investment funds are concerned. Thus, turnover from the entire groups of the selling and buying companies are considered when calculating thresholds.

[4] See Article 88, Paragraph 3, Law No. 12,529/2011.

[5] According to CADE's Internal Regulation, parties must maintain separate physical structures and continue to compete independently, keeping "competition conditions" unaltered, until CADE clears the deal. It expressly forbids any asset transfers, influence from one party over the other, and exchange of competitively sensitive information other than strictly necessary for the signing of the deal (CADE's Internal Regulation, Article 147, Paragraph 2).

[6] If parties close or take any of the actions described above, they are subject to a fine that shall range from BRL 60,000 to BRL 60,000,000. The calculation of such fine will take into account the size of the parties, intent, bad faith, and the anticompetitive potential of the transaction, among other factors (Article 88, Paragraph 3 from Law No 12,529/2011 and Article 156 from CADE's Internal Regulation).

[7] Marrara, Thiago. *Sistema Brasileiro de Defesa da Concorrência*. São Paulo: Atlas, 2015, p. 166.

[8] Indeed, parties are subjected to an investigation for antitrust infringements if the premature consummation of the transaction results in any form of exchange of sensitive information or collusion (Law No. 12,529/2011, Article 88, Paragraph 3 and CADE's Internal Regulation, Article 152, Paragraph 3). This scenario is not difficult to foresee since merging companies starts acting as a sole player sharing, thus, the same economic strategy and coordinating their activities to the maximization of their wealth. CADE has published specific guidelines regarding gun jumping, available at: http://www.cade.gov.br/acesso-a-informacao/publicacoes-institucionais/guias_do_Cade/gun-jumping-versao-final.pdf. Access on March 31, 2018.)

Even though it could be argued that carve-out agreements are not rigorously forbidden by the Law in Brazil[9–10], experience shows important practical limitations which generally sustains the decisions from NCAs – including CADE – not to consider carve-out agreements as an effective way of securing competition in each jurisdiction from the unauthorized deal.

The discussion in Brazil is quite recent and the first case analyzed by CADE on this matter in more depth was in 2016, involving the acquisition of a subsidiary from Cisco Systems, Inc by Technicolor S.A[11]. This was a cross-border merger, submitted to the clearance from six NCAs[12], that aimed to conclude the sale of a Cisco business concerning connectivity systems. Even though the Share Purchase Agreement (SPA) was signed on July 23, 2015, the merger was filed before CADE only 43 days thereafter, on September 4, 2015. When reviewing the case, CADE understood that the merger was filed lacking crucial information for the antitrust assessment and, thus, requested the amendment of the case on September 23, 2015. After some time, when CADE was examining the case, public news came to light regarding the final consummation of the deal by the parties[13], who, after two days,

[9] See Burg, Amanda Karolini. O carve-out agreement como instrumento capaz de elidir a configuração do gun jumping. In: *Revista de Defesa da Concorrência*. v.4, n.2 (2016), p. 96. See also Concentration Act No. 08700.011836/2015-49. Parties: Cisco Systems and Technicolor S.A. Reporting Commissioner Paulo Burnier da Silveira. J. on January 01, 2016.

[10] Marrara, Thiago. *Sistema Brasileiro de Defesa da Concorrência*. São Paulo: Atlas, 2015, p. 163.

[11] See Concentration Act No. 08700.011836/2015-49. Parties: Cisco Systems and Technicolor S.A. Reporting Commissioner Paulo Burnier da Silveira. J. on January 01, 2016.

[12] Among of which stands Brazil, USA, Canada, Ukraine, Nederland and Colombia.

[13] "Paris (France), November 20, 2015 - Technicolor (Euronext Paris: TCH, OTCQX: TCLRY) has successfully completed the acquisition, announced on July 23, 2015, of Cisco Connected Devices, the company's home terminal and video solutions business (NASDAQ: CSCO), for a purchase price of 600 million US

contacted CADE in order to inform that despite the consummation, Brazil would be securely protected from the anticompetitive effects by means of a newly carve-out agreement celebrated by the parties. The core justification for the consummation was the urgency in closing the transaction, given the financial difficulties faced by Cisco could impact the interest of the parties regarding the deal.

In its unanimous decision, CADE's Tribunal ruled that Cisco and Technicolor should be convicted for gun jumping, setting a fine of BRL 30 million. CADE understood that carve-out agreements in general arise doubts on their effectiveness to isolate the effects of a closed deal in Brazil, and that, in the concrete case, the carve-out agreement entered by the parties presented several limitations.

First, according to the decision, the parties acted in bad faith, indicating, therefore, an intention of bypassing the law observed in the following actions: (i) filing the transaction only after a relevant period of time had gone by; (ii) not disclosing upfront the carve-out agreement and not mentioning it in the Sale and Purchase Agreement; (iii) not informing the intention of consummating the deal earlier; (iv) using an argument based on urgency, while CADE's assessment is quite fast. Second, CADE considered the provision quite dubious in terms of effectiveness for two main reasons: (i) the relevant market was considered global and (ii) the agreement was limited to the prohibition of contract and assets transfer exclusively related to the activities in Brazil, even though the parties are active in the country by means imported devices and there was room for an exchange of information at global level that could impact the Brazilian market.

CADE had also the opportunity to discuss this topic in the DIA/Casino deal, that consisted in the creation of a global joint venture to offer the so-called *on top* services (basically market intelligence services) and form a buyer alliance to increment their bargain power to

dollars (equivalent to 561 million euros), paid in cash and shares." (Free translation. Available at: https://www.technicolor.com/node/4385. Access on March 31, 2018.

negotiate with suppliers[14]. Such global agreement was planned to be placed by means of two different agreements: one concerning Europe and Asia and another specific for Latin America. During the merger review the Brazilian Association for Food Industry (ABIA) claimed that this separation of the agreement consisted in a form of carve-out agreement.

Despite ABIA's claim, CADE[15] considered that this case was quite different from the Cisco/Technicolor merger. According to the Authority, the DIA/Casino deal was not a global transaction, but rather a global negotiation that would have isolated impacts in each nation. This conclusion arose from the analysis of the contract and the consideration that the geographical relevant market for the transaction was national. Based on that, the segmentation of the merger would not consist any form of violation to the Brazilian pre-merger notification system.

3. Conclusion: key lessons and strategic outlook

Considering the recent precedents from CADE on assessing the validity of carve-out agreements, some lessons should be noted.

The first of them is that the Cisco/Technicolor deal has very specific characteristics and may not necessarily serve as a general rule. As explained above, CADE considered that the parties acted in bad faith due to the late notification, lack of transparency, closure of the deal without previous notice and the draft of *a posteriori* carve-out agreement[16] that was not negotiated, nor frankly discussed with CADE. Moreover, the international relevant market along with the weak

[14] See Concentration Act No. 08700.003252/2016-81. Parties DIA and International Retail & Trade Services. J. on October 25, 2016.

[15] By means of a technical note issued by the General-Superintendence.

[16] In the DIA/Casino deal, CADE explicitly mentioned that only *a posteriori* carve-out agreement shall be condemned *per se* (See Concentration Act No. 08700.003252/2016-81. Parties DIA and International Retail & Trade Services. Ruled on October 25, 2016).

remedies to isolate the deal contributed to the inefficiency of the provision. To this last point, we should highlight the understanding from CADE in the DIA/Casino deal that the national relevant market was important do dismiss any interpretation that there was gun jumping in the case.

Despite of this discussion, a plausible alternative for merging parties that urges to close the deal is the provisory authorization to consummate the merger set forth in Law No. 12,529/2011, Article 59, Paragraph 1, and on CADE's Internal Regulation, Article 155. According to this provision, parties are allowed to request CADE to approve precariously a transaction upon certain conditions and commitments to reestablish the market to the *status quo* conditions and secure the competition environment in Brazil if the transaction is not finally approved by CADE[17]. Note that the logic of this settlement is similar to the carve-out agreement, having, at least, one key difference: the solution involved the assessment of the authority along with the interests from the Applicants. One key point, however, is that this is not necessarily a speedy solution, in practice making more sense in complex transactions (simple cases may possibly be cleared before the request for the provisory authorization is decided).

An attempt to carving Brazil out of a multijurisdictional merger may bring about relevant risks, given the few precedents on the subject, and it is key to be transparent and upfront with CADE regarding any situations involving extraordinary urgency. It is important to remember that CADE has indeed been very fast in deciding simple and complex mergers, something that must be taken into account before considering any carve out solutions and their inherent risks.

[17] In addition to this general condition, CADE's Internal Regulation also establishes that the transaction must not carry any risk of irreversible damage to competition and the Applicants sufficiently proves the financial necessity to consummate the merger before the formal authorization by CADE.

WHAT IS CADE'S SUBSTANTIVE STANDARD FOR MERGER REVIEW?

José Carlos Berardo

1. Legal framework

The question this brief article seeks to answer seems easy, almost naïve, but CADE's decision practice shows there is still uncertainty in this respect. The purpose, therefore, is to provide an overview of the substantive tests adopted by the Brazilian Competition Law, with a special view to highlighting evidence-related aspects.

The statutory provisions regarding merger control under the current Competition Law set forth that the CADE must prohibit a concentration in the following circumstances (article 88, paragraph 5):

(i) If it eliminates competition "in a substantial part of the relevant market"; or

(ii) If it could create or strengthen a dominant position; or

(iii) If it could result in the domination of a relevant market.

The authority may, however, authorize a concentration that entail any of the above "effects" if the concentration is strictly necessary to either increase productivity and competitiveness, improve the quality of goods or services, or encourage efficiency and technological or economic development, as long as a "relevant part of the resulting benefits are transferred to consumers" (article 88, paragraph 6).

Brazilian law, then, adopts both a "substantial lessening of competition" legal test and what could generically be considered an alternative "dominance" legal test, and it explicitly provides the framework for a particular type of "consumer welfare standard" in the consideration of concentration-specific "efficiencies". In addition, the law clearly sets forth that the authority has the discretion – and it is thus not required to – accept efficiency defenses in merger review; the current

Competition Law, it is worth highlighting, eliminated the "public interest" element that used to be in place prior to 2012.[1]

Courts have not decided upon substantive tests or related evidentiary issues in merger cases in Brazil, and, considering the incentives in place, it is very unlikely merging parties will challenge merger decisions in Courts on either merits or procedural grounds in the near future.[2] As a result, CADE's application of the actual content of the SLC and dominance tests is currently the single source of authority on the matter and on a general level, converges to current international standards.

2. Substantive tests and competition analysis

Surprisingly, however, there is a lack of debate on possible distinctions regarding the proper interpretation of these substantive legal tests in CADE's precedents, and, one might consider, there is reason to believe that this is purposeful, as the authority has never been called to explain how these legal tests translate into a competition test and, pursuant to what seems to be an widely accepted (and not much discussed) understanding, there seems no reason to do so on economic

[1] The substantive legal test under article 54 of Law 8,884, in place from 1994 to 2012, was particularly convoluted (as it mixed a notification test, efficiency requirements and a substantial lessening of competition criteria), but provided expressly that the authority could be more lenient in the review of mergers in consideration of public interest or "the benefit of the Brazilian economy" as long as "end consumers" were not harmed.

[2] For instance, according to most recent survey released by the National Council of Justice (based on 2016 data), on average a lawsuit in a Federal Court – the venue in which a challenge to a CADE decision would need to be filed – takes 6 years. This does not seem compatible with the needs justifying a challenge to a merger block (or clearance), especially because the chances of justifying an injunction (e.g., an interim decision allowing for the merger to proceed) are slim to none.

grounds in practice[3], as long as the authority pursues thorough investigation of sound theories of economic harm in what regards both "unilateral" and "coordinated" competitive effects, in "horizontal" mergers, and "foreclosure" and "increase to rivals' costs" in "vertical" mergers.

CADE's assessment of unilateral effects and related "theories of harm to competition" usually follow "conventional" antitrust wisdom, and the authority's current horizontal merger guidelines, issued in 2016, echoes its United States counterpart. Despite a few cases in which less common theories of harm have been adopted as the basis for challenging horizontal mergers, such as the "elimination of a maverick" theory[4], overall the authority generally looks at single firm dominance as the basis for most challenges – or, conversely, at lack of a dominant position from a single firm as the basis for the vast majority of the approvals.

In that context, great weight is given to resulting market shares and market concentration levels, and the higher those are, the less likely a transaction is to be cleared. This is not to say that other elements – especially barriers to entry or expansion or repositioning from rivals – are not considered, but there is – a sometimes undue – reliance on resulting shares as an expression of competitive effects.

The investigation of coordinated effects, in the past, could generally be seen as an afterthought in more complex cases, but more recent decisions[5] show the authority is looking beyond a so-called checklist approach, and looking at distinguishable market and industry features that transactions effectively change to tip the market towards increased chances of tacit coordination. The current market structure

[3] Considering what now seems an old debate: OECD, Substantive Criteria used for Assessment of Mergers, Series Roundtables on Competition Policy, 2003. See: http://www.oecd.org/dataoecd/54/3/2500227.pdf.

[4] Concentration Act No. 08700.006444/2016-49 (Ipiranga/Alesat).

[5] Concentration Act. No. 08700.005937/2016-61 (Dow/Dupont), No. 08700.001097/2017-49 (Bayer/Monsanto) and, especially, No. 08700.002155/2017-51 (Ultragaz/Liquigas).

(shares and numbers of players), the reduction of the number of players and past cartel infringements in the same or related industries are generally given relevant weight in the assessment of possible "coordinated" effects[6].

The authority has not issued guidelines for the assessment of "vertical" mergers, but its current general practice shows that it is effectively concerned with investigation dominance first, and then theories of harm regarding foreclosure and increase to rivals' costs strategies focusing on ability and incentives to engage into such strategies, as other competition authorities[7]. Even if there is not a statutory definition of "safe habor" for the review of "vertical" transactions, cases involving shares below 30% at either upstream or downstream levels tend not to be considered complex.

So called "conglomerate" effects resulting from mergers – such as increase in portfolio products or locations – have also been raised by the authority as possibly causes of lessened competition, but are not generally accepted as being sufficient to justify the adoption of remedies or blocking of transactions[8]. Other potentially relevant "spill-over" effects, involving, for instance, access to third parties' sensitive confidential information, have also been addressed by certain CADE precedents[9], although not great weight has been given to whether these are properly incorporated in the legal substantive provision or not.

[6] Concentration Act No. 08700.002155/2017-51 (Ultragaz/Liquigas).

[7] Concentration Act No. 08700.004446/2017-84 (Essilor/Luxotica), Concentration Act No. 08700.001390/2017-14 (Time Warner).

[8] Concentration Act No. 08700.001097/2017-49 (Bayer/Monsanto).

[9] Concentration Act No. 08012.002148/2008-17 and, more recently, No. 08700.002792/2016-47 (joint-venture among different Brazilian banks).

3. Burden of proof and evidence gathering

The current Competition Law effectively sets forth, in the section prohibiting anticompetitive conduct (*ex post* intervention) a rebuttable presumption that a 20% market share in a properly defined relevant market corresponds to a dominant position; although the authority does not clearly state it in the horizontal merger guidelines, current practice in merger investigations and decisions effectively show that the burden of proof of mitigating factors lie, as a matter of fact, with the merging parties.

Within this framework, although it is not possible to directly state there is a statutory presumption of unlawfulness of mergers with market shares above 20%, in practice merger investigations are conducted – and cases would be better managed under that express assumption – as if the merger parties should actively produce evidence – mainly economic and empirical – of mitigating factors or alternative market definitions.

Obviously this poses a challenge, since under the Brazilian regime it is incumbent upon the authority the duty to investigate and produce evidence to support its findings, as under Public Law in Brazil the Government must always declare the reasons that support their decision, especially if that decisions eliminates or restricts private rights. The merging parties, even if much better informed about the merger and their industry, cannot, however, have access to the type of information and data the authority has powers to access, especially from third parties, using court-enforceable requests for information.

The fact-finding phase of more complex merger investigations, may be, thus, a little bit more convoluted than in usual civil court proceedings; nonetheless, it is worth pointing out that all the questions made to third parties are promptly disclosed and, generally speaking, the authority and its proceedings are transparent and readily accessible.

The adoption of quantitative analysis and, specially, screening tests, has increased over time and decision makers have relied them occasionally as tools to provide additional support to more conventional

qualitative analysis, but their results suffer, on most cases, from the lack of reliable data promptly available.

4. Conclusion

Even if the precedents lack detailed discussions about the actual legal content of the substantive tests provided for in the current Competition Law, it is possible to say that CADE's decision practice is reasonably aligned with international standards in what regards the need for the authority to investigate plausible theories of harm to competition based on fact-based, sound economic reasoning. The competitive analysis performed on the vast majority of cases adheres to the merger guidelines and to precedents, when the former are not applicable, and this assures legal certainty.

It remains to be seen, however, how the authority is going to deal with the production of evidence, specially as industries become increasingly complex and the arguments from companies become ever more sophisticated, in a scenario in which the burden of proof is not entirely clear.

HOW DOES CADE MEASURE MARKET POWER IN TRANSACTIONS WITH HORIZONTAL OVERLAPS?

Tiago Machado Cortez
Marcelo Laplane
Maria Amoroso Wagner

Like in most jurisdictions, in Brazil, the first step in antitrust merger review is the definition of the relevant market, the *locus* in which competition takes place. This first step will allow the authorities to evaluate the market structure and its competition pattern; from which it will infer the probability of the post-merger market structure to be more prone to the occurrence of abuse of market power by the merging parties.

The assessment of the market structure starts with the evaluation of market concentration. This is a straightforward application of a general result from economic theory, which identifies a positive correlation between market concentration and the probability of abuse of market power.

At this stage the Brazilian Antitrust Authority (CADE) is concerned with two features associated to market concentration: (i) the post-merger level of market concentration, and (ii) the change in market concentration from the pre-merger market structure and the post-merger market structure.

The most basic index to evaluate market concentration is the sum of the market shares of the merging parties and its main competitors in a relevant market (the "**CR_n**"). CADE will presume the existence of dominant position when the post-merger market share of merging parties exceeds 20%. Also, the **CR_4** (the sum of the market share of the four largest competitors) is used to evaluate the possibility of a transaction to give rise to "coordinated effects", which are likely to take place when the post-merger **CR_4** exceeds the threshold of 75%.

In addition, the evaluation of the Herfindahl-Hirschman Index ("HHI") of market concentration, calculated by summing the squares of

the individual firms' market shares, also plays an important role in the merger review in Brazil. Both the post-merger level of the HHI and the increase in the HHI resulting from the merger are relevant for the authority and allow it to categorize markets into three types: (i) unconcentrated markets: HHI below 1500; (ii) moderately concentrated markets: HHI between 1500 and 2500; and (iii) highly concentrated markets: HHI above 2500.

The examination of the variation of the HHI also provides relevant information about changes in market structure. For the authority, mergers involving an increase in the HHI of less than 100 points, in general, are unlikely to have significant competitive effects. Also, markets in which the HHI remains below the 1500 threshold are unlikely to have adverse competitive effects and ordinarily require no further analysis.

On the other hand, mergers resulting in a post-merger HHI between 1500 and 2500 (Moderately Concentrated Markets) that involve an increase in the HHI of more than 100 points potentially raise significant competitive concerns and demand a more detailed review. Similarly, mergers resulting in highly concentrated markets that involve an increase in the HHI of between 100 points and 200 points also raise significant competitive concerns.

Finally, mergers resulting in a HHI higher than 2.500 and involve an increase in the HHI of more than 200 points will be presumed to be likely to enhance market power.

Note that the purpose of the thresholds above is not to provide a strict frame to assess whether a transaction can be harmless or not to competition. For example, although low levels of HHI variation usually indicates that a merger is unlikely to raise competitive concerns, the examination of other characteristics of the market might indicate the opposite. This is the case when a leader firm acquires a small but fast-growing competitor (a "Maverick"), in a market in which the fringe plays an important role in the competitive equilibrium.

In addition to the evaluation of market concentration indexes, CADE may use additional information to assess the competitive dynamics in the markets affected by the transaction under review. For instance, the evaluation of profitability indexes is a helpful approach to

assess if incumbent firms hold market power. The higher the mark up a firm is able to impose over its costs, the higher the market power it possesses. One straightforward profitability index is the ratio between the added value in a certain industry and the sum of labor cost and capital cost, but there are many other available.[1]

The assessment of whether or not market power is contestable is also an important step in merger review. At first, the share of imports in total consumption is a relevant indication of contestability, and in an in-depth analysis, the level of entry barriers allows a more detailed assessment of the post-merger effects on competition. In regard to the level of barriers to entry, the authority will consider that a market has low entry barriers if the entry would be timely, likely, and sufficient to deter anticompetitive effects.

To be timely, a new competitor should be ready to fully operate in less than two years; to be likely, the entry should be profitable, considering the impact on prices of that entry itself; and, finally, the entry will be consider sufficient to deter the abuse of market power if one or more entering firms, even if individually operating at a smaller scale, can achieve a significant market share in short time frame and are not at a significant competitive disadvantage to the incumbents.

To assess the likelihood of entry, the more common methodology is the comparison between the minimum viable scale and market growth. If the minimum viable scale is higher than the projected ratio of market growth, we can expect it is likely that new firms will enter the market. This assessment can be completed with the evaluation of return on investment indexes, like the ratio between new investments and the capital stock.[2]

If evaluating the market structure and contestability by importations and potential entering firms is not enough to eliminate the

[1] Work paper No. 002/2017: Competition Elements. CADE's Department of Economic Studies (DEE) (2017). Available at http://www.cade.gov.br/acesso-a-informacao/publicacoes-institucionais/dee-publicacoes-anexos/documento-de-trabalho-02-2017.

[2] Please refer to footnote n. 1, above.

competitive concerns identified, the authority will screen for rivalry between the remaining competitors to assess the impacts of post-merger market structure on social well fare.

To assess how strong rivalry among remaining firms is, information regarding installed capacity and idle capacity is a key factor. Notably, the remaining competitors have to have idle capacity in an extent sufficient to be able to absorb deviations in demand caused by a price increases imposed by the merging parties.

In addition, in recent cases, the authority has also used more sophisticated screening tests, like the Upward Pricing Pressure-Test ("UPP Test") and Gross Upward Pricing Pressure ("GUPP Test") and, to a less extent, simulation models, like the Proportionality Calibrated Almost Ideal Demand System (PCAIDS).[3] Naturally, results from the screening tests and simulations are used with parsimony and its results are taken into account in the context of all other indications of the market structure and pattern of competition as an indication of the expected post-merger effects on competition.

Finally, if CADE is not convinced that the merger under review will not cause harm to competition (that the merging parties will not impose higher prices, reduce output or capacity, or other dynamic effects, like the reduction of quality or curtail research and development efforts), it will move forward to evaluate if the transaction will result in efficiencies that might compensate the enhanced market power of the merging parties. It should be noted, however, that economic efficiencies, although a well known concept in economic theory, are very difficult to assess and the authority is most likely not to decide a case based solely on the net effect of the comparison between market concentration and economic efficiencies.

[3] For examples, see the opinions from the DEE in the Concentration Acts No. 08700.006444/2016-49 (Ipiranga Produtos de Petróleo S.A. and Alesat Combustíveis S.A.) and No. 08700.002155/2017-51 (Liquigás and Petrobras S.A.), among others.

WHAT HAS BEEN CADE'S APPROACH TO VERTICAL MERGERS?

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Introduction

Historically, CADE has not raised substantial concerns with respect to vertical mergers. In recent years, however, and particularly after the coming into force of the Brazilian Antitrust Law in 2012[1], one may notice a in CADE's decisional practice towards a greater scrutiny of this type of transaction. CADE has more frequently raised concerns in vertical mergers where the resulting entity potentially wields significant portfolio power and has the ability to foreclose the market.

CADE's Case Law on Vertical Mergers Under the Current Brazilian Antitrust Law

American Chemical and Oxiteno[2] was the first high-profile vertical merger reviewed by CADE under the current Brazilian Antitrust Law and subject to high scrutiny. The General Superintendence recommended the rejection of the transaction, but CADE's Tribunal ultimately approved it conditioned to behavioral commitments proposed by the parties to preserve the competition conditions relating to the access of third parties to inputs in the Brazilian market as they were

[1] Law No. 12,529/11 was enacted in 2011 and entered into force on May 29, 2012.

[2] Concentration Act No. 08700.004083/2012-72 (American Chemical I.C.S.A and Oxiteno S.A. Indústria e Comércio), approved with restrictions by CADE's Tribunal on November 20, 2013.

before the transaction. The parties agreed to act according to usual commercial practices, in good faith and without imposing discriminatory conditions when supplying inputs to third parties.

Similarly, the transaction involving América Latina Logística ("ALL") and Rumo[3] was also subject to deeper scrutiny, particularly as a result of participation of third-parties in the case with submissions formally submitted in the case files. According to the third parties' accounts, the resulting entity would have incentives to engage in discriminatory behavior against customers and competitors and the transaction had the potential to raise costs of commodities exports. As a result, the parties proposed an extensive remedies package in order to have the transaction approved, which included: (i) the guarantee from the new entity that access would be granted to competitors to its terminals and long-term contracts to railway uses that commit to the volume of cargo transportation to reduce the possibility of market foreclosure; (ii) the obligation to meet objective parameters for pricing the services provided to competitors; (iii) limiting the use of logistical assets by companies related to the controlling group; (iv) the creation of an online dashboard to present to each of the competitors information such as complete real-time data regarding the service provided to it, average service time to other users of the specific sector and average service time of the company related to the controlling group with which it competes; and (v) the total separation of contracts for the provision of each service by the resulting entity to prevent tying/bundling, among others.

CADE's approach in these two cases seems to have been replicated in more recent vertical mergers. In the AT&T/Time Warner case[4], CADE considered that the vertical integration between the companies could result in the alignment of interests that would harm competitors in both segments affected by the transaction, which had the

[3] Concentration Act No. 08700.005719/2014-65 (América Latina Logística S.A. and Rumo Logística Operadora Multimodal S/A), approved with restrictions by CADE's Tribunal on February 11, 2015.

[4] Concentration Act No. 08700.001390/2017-14 (AT&T Inc. and Time Warner Inc.), approved with restrictions by CADE's Tribunal on October 18, 2017.

potential to create incentives for the resulting entity to discriminate among competitors in the content programming market and foreclose the pay-tv operations market. To address the competition issues identified by CADE, the parties agreed to a series of behavioral commitments, including maintaining Sky Brasil – which belongs to the AT&T Group – and Time Warner's programming channels as independent companies with their own governance and administration structures, refraining from exchanging competitively sensitive information, and offering programming channels and broadcasting to third parties not affiliated to AT&T upon non-discriminatory conditions.

In the review of the Bayer/Monsanto case[5], CADE identified relevant competition concerns related to the potential exercise of market power deriving from the horizontal overlaps resulting from the transaction, and market foreclosure generated by the reinforcement of vertical integration and conglomerate effects. In reaction, the parties proposed both structural and behavioral commitments to address the competition concerns. The structural remedy consisted in the divestment of all Bayer assets related to the soybean seeds and cotton businesses, as well as the unit of non-selective herbicides based on ammonium glufosinate, and was proposed to solve the issue related to the horizontal overlap. The behavioral commitments on their turn were proposed to address the vertical concerns. Such behavioral commitments included the transparency of commercial policies, prohibition to impose exclusivity on sales channels, tying and bundling, and a wide and non-discriminatory licensing practice of its products.

In the more recent WEG/TGM case[6], CADE conditioned the approval of the merger to behavioral commitments that could solve problems related to tied selling of WEG and TGM products that integrate

[5] Concentration Act No. 08700.001097/2017-49 (Bayer Aktiengesellchaft and Monsanto Company), approved with restrictions by CADE's Tribunal on February 7, 2018.

[6] Concentration Act No. 08700.008483/2016-81 (WEG Equipamentos Elétricos S.A. and TGM Indústria e Comércio de Turbinas e Transmissões Ltda.), approved with restrictions by CADE's Tribunal on February 28, 2018.

the energy generation system. As a result, the parties agreed to non-discriminatory conditions for the supply of the products to competitors, providing third parties interested in acquiring the products with the individual prices for each components of the integrated energy generation system, and guaranteeing that customers would be able to purchase each component separately or the integrated system at their own discretion.

Types of Remedies Requested by CADE

Although CADE's approach to vertical mergers has become more stringent in the last five years, CADE has not to date required structural remedies for the approval of a vertical merger under the current Brazilian Antitrust Law. In the more extreme cases – where the resulting entity's upstream and downstream market shares were significantly high and so were entry barriers –, CADE has requested behavioral remedies of an increasingly more sophisticated and restrictive character. Such behavioral remedies may include objective pricing criteria, transparent commercial policies, as well as prohibitions to impose exclusivity, discriminatory conditions, tying and bundling strategies.

Moreover, in cases where during the review of the vertical merger CADE identifies that the parties involved may have engaged in vertical conducts that could ultimately be a violation of the Brazilian Antitrust Law, althought not directly related to the transaction, CADE may request the opening of a formal and separate investigation into these conducts. In the Bayer/Monsanto case, for example, while consulting competitors, customers and associations, CADE's General Superintendence received complaints that the parties could have been engaging in unilateral conducts with anticompetitive effects in the soybean seeds and cotton markets. Because these complaints were not directly related to the transaction, the General Superintendence decided to initiate a separate preliminary investigation procedure, which is underway.

Conclusion

CADE's recent decisional practice indicates that vertical mergers are not reviewed lightly by Brazilian antitrust enforcers when there is evidence that, as a result of such transactions, the parties would be capable of engaging in discriminatory behavior against competitors, tying/bundling strategies or any other behavior that can only drive competitors out of the affected downstream and/or upstream markets. Although CADE had historically adopted a more permissive approach to vertical mergers, the recent case law demonstrates that there is a closer scrutiny of these transactions if compared to past practice, recognizing that, under circumstances, these transactions could potentially raise serious competitive concerns. In these situations, behavioral remedies are likely to be a condition for approval in these cases. In all cases listed above, parties only gained clearance after proposing significant behavioral commitments to address vertical concerns.

INTANGIBLE ASSETS AND MERGER CONTROL: WHAT ARE THE MAIN CONCERNS, LIMITATIONS, REMEDIES AND RECENT TRENDS?

Guilherme Justino Dantas
André Franchini Giusti

According to the Brazilian Antitrust Law, when one or more companies acquire, directly or indirectly, a portion of another company to through the acquisition or exchange of assets, tangible or intangible, and if the turnover thresholds are met, this transaction must be submitted to CADE.

The International Glossary of Business Valuation Terms (IGBVT) defines intangible assets as "non- physical assets such as franchises, trademarks, patents, copyrights, goodwill, equities, mineral rights, securities and contracts (as distinguished from physical assets) that grant rights and privileges and have value for the owner."

Role of intangible assets in merger control.

Mergers and acquisitions are acts of corporate concentration that may involve the transfer of large portfolios of assets. There are cases where intangible assets owned by the target company are unquestionably strategic and essential so that they become the focal point of the assessment of the antitrust impacts by the competition authority.

Patents, copyrights, and mainly brands are most relevant intangible assets that may be negotiated in a merger transaction. From a competition standpoint, brands are often seen as barriers to the entry of new competitors due to their tradition and reputation, so that customers do not pay attention to new products in the market. Notwithstanding, antitrust analysis takes differences among these forms into account in

evaluating the specific market circumstances in which transactions occur, just as it does with other particular market circumstances.

CADE's recent understandings in relation to assets acquisition (including intangible assets) is that when the transferred assets are (i) essential to the parties' activities; (ii) linked to the activities to be developed by the buyer; and/or (iii) represent acquisition or increase of productive capacity for the buyer, the transaction should be previously approved by CADE.

In this sense, it is important to point out that CADE will not presume that the intangible assets of a company necessarily confers market power upon its owner. If such intangible assets do confer market power, that market power does not by itself offend the antitrust laws. However. as in other antitrust contexts, however, market power could be illegally acquired or maintained and that may be questioned by CADE.

Main concerns regarding anticompetitive effects.

The antitrust authority will focus on markets where barriers to entry are high or to be increasing. An example of this issue is verified with the increase of technology. Big tech platforms, e.g. Facebook, Google and Amazon, are raising a worry about fair competition. Those "techtitans" do not simply compete in a market, they are the market itself - providing the infrastructure (or "platforms") for much of the digital economy. Many of their services appear to be free, but users "pay" for them by giving away their data. There is thus a justified fear that they will use their power to protect and extend their dominance, to the detriment of consumers.

And how to prevent anticompetitive effects in a merger by a major competitor/market ruler? The traditional tools of utilities regulation, such as price controls and profit caps, are hard to apply, since it may impact in investments and innovation. Likewise, a full-scale break-up of major firms could worsen the service they offer consumers.

Furthermore, looking simply at prices and market shares is too simplistic, especially when technology is often free to the user and

constantly changing the shape of the market – one example is the purchase of Instagram by Facebook, which the Britain's Office of Fair Trading did not challenge because it saw Instagram as a "camera and photo-editing app", not a social network, and thus unlikely to ever be "attractive to advertisers on a stand-alone basis".

Thus, a better use of existing competition law and the agencies themselves must be on the table. Antitrust authority should review mergers to gauge whether a deal is likely to neutralize a potential long-term threat, even if the target is small at the time.

In that sense, last year Germany and Austria changed their merger-review policies to assess deals based on the values, not revenues, of the acquired firms. This will enable these authorities to review the acquisition of startups that do not yet make money. This measure takes into consideration market concentration and consumer welfare - which includes price, quality and the diversity of products in the market - to evaluate fair competition.

Therefore, the change of the standards for big deals is recommended, requiring firms to prove that their deal would be helpful to competition and to report data about a merger's impact for the coming years. This is unlikely to occur in a short term, but a "potential competition doctrine" could emerge through new precedents and be adopted by CADE to improve merger control in the near future.

Intangible assets as alternative for antitrust remedies.

An antitrust remedy consists in a process that involves the delimitation of actions for the parties involved in a transaction, how these actions are applied and their monitoring and verification of compliance by the authority and can take the form of structural or behavioral commitments. CADE tends to prefer structural remedies to behavioral ones, but the latter have been used in a few number of cases, especially in cases involving cooperation among competitors or vertical issues.

A structural remedy package must include all assets - tangible and intangible - that the divestiture buyer needs to compete. Intangible

assets include intellectual property rights and know-how. The package may go beyond those assets required to sell the product or service in issue if the buyer needs more to compete effectively in the market. In extreme cases, the competent authority may require licensing intangible assets to one or multiple firms. If, however, the merged firm can show that intangible assets are necessary to achieve certain valuable efficiencies, the authority may allow the merged firm to retain rights to those assets.

Effective remedy packages will vary from deal to deal. As a general principle, the objective of any remedy is to restore or replace competition that is likely to be lost from the transaction. This means that the authority focus is on preserving competitive process, considering the nature of the market and participants, as well as the characteristics of the divestiture buyer.

CADE's recent precedents on intangible assets.

In Concentration Act No. 08700.001097/2017-49, which analyzed the acquisition by Bayer Aktiengesellschaft of the control of Monsanto Company, CADE's assessment identified competition problems linked to horizontal overlaps and reinforcement of vertical integrations in the markets of soybean seeds and transgenic cotton. Moreover, it was also identified that issues related to conglomerate effects could arise from the transaction in related markets. Thus, the main remedy approved consists in the divestment of all the current Bayer's assets that are related to the soybean seeds and cotton businesses, as well as the unit of non-selective herbicides based on ammonium glufosinate, which shall be acquired by BASF. In addition to the structural remedies, Bayer and Monsanto also proposed behavioral commitments that involve the transparency of the commercial policies, the prohibition to impose exclusivity on the sales channels, tie-in sales and bundling, as well as a wide and non-discriminatory licensing practice of its products. A Trustee will support the monitoring of the commitments agreed ().

In Concentration Act No. 08700.005937/2016-61, which analyzed the merger between Dow Chemical and DuPont de Nemours, it was identified that the transaction engenders a high concentration in the

markets related to materials science, such as acid copolymers and ionomers, petrochemical products used in a large variety of end-use applications; crop protection products; and corn seeds, including the development of transgenic seeds. For avoiding antitrust effects, the remedies included: (i) divestiture of Dow's acid copolymer global business (which consists in a relevant set of tangible and intangible assets and workforce required to ensure the viability and the competitiveness of the business) and ionomers; (ii) divestiture assets of Dupont's herbicides and insecticides business; (iii) transfer and/or license of certain products, product registrations, registration data, intellectual property (including registered brands, patents and know-how), human resources, customer records, agreements with third parties, production facilities and workforce; and (iv) divestiture of certain assets related to Dow's corn seed business in Brazil, which includes the transfer of the copy of the DAS Sementes' germplasm bank, the transfer of part of the hybrids in Pipeline and commercial hybrids of Dow in Brazil, and the transfer of production facilities, research centers, brands, staffs, and sales force. The proposed remedies also establishes minimum requirements for potential buyers.

In Concentration Act No. 08700.003462/2016-79, involving the acquisition by Reckitt Benckiser (Brasil) Ltda. of the condom and intimate lube business of Hypermarcas S.A., the remedy approved was the divestiture of the "KY" brand in Brazil – leader brand in Brazil - to other player with capacity to compete with RB in the intimate lube market. In January 2017, CADE approved the indication of Semina Industria e Comércio Ltda. to acquire the brand and comply with the approved remedies.

In Concentration Act No. 08700.004185/2014-50 regarding the acquisition of the control of Veyance Technologies Inc by Continental Aktiengesellschaft, CADE identified potential anticompetitive effects due to the overlap in the markets of heavyweight steel conveyor belts and air springs. The parties signed an agreement with CADE committing to the divestment of two facilities owned by Veyance, one in each market, located both in Brazil and abroad. However, to assure the divested

businesses' feasibility, the agreement signed with CADE also included intangible assets, such as brands, customer contracts, software, etc.

Finally, yet it is not recent, a remarkable case concerning the IP-Antitrust interface was the acquisition of Kolynos do Brasil S/A by Colgate-Palmolive Company in January 1995, in which it brought together under the same roof the two main companies in the Brazilian oral hygiene segment: Kolynos and Colgate. At the time of the business, these companies held market shares of 52.5% and 25.6%, respectively. The operation was examined by CADE, which, using rules of analysis of horizontal agreements, considered that, depending on the characteristics of the oral hygiene market, the decision should focus entirely on the brands held by the companies. CADE concluded that control of the "KOLYNOS" and "COLGATE" brands would give Colgate a market power that would prevent new entrants from entering and would cause serious damage to competition. In the end, the Council approved the operation but did so with restrictions, determining the suspension of the use of the brand "KOLYNOS" for 4 years, which it considered reasonable for new competitors to take advantage of the vacuum left by the brand and establish a new competitive order in the segment. It was the first case where CADE limited an individual's industrial property right in favor of antitrust rules.

COMMON OWNERSHIP IN COMPETING FIRMS: WHAT IS THE BRAZILIAN PERSPECTIVE FOR MINORITY INVESTORS?

Olavo Chinaglia
Ricardo Pastore
Bruno Renzetti

This short piece intends to provide a brief overview of the current state of the discussion regarding minority shareholding in competing firms and the position of the Brazilian Competition Authority (CADE). The first section lists the merger control regulations applicable to acquisitions of minority shareholdings and its implications to minority investors in competing firms. The second part explains CADE's main concerns with common ownership. The third discusses three cases analyzed by CADE's General Superintendence in which the issue of acquisition of minority shareholdings and common ownership has been touched upon during the merger review process and the last section concludes summarizing the Brazilian experience so far.

1. What is CADE's experience regarding minority investors?

CADE has been dealing with issues regarding minority shareholders well before the enactment of the Brazilian Antitrust Law – Law No. 12,529/2011. The legal scenario has undergone significant changes since then, and CADE started taking a more careful look at transactions involving acquisitions of minority shareholdings. Article 90 of Law No 12,529/2011 sets forth the definition of a concentration act, which must be submitted to CADE's review. The main issue for investors looking to acquire minority shareholdings is in the exact meaning of "parts of company", as stated in article 90(2) of Law No. 12,529/2011. In order to clarify such issues, CADE enacted Resolution No. 2, in May 2012, that defines the procedural rules for notification of

concentration acts. According to Article 9(2) of Resolution CADE No. 2/2012, the acquisition of minority shareholdings would be subject to mandatory notification if it does not result in the acquisition of control but meet the *de minimis* thresholds provided for in article 10 of Resolution CADE No. 2/2012. Article 10, on its turn, defines the *de minimis* thresholds by establishing that the following situations must be notified to CADE for prior approval: (i) acquisitions stakes of 20% or more of a company that is not a competitor and/or does not have activities in a vertically related market and (ii) acquisitions of stakes of 5% or more of a company if the target company is a competitor or conducts activities in a vertically related market.

Despite all the efforts by CADE to shed light on the types of transactions that must be notified for its prior approval, transactions involving the acquisition of minority shareholdings still face some uncertainty as there are no clear guidelines on the minimum stake that the acquiring company (or its economic group) would need to hold in a competitor or vertically related company to trigger an "overlap" with the invested company in order to meet the *de minimis* thresholds. In such cases, the parties file their transactions for clearance only due to the fear of potentially violating either Law No. 12,529/2011 or the provisions set forth in Resolution CADE No. 2/2012 and incurring in potential fines for gun jumping. Such behavior is a symptom that the legal reasoning behind the requirements for filing certain transactions is not very clear and still brings much confusion in borderline situations where the regulation continues to be dubious or unclear.

2. What are CADE's main concerns when scrutinizing common ownership issues?

It is well known that the acquisition of minority shareholdings in rival firms, either by competing firms or institutional shareholders, may raise important concerns regarding potential coordination effects that may facilitate anticompetitive behavior of these firms, especially because of the easy access to a wide array of competitively sensitive information of rival firms.

Tacit collusion is one of the concerns of the competition authorities when dealing with common ownership of minority shareholdings by institutional investors in competing firms, since it is more prone to happen when there are structural links between these companies.

The relevant influence in corporate decisions is also often scrutinized by the competition authorities. In order to measure if a minority shareholder has any capability of influencing a strategic decision that would harm or favor competitors in which he has investments, one must assess whether his participation is politically active or only has financial goals.

Interlocking directorates are also another issue in which the competition authorities pay attention. Institutional investors that hold chairs in Boards of Directors of rival firms could raise concerns for the competition authorities, since they will not only be exposed to sensitive information, but also in many occasions will have the power to make decisions regarding competitive strategies of these firms.

3. What is CADE's case law on the matter?

In order to illustrate how CADE has been dealing with the issues related to the thresholds for filing transactions involving acquisition of minority shareholdings as well as issues related to common ownership of shareholdings in competing firms we now examine three important decisions rendered by CADE on the matter. The precedents indicate that there is still debate on how CADE will position itself when analyzing acquisitions of minority shareholdings, especially those that can involve investors that hold shareholdings in competing firms.

a. Concentration Act No. 08700.007119/2012-70

The first case refers to a merger that was filed by Prática Participações S/A (Praticapar), a holding company which main activity was the investment in other companies, mainly focused on the production of industrial kitchen appliances, such as large-scale ovens and refrigerators. This transaction related to the entrance of BNDESPar (the

investments arm of the Brazilian Bank for Social and Economic Development - BNDES) in the corporate capital of the company. BNDESPar would buy preferred shares in the target company, with voting rights and convertible to common shares. The BNDES would also grant the target company a line of credit for the expansion of its plants and facilities.

The transaction was filed to CADE and had as main concern the relevant influence that BNDES would have in the target company, such as veto power to questions regarding mergers and acquisitions, appointment of members to the Board of Directors and the possibility of investments in companies that would not fall within the legal limits of the company's scope.

Most of the discussion in the case was raised due to the opinion rendered by the Federal Attorney's Office. The opinion followed two steps to check if CADE should clear the case: first, if the case achieved the jurisdictional thresholds put forth in article 88 of Law No. 12,529/2011; and second, if the acquiring party would gain a relevant influence in the target company.

The answer to the first step was negative. Even though the companies' turnovers were well within the criteria set forth in Article 88 of Law No. 12,529/2011, the transaction did not meet the criteria established in Articles 9 and 10 of Resolution CADE No. 2/2012: there was no acquisition or consolidation of control by the acquiring company, nor the acquisition of more than 20% of the corporate capital or voting shares of the target company by the acquiring party, which was not considered a competitor or an entity active in a vertically related market.

By its turn, the second step was to verify the presence or not of relevant influence. The Opinion stressed that the relevant influence is directly linked to the concept of controlling power and, even though they do not hold the same meaning, both refer to an *active* equity participation[1]. However, according to the Opinion, the relevant influence

[1] On the other hand, a passive participation would be verified when there is no interference in the decision-making process of the invested company, given that the only goal of the investor is the profits generated by its investment.

criteria is not required to verify if an investment (acquisition of minority shareholdings) should be submitted to CADE or not, because Articles 9 and 10 already provide an objective criteria that should guide the analysis of such cases. Therefore, the Federal Attorney's Opinion concluded that the transaction between Praticapar and BNDESPar should not even be notified to CADE because it did not fulfil all the formal requirements to be qualified as a concentration act.

b. Concentration Act No. 08700.001423/2014-75

Through this merger, *Serviços e Tecnologias de Pagamentos S/A* (STP), a company specialized in electronic toll payments and parking structures, would sell 11.41% of its shares to *Freelane I* – CAP I (11.19%) and *Freelane II* – CAP II (0,22%), two companies created by its parent company Capital Group, an international investment firm, only for this specific transaction.

In order to evaluate the concentration act, the General Superintendence used the same criteria put forth by the Federal Attorney's office in the BNDESPar/Praticapar case, as seen previously. First, it noted that the buyers had no previous shareholdings in the target and, thus, could not be considered controlling shareholders by any means, not falling within the rules of both Article 9(1) and 9(3) of Resolution CADE No. 2/2012[2]. The next step was to check if the situation would be the one prescribed in Article 10 of Resolution CADE No. 2/2012: if the purchaser could be considered a competitor in a vertically or horizontally related market.

Since both CAP I and CAP II were formed only for this specific transaction, it was not possible to assess their operational activities. Moreover, their parent company, Capital Group, had no business or investments in the electronic toll payments and parking market in Brazil. In such scenario, it was impossible to conceive any vertical or horizontal links between the companies involved in the transaction. Hence, the

[2] It is important to stress that Article 9(3) is no longer in force, since it was repealed by Resolution No. 9/2014.

conclusion in this case was similar to that in the BNDESPar/Praticapar case: the transaction did not meet the necessary thresholds to qualify as a concentration act reportable to CADE.

c. Concentration Act No. 08700.010200/2012-37

This case is different from the previous two and involved not only discussions of acquisition of minority shareholdings but also common ownership of minority stakes in competing firms. This was also a transaction involving BNDESPar, in which the company sought to purchase 13.5% of preferred shares in Suzano Papel e Celulose S/A, a Brazilian pulp and paper company. BNDESPar already had 4.36% of Suzano's corporate capital and the transaction would increase its shareholdings to 17.9% of the corporate capital of the company (equivalent to approximately 27% of Suzano's preferred shares).

The main concern expressed by CADE in this case was the fact that BNDESPar also held shareholdings in Fibria Celulose S/A (and participated in the controlling block of that company), the largest rival of Suzano. Moreover, BNDESPar had veto powers in Suzano regarding specific matters and tag along privileges in case of a transfer of control, but it did not have the right to request information that had not yet been disclosed to the market by Suzano. Regarding its shareholdings in Fibria, they granted BNDESPar the right to appoint two members of the Board of Directors, responsible for guiding the company's business, market decisions and managing most of the company's budget.

Despite all the concerns showed above, CADE cleared the transaction with no restrictions. This is one of the few cases in which CADE openly discussed common ownership of shareholdings in competing firms, but CADE only analyzed such fact in its review of the merits of the case, because the case met the necessary notification thresholds to be qualified as a concentration act that demanded prior approval by CADE.

4. What should investors be aware of when acquiring minority shares?

It is clear that CADE has established an objective two-step test to verify if a minority investment should be notified as a concentration act for its prior approval: ***first***, if the companies taking part in the transaction have turnovers above the thresholds set forth in Law No. 12,529/2011; ***second***, if the transaction does not result in the acquisition of individual or shared control, CADE must verify if it meets the *de minimis* thresholds of Article 10 of Resolution CADE No. 2/2012, that is, if **(i)** the purchaser or its economic group have "overlapping activities" (i.e. the purchaser or its economic group is considered a "competitor") or a "vertical relationship" with the target in Brazil and is acquiring 5% or more of the company or **(ii)** if there is no overlapping activity or vertical relationship between the purchaser's economic group and the target, if the transaction involves the acquisition of at least 20% of the target.

The conclusion here is that transactions involving acquisitions of minority shareholdings not capable of altering the controlling shareholders and that do not fall within the scope of Article 10 of Resolution CADE No. 2/2012 do not need to be notified to CADE for prior approval. This is because the relevant influence exam is not a legal requirement for the notification of such transactions. Nonetheless, institutional investors that own shareholdings in competing companies must be aware of the notification thresholds and the moment in which transactions must be notified. It is important to stress that, once the transaction fulfils the submission criteria, no integration or closing of the agreement may happen before CADE renders a final decision. Otherwise, the players are subject to large penalties due to gun jumping.

WHAT IS THE ROLE OF THE DEPARTMENT OF ECONOMIC STUDIES IN MERGER CONTROL?

Simone Maciel Cuiabano[1]

1. The Department of Economic Studies ("DEE"): The DEE is one of the bodies which composes CADE, together with the General Superintendence ("GS") and the Administrative Tribunal.

2. Beginning of Activities: In 2009, Resolution CADE No. 53/2009 stablished the Department, starting its administrative transition (2009-2012) to obtain a formal configuration. At first, it was an advisory unit linked to CADE's President and the Commissioners. Subsequently, Law No. 12.529/2011, which reformed the Brazilian System of Economic Defense, created the DEE formally.

3. Main attributions: The DEE is responsible for two branches of complementary activities, according to Law No. 12.529/2011, Article 17: first, advising the GS and the Tribunal in the instruction and analysis of administrative proceedings related to mergers and anticompetitive conducts; and, second, designing studies to ensure CADE's technical and scientific updating.

4. Main activities:

To elaborate and analyze economic technical opinions;

- To monitor the instruction of proceedings;
- To conduct sectorial studies to keep CADE updated on the evolution of specific markets;
- To conduct studies about the effects of CADE's decisions in certain markets;

[1] This article represents the opinions of the author. It is not meant to represent the position or opinions of CADE or its Members, nor the official position of any staff members. Any errors are the fault of the author.

- To propose and elaborate guides of analysis for different proceedings;
- To elaborate and publish its own technical studies such as articles and working papers;
- To disseminate the theoretical knowledge of Economics and its application to competition defense for CADE's technical staff.

5. The appointment of the Chief Economist its impeachment rules: The Chief Economist is the head of the DEE, according to Law No. 12.529/2011, Article 18. He/she is jointly appointed by the General Superintendent and the President of the Tribunal, among Brazilian citizens who possess a moral reputation and outstanding knowledge of economics. He/she may participate in meetings of the Tribunal, without voting rights, and he/she is prohibited from receiving fees, percentages or costs, engaging in the practice of a professional service, stating an opinion on cases pending trial, according to Law No. 12.529/2011, Article 8.

6. DEE's opinion in the proceedings: Article 109 of CADE's Internal Ruling establishes that the President, the Reporting Commissioners and/or the GS may request the DEE to examine the records, setting a time for issuance of an opinion.

The request of the opinions does not imply the suspension of the term of review or adversely impact the regular progress of the proceeding. If the opinion is not issued within the established term, the Chief Economist may verbally issue his/her opinion at the judgment session.

7. Examples of how DEE's opinion may influence merger analysis: The DEE started using quantitative analysis to assess the possible effects of mergers in cases declared complex (which requires an extension in time) by the GS[2]. The Department has issued opinions in cases related to private plans and health care, higher education,

[2] Article 160 of CADE's Internal Ruling.

petrochemicals (PVC, polystyrene, etc.), industrialized foods, steel industry, cement and automotive products.

An example is the discussion on relevant market delimitation. The Department has emphasized the importance of the Hypothetical Monopolist Test (TMH) in which the relevant market is defined as the smallest group of products and the smallest geographic area necessary for an alleged monopolist to be able to impose a small but significant and non-transitory price increase. Besides TMH, the DEE has also highlighted other methods including the diversion ratio (considering the degree of substitution or competition between two or more products), the shipment test (considering the significant volume of trade), event studies and qualitative research[3].

A milestone to this discussion is in the proceedings of the Braskem-Solvay merger. At the end of 2013, Braskem proposed the acquisition of its competitor Solvay, located in Brazil and Argentina[4]. Following the market consolidation which had begun with the acquisition of Quattor, the company strategy was to strengthen its plastic resin production in Mercosur. In the Braskem-Quattor merger the main products were polyethylenes and propylenes; with Solvay, the main resin involved was PVC[5], which can be commercialized as suspension (PVC-S) or emulsion (PVC-E). CADE's case law for the previous analyzed plastic resins defined the geographic relevant market as international and the parties argued that it should be the case for PVC.

They presented an economic study of price cointegration in the PVC market. The main hypothesis was that imports could block any attempt of market abuse from the new company. The econometric results pointed to the rejection of the null hypothesis, so economists concluded

[3] Some concrete cases of mergers in Brazil and its respective methodologies are described in the DEE Working Paper n. 01/2010, *Relevant Market Delimitation* (in Portuguese). Available at http://www.Cade.gov.br/acesso-a-informacao/publicacoes-institucionais/dee-publicacoes-anexos/delimitacao_de_mercado_relevante.pdf.

[4] Concentration Act No. 08700.000436/2014-27.

[5] Polyvinyl chloride.

that the relevant market should include imports because of the long run relationship between domestic and international prices.

On reviewing the parties' study, the DEE followed Haldrup's (2003)[6] methodology to run econometric tests again. Using common costs such as ethane and naphtha to control domestic and international prices changes, the tests did not indicate prices possessed any unit root and they should have been interpreted as stationary. By using a simply correlation analysis for domestic and foreign prices, the DEE found a strong relation between the domestic and the US-Gulf prices, but not for other price origins. The VAR model and the Granger causality test ran by the Department also showed the strongest effect of the US-Gulf prices to the national prices.

The DEE proceeded with the hypothetical monopolistic test for the PVC market, following the methodology proposed by Werden (2003)[7]. Using quantity and price data for imported and locally produced PVC and using energy and labor costs as instruments, the Department estimated demand elasticities ranging from -0,5 to -0,8, much lower than the critical elasticity. The probability for a non-transitory profitable price increase of more than 10% for the monopolist in the PVC market was very high, according to the DEE. As a conclusion, domestic production of PVC would not be rivaled by products in other geographical regions. The relevant market of this product would have national geographic dimension.

Given the controversy and the debate between the parties and CADE, the DEE held a difference-in-differences test, such as the

[6] HALDRUP, N (2003). *Empirical analysis of price data in the delineation of the relevant geographical market in competition analysis*. University of Aarhus, Economics Working Paper n. 2003-09.

[7] WERDEN, G. (2003). The 1982 Merger Guidelines and the Ascent of the Hypothetical Monopolist Paradigm. *Antitrust Law Journal*, Vol. 71, No. 1, 2003. Pp. 253-275.

analysis made in Ineos Group Limited and Kerling ASA[8] merger in the UK. Considering the effects of plants interruptions in the Brazilian PVC market, the DEE sought to determine whether there was an increase of imports, their main origins and their impacts on domestic plastic resin prices. The Department observed that the relevant geographic market could be broader than just Brazil but only including South America and eventually North America. Asian and the European Union imports did not seem to belong to the same relevant market since results were negative and not significant, contradicting the cointegration analysis presented by the parties' economists. The Department also stressed the importance of extra factors such as the presence of stocks and anti-dumping measures which distorted the results of the econometric evaluations.

In 2014, Reporting Commissioner Gilvandro Araujo ruled for the definition of the relevant geographic market as South America, with moderate degree of rivalry from North America. At the end of negotiations, companies were not able to present any structural remedies, opting to drop the case before the conclusion of the merger analysis. Later in 2016, Unipar Carbocloro, Brazil's main caustic soda producer, cleared the operation to acquire Solvay Indulpa, creating the second largest producer of PVC, following the leader Braskem.

DEE's influence through market studies: In 2016, CADE received an Honorable Mention in the 2015-2016 Competition Advocacy Contest promoted by the International Competition Network and the World Bank. The award was due to the luncheon of two studies issued by the DEE concluding that ridesharing applications in Brazil, such as Uber, can result in several benefits for consumers. These platforms have the potential to serve as a substitute for private cars for one group of consumers, and as a substitute for taxis for another group. Since releasing these studies, local governments, such as the executive government of the city of São Paulo, started consulting with CADE on the regulation of

[8] Operation notified to the European Commission on 17 July 2007. For details, see Amelio A .; De La Mano, M. and Godinho, M. (2008).

ridesharing platforms and the market for individual passenger transportation services.

HOW QUANTITATIVE METHODS HAVE BEEN IMPLEMENTED AFTER THE 2016 BRAZILIAN HORIZONTAL GUIDELINES?

Fabiana Tito
Débora Mazetto

1. Introduction

In 2016, CADE published its new guidelines for competitive assessment of horizontal merger and acquisition, known as 'Guia H'. The objective of the document was to present the best practices in the analysis of horizontal concentrations, systematizing the methodology and the criteria used by the institution.

Guia H does not only consist of an update of the earlier document of 2001,[1] but brings new approaches, according to case law, including from the USA and Europe, and complementary and alternative methods of analysis, particularly quantitative methods. Thus, it places an important emphasis on economic and quantitative aspects of horizontal concentration analyzes.

The aim of this article is to present the quantitative methods brought in the guidelines and how they have been used in recent cases evaluated by CADE. After this introduction, a brief description of the methods covered by *Guia H* is presented, followed by recent cases in which both the GS and the Tribunal used them at different stages during the review of the case. Last section synthesizes the use of these methods in Brazil's case law.

[1] Elaborated at that time by the Secretariat of Economic Law (SDE) and the Secretariat for Economic Monitoring (SEAE).

2. The 2016 Guidelines and the quantitative methods

In recent years, CADE's mergers analysis has become increasingly sophisticated. Among the several changes brought by *Guia H*, the adoption of quantitative methods in the analyzes is the main highlight. In particular, in competitive analyzes, quantitative methods seek to assess whether the competitive effects of a given horizontal merger are deleterious to the market or not – that is, whether the transaction can alter market incentives so as to make it less competitive or to give the participating companies the ability to exercise market power. These methods can be used in several stages of the competitive analysis, from the delimitation of the relevant market to the evaluation of the ability to raise prices after the merger or even to judge efficiencies resulting from the transaction.

Regarding the relevant market, *Guia H* presents the hypothetical monopolist test, applied both to evaluate the product and/or geographic dimensions of a market and the unilateral effects of a given merger. The economic intuition behind this test is that if a monopolist is not capable of imposing a significant and non-transitory price increase, then there are products or regions that constraint on this monopolist that must be incorporated into the market, increasing the relevant market dimensions,[2]

Another more sophisticated approach that can be used to define the relevant market is the critical loss (or critical elasticity) analysis. The method evaluates whether a significant price increase is profitable for a company, considering a certain profit margin and price elasticity of market demand.[3] It requires the development of econometric models to

[2] Similarly, if that monopolist is able to impose a significant and non-transitory price increase on a market, all products (or the entire geographic region) to which it has influence are delimited and set the relevant market.

[3] Price elasticity is the measure of sensitivity that the demand (consumers) has in relation to a product price. For example, it measures how many units of that product the consumer is willing to give up given a 1% increase in the price of that product.

measure the price elasticity of market demand, which depends on a significant amount of data.[4] [5]

In terms of evaluating post-merger price increases, a method also widely used in recent cases by CADE is the Upward Pricing Pressure test (UPP test) and the Gross Upward Pricing Pressure Index test (GUPPI test). The UPP test estimates if a post-merger price increase can be expected or not, considering gross profit margin and the merger efficiency gains.[6] There will be price increases if the UPP test is positive. Unlike the UPP test, the GUPPI test assumes no efficiency gains of a merger, considering only profit margins and diversion ratios. The

[4] Alternatively, although it is not the most adequate approach, a reference value is used for the demand elasticity based on the economic literature. Therefore, this method is often rarely used.

[5] *Guia H* also highlights the use of diversion rates, usually applied in markets with differentiated products. Due to a market concentration, it is possible that the resulting company would impose unilateral price increases more intensively to the extent that the merging firms have very similar products. Therefore, it is necessary to consider the cross price elasticity of the products of the two companies and the percentage of demand deviation from one to another. The higher the diversion rate, the greater the substitutability between the two companies' products and, therefore, the greater the likelihood of the operation provoking deleterious effects on competition.

[6] The probability of a post-merger price increase is calculated by multiplying the gross profit margin with the diversion ratio followed by the subtraction of the efficiency gains (as "downward pricing pressure"). Mathematically, the UPP of product 1 in relation to product 2 is calculated as follows: $UPP_1 = (p_2 - c_2)D_{12} - ec_1$

Where p_2 is the price of product 2 and c_2 is the marginal cost of product 2, c_1 is the marginal cost of product 1, and e represents the efficiency gains resulting from the merger. The diversion ratio between products 1 and 2 (D_{12}) measures what percentage of the demand for product 1 will be transferred to product 2 as a result of a price increase of product 1. $D_{12} = \frac{\varepsilon_{21}}{\varepsilon_1}\frac{Q_2}{Q_1}$

Where Q_1 and Q_2 refer to the demand for products 1 and 2, respectively, ε_{21} is the cross price elasticity between product 1 and product 2, and ε_1 is tkhe price elasticity of product 1.

thresholds used for this test are 5% or 10% apply, that means, a result more than 5% or 10% indicates a high probability of post-merger price increases.[7]

Last, the Coordinated Price Pressure Index test (CPPI test) is adopted to evaluate the increasing probability of post-merger collusion. The test basically considers the limit at which firms are willing to perform a Parallel Accommodating Conduct (PAC). It is an example of coordination in which a company raises prices with the expectation that others will follow it.

To illustrate those methods, next section presents four recent merger cases analysed by CADE where quantitative methods were extremely helpfull to conclude whether the transaction could raise anticompetitive concerns in the affected markets.

3. Recent Cases

Recently, several major cases decided by CADE had a determinant conclusion obtained from quantitative methods, such as: ArcelorMittal and Votorantim Siderurgia[8], Alesat and Ipiranga[9], Bradesco and HSBC[10] and Kroton and Estácio[11].

3.1 ArcellorMittal and Votorantim Siderurgia

The acquisition of Votorantim Siderurgia by ArcellorMittal had as relevant market the long steel segment in Brazil. Since CADE concluded that the transaction generated competition concerns in some long steel markets, the authority ruled on that the approval would be

[7] The GUPPI is defined mathematically as follows: $GUPPI_1 = \frac{D_{12}(p_2 - c_2)}{p_1}$

[8] Concentration Act No 08700.002165/2017-97. Approved on February 7, 2018.

[9] Concentration Act No 08700.006444/2016-49. Rejected by the Tribunal on August 2, 2017.

[10] Concentration Act No 08700.010790/2015-41. Approved on June 8, 2016.

[11] Concentration Act No 08700.006185/2016-56. Rejected by the Tribunal on June 28, 2017.

conditional on remedies to allow established companies and new entries to compete effectively with the merged company.

Thus, the parties proposed some packages of structural remedies to suit the requirements imposed by CADE. it's the Department of Economic Studies (DEE) evaluated the effectiveness of the proposed remedies, and an appraisal of the possibility of a post-merger price increase before and after the remedy was conducted, using the UPP and GUPPI tests.

After several economic analysis undertaking, the DEE studies on the matter gave the Tribunal the security to approve the merger conditional to the implementation of the remedies.

3.2 Alesat and Ipiranga

The acquisition of the fuel distributor Alesat by Ipiranga was rejected by CADE, since there were regional distribution markets that would be affected by the transaction and no agreement with the parties regarding remedies was capable to neutralize the competitive risks.

According to CADE's analysis, Alesat is the largest regional fuel distributor in Brazil, being considered a maverick player capable of rivaling the other three companies operating at the national level, including Ipiranga. As the structure of the fuel distribution market interferes in the resale market, the merger would affect the competitive dynamics of the regional and white flag stations supplied by Alesat.

In order to evaluate the unilateral effects (GUPPI test) and the coordinated effects (CPPI test) that could occur due to the operation, the DEE performed quantitative tests with information from the resale and distribution markets. In addition, it performed descriptive value regressions to assess the price dynamics between stations controlling for the white flag effect. The conclusion was that in most of the regional markets for resale and distribution there were incentives for collusion after the merger, although there was no incentive to increase prices.

Given the likely that the merger would create perverse incentives to the markets competitive dynamics, a remedy was needed to address the issue. However, no agreement on the possible remedies could be set

and the merger was rejected. Thus, the DEE role on evaluating the existence of possible anticompetitive effects on the market was essential to support CADE's decision.

3.3 Bradesco and HSBC

Accordingly to CADE, the acquisition of HBSC by Bradesco would increase the concentration in a market with low competition and, in general, a sector characterized by high asymmetry of information and high transaction costs.

The DEE was called upon to express its view on the competitive impacts of the merger on the relevant markets. By means of simulations on the hypothetical behavior of the merged companies and the possible unilateral and coordinated effects, the DEE evaluated the market dynamics considering some baskets of products and services, using UPP, GUPPI and CPPI tests. According to the report, the simulations did not rule out the possibility of the transaction generating unilateral or coordinated anticompetitive effects.

This conclusion was preponderant for the GS to recommend remedies for approval of the transaction. The agreement signed with the Tribunal provided for behavioral measures in six main areas of Bradesco's operations, such as communication and transparency, incentive to credit portability, training, quality indicators, compliance and restriction on the acquisition of financial institutions for 30 months.

3.4 Kroton and Estácio

The merger between Kroton and Estácio was rejected by the Tribunal because of the insufficiency and the inviability of the remedies proposed. According to the Reporting Commissioner, the transaction would generate competitive concerns in the presential educational modality, due to a lack of sufficient rivalry in certain Brazilian municipalities. In the distance learning mode (EAD), given the already relevant presence of Kroton in the market, after the merger its national capillarity would be even greater.

These findings were based largely on the DEE report regarding the relationship between presential and distance education markets, and

the importance of the brand in the EAD market. Through some econometric modelling, DEE concluded that brand still exerts an influence on the tuition prices, a fact that corroborates the hypothesis that brand is an important attribute for the consumer in the EAD market. Thus, not only the brand, but also the ability to invest in marketing are determining factors for consumer's decision on which institution to study.

Regarding the relations between the presential and EAD markets, the DEE adopted a quantitative experiment[12] to test whether the offer of presential teaching provides any benefit to companies that also offer the EAD. The results corroborated the initial hypothesis, that is, offering presential teaching together with distance education favors the capture of new students in the EAD modality.

Thus, the DEE were determinant to demonstrate the need for remedies to approve the transactions. However, although the Reporting Commissioner sewed up a possible package of remedies, the other Commissioner did not consider the implementation of the proposed remedy to be feasible or sufficient, thus prohibiting the transaction.

4. Final Remarks

The use of quantitative methods in CADE's analysis has been increasingly frequent. With the publication of *Guia H*, the institution sought a greater openness to the adoption of these methods, helping to clarify in which contexts they can be used.

This article has brought recent cases in which the conclusions obtained from quantitative analyzes were of great importance for the case approval or rejection.

Thus, CADE places itself on the same level of other jurisdictions, such as the USA and Europe, in the adoption of objective and quantifiable assessments of certain competitive effects arising from concentration acts.

[12] This method is widely used when it is desired to verify the impact of an exogenous event on a specific group.

WHAT IS CADE'S RECENT EXPERIENCE ON NON-PRICE EFFECTS AND STRUCTURAL ANALYSIS?

Bernardo Gouthier Macedo
Sílvia Fagá de Almeida
Anna Olimpia de Moura Leite
Paulo Adania Lopes

It is unquestionably crucial to evaluate price impact when analyzing competitive concerns arising from mergers and acquisitions. Accordingly, quantitative methods are quite rightly used to gauge the unilateral effects of an M&A transaction on prices by CADE. As we will see, however, in many cases it is necessary to assess other relevant competitive variables depending on the characteristics of the market analyzed. These may include innovative capacity, product or service quality, and brand, among others. Other characteristics of market dynamics may also be considered when analyzing the competitive impact of M&A deals, such as potential competition, the presence of mavericks, and portfolio power.

The emphasis given to the price variable originates in conventional economic theory –according to which the price of a good results from a balance between the forces of supply and demand. The doctrine assumes a stable economic equilibrium as well as free competition, homogeneous products, full information for all agents, free factor mobility, and a lack of entry barriers. In this theoretical world, price is the core of competition – because everything else is supposed to equalize all players.

These characteristics, however, are unlikely to exist in the real world, let alone in the antitrust world, which addresses oligopolized markets, with differentiated products, information asymmetry among agents, and limited factor mobility. Firms are not price takers and

competition has to be assessed in dynamic terms.[1] Competition is driven by monopolistic profit and firms compete by entering new markets and introducing new products or new forms of production. In this context conventional microeconomic analysis focusing solely on price may ignore the crux of competition.

This article reviews CADE's recent case law on mergers, under the ex-ante legal approach, discussing cases in which competition via non-price variables and other market structural features plays a significant role in the antitrust analysis. In the past three years CADE has investigated over 30 M&A deals in depth, providing a large dataset for our review. First, we look at the cases decided by CADE in which non-price variables such as innovation, quality and brand were considered relevant to competitive dynamics. Next, we focus on cases in which market structural characteristics such as potential entry, the presence of mavericks and portfolio power were a key part of the analysis.

Innovation-intensive markets have peculiarities that make the tools used in conventional economic analysis inadequate because they ignore the pro-competitive effects of innovation. In these markets the price dimension tends to be less relevant, while firms' capacity to upgrade and launch new products and processes is far more important. It is also necessary to consider the potential competition that may be imposed by firms and products not yet part of the market analyzed. As for entry conditions, whether an M&A deal intensifies or limits competitiveness through innovation is essential and cannot be overlooked in markets with significant sunk costs (typically, investment in R&D).

The Dow/DuPont merger approved in 2017 by CADE's Tribunal[2] – and elsewhere – is a suitable example. The antitrust bodies

[1] For a Schumpeterian framework, see e.g. Possas, M. L (2004), "Eficiência seletiva: uma perspectiva neo-schumpeteriana evolucionária sobre questões econômicas normativas", *Revista de Economia Política*, 24.

[2] Concentration Act No. 08700.005937/2016-61, approved with restrictions by the Tribunal on May 17, 2017.

that analyzed the case were concerned about the negative impact on the merged company's capacity to innovate. One of the items that composed the remedy package proposed by the parties, to which CADE agreed, was to sell DuPont's research division in herbicides to a third party capable of exercising rivalry. The same concern was relevant to CADE's analysis of Bayer's acquisition of Monsanto,[3] approved in February 2018 with the imposition of a structural remedy. The restriction consisted of the requirement to sell Bayer's assets in the soybean and cotton seed business – including R&D assets.

With regard to **quality**, there are cases in which this variable also determines competitive dynamics in some markets, and positive effects in terms of quality can be considered efficiencies due to the transaction, as they are by CADE in its *Guide to the Analysis of Horizontal Mergers*.[4] An example is Simba, a joint venture agreed among Brazilian television broadcast networks SBT, RedeTV and Record.[5] CADE's approval in 2016 was conditional on an undertaking by Simba to use a significant proportion of its future revenue for "individual investments by the three parties to increase the supply and/or quality of content".[6] In other words, the networks were required to use efficiency gains due to the joint venture deal to enhance the content and diversity of the programming offered to their viewers.

[3] Concentration Act No. 08700.001097/2017-49, approved with restrictions by the Tribunal on February 7, 2018.

[4] Available at <http://www.cade.gov.br/acesso-a-informacao/publicacoes-institucionais/guias_do_Cade/guia-para-analise-de-atos-de-concentracao-horizontal.pdf>. Last visited Aug. 29, 2017.

[5] Concentration Act No. 08700.006723/2015-21, approved with restrictions by the Tribunal on June 22, 2016.

[6] Concentration Act No. 08700.006723/2015-21, settlement agreement available at <http://sei.cade.gov.br/sei/institucional/pesquisa/documento_consulta_externa.php?39YTcUUQz2-s_Q2NZCwcg3pO11CNFAMFPG2t2FuOPpX9IRNvyTGAs_GpSvojtYYB2jisgMINYa54xwTkx6Sw2w,,>.

In her analysis of the proposed transaction involving higher education providers Kroton and Estácio, Reporting Commissioner Cristiane Alkmin stressed the importance of quality as a driver of competitive pressure in the education market.[7] She voted for approval with restrictions that included the requirement for the parties to maintain quality standards. Despite her being in the minority, because the Tribunal ruled on that the proposed remedies were insufficient to address all competitive concerns arising from the transaction, her remarks are worth taking into account. Quality is a costly investment for companies in this industry, she argued, and at least maintenance of quality levels in the courses offered must be required following the transaction.

Brand is another competition driver often considered in antitrust analysis. In differentiated product markets, brands tend to have a significant impact on competitive dynamics. Indeed, for this reason they are frequently the object of divestment when the antitrust authority takes the view that brand transfer is capable of strengthening rivals of the merged firm. A remarkable example is the acquisition of the sexual wellbeing business of the firm Hypermarcas S.A. by Reckitt Benckiser Brasil Ltda. (RB), involving condom brands Jontex, Olla and Lovetex, and intimate lubricant brands Jontex and Olla.[8] According to CADE's analysis, brands are relevant assets for the effective entry of a rival in this market, since consumers put more trust in the quality of familiar brands. The transaction was approved with a significant structural remedy consisting of the sale of K-Y, the number one sexual lubricant brand in Brazil and elsewhere.

Besides the non-price variables that should be considered when analyzing oligopolized markets with differentiated products and high barriers to entry, there is also a need to analyze market structural

[7] "The characteristics indicate that the market in question is one of monopolistic competition in which there are many players, and brand, quality and price are the most relevant factors in the competitive dynamics." Concentration Act No. 08700.006185/2016-56, vote, page 17.

[8] Concentration Act No. 08700.003462/2016-79, approved with restrictions by the Tribunal on September 09, 2016.

characteristics. One is **potential rivalry**. Firms present in the market with limited operations but in a position to expand them, or not yet in the market but capable of entering it, can be considered potential rivals. The view is that potential rivals exert competitive pressure and inhibit market power, so that deals between incumbent firms in the relevant market and potential rivals could be a concern for antitrust authorities.[9]

This feature was highlighted in a recent case decided by CADE involving financial market infrastructures BM&FBOVESPA and CETIP.[10] CETIP had a platform for trading in over-the-counter products and exerted potential competitive pressure in the securities market. The Tribunal approved the deal on condition that the parties implemented remedies designed to reduce barriers to entry for new players.

Another structural analytical pillar frequently mentioned by CADE is the presence of mavericks, atypical firms capable of imposing disruptive rivalry in the relevant market. Although they will almost always have a small market share, mavericks promote rivalry through innovative business models and/or typically low cost structures.[11] This topic was recently highlighted by the Tribunal during its decision of a deal involving the acquisition of a large stake in investment services firm XP Investimentos by Itaú Unibanco, Brazil's leading financial conglomerate.[12,13] It took the view that XP could be considered a maverick and that its elimination would lead to a "stifling of competitive

[9] "M&A deals between firms that are already active and potential competitors in the same relevant market can have anti-competitive effects similar to those between two active firms in the same relevant market." CADE, H Guide.

[10] Concentration Act No. 08700.004860/2016-11, approved with restrictions by the Tribunal on March 22, 2017.

[11] MOTTA, Massimo. *Competition Policy: Theory and Practice*. New York: Cambridge University Press, 2004.

[12] Concentration Act No. 08700.004880/2017-64, approved with restrictions by the Tribunal on March 14, 2018.

[13] For more information, see http://www.valor.com.br/financas/5191009/por-que-xpitau-esta-na-mira-do-cade.

pressure".[14] This view contributed to its decision to approve the deal with restrictions.

Another recent example worth highlighting is the case involving fuel distributors Alesat and Ipiranga,[15] in which the Reporting Commissioner João Paulo de Resende considered Alesat a maverick that therefore exerted specific competitive pressure on the large distributors. The Tribunal unanimously rejected the deal.

Another feature to which CADE has paid attention recently is conglomerate effect (or portfolio effect). Cases mentioned earlier such as Bayer/Monsanto, Kroton/Estácio and Hypermarcas/Reckitt included in-depth analysis of the potential expansion in these firms' portfolios and its impact on competitive dynamics. The antitrust authority was concerned that the efficiency gains from portfolio expansion could increase barriers to entry and/or facilitate exclusionary practices. Given its recurrence in recent complex cases, the topic will certainly require further discussion of the net effects of each deal, given that it intrinsically presupposes efficiency gains.

In sum, while there is a consensus that antitrust case law tends to prioritize price effects, and rightly so, it is clear from the examples briefly outlined here that cases requiring in-depth analysis by CADE entail concerns regarding other competition drivers besides price. This is because the actual markets subject to antitrust scrutiny tend to differ considerably from the framework assumed by perfect competition theory and are characterized by competition based on different drivers, such as quality and innovation, which should not be – and indeed are not – ignored by antitrust authorities.

[14] Concentration Act No. 08700.004880/2017-64.

[15] Concentration Act No. 08700.006444/2016-49.

CONGLOMERATE MERGERS AND PORTFOLIO EFFECTS: WHAT IS CADE'S POSITION ON THE MATTER?

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Conglomerate mergers are those that occur between firms that are neither horizontally nor vertically related, that is, firms that have no competitive relationship either as competitors or as suppliers and customers to one another.

There are three kinds of conglomerate mergers: (i) pure conglomerate mergers, with the union of two firms that are active in completely unrelated product markets; (ii) market extension mergers, between firms that sell the same products in different geographic markets; and (iii) product extension mergers, between companies that sell different but related products.

Since conglomerate mergers do not immediately change the level of concentration in any relevant market affected by the merger, they generally do not draw concerns from competition authorities. Usually, the conglomerate mergers that are subject to antitrust scrutiny are the ones that involve firms that operate in closely related markets, that is, firms that supply non-competing but complementary products[2] requested by the same set of customers, or products that are in the same product range.

[1] The views and opinions expressed in this article are those of the authors and do not necessarily reflect the official policy or position of CADE.

[2] According to the European Commission's Guidelines on the assessment of non-horizontal mergers (EC, 2008), products or services are complementary when they are more valuable to a customer if used together than separately.

It is worth noticing that conglomerate mergers can, at the same time, provide scope for anticompetitive concerns but also entail positive effects due to efficiencies, thus being pro-competitive.

It is undeniable that conglomerate mergers can generate efficiencies as direct positive effects. For example, firms that have a larger portfolio or a more diversified product range can benefit from economies of scale or scope, due to costs reduction. A large portfolio can also reduce customers' transaction costs, who will have to deal with fewer suppliers. In addition, customers may have other benefits such as one-stop-shopping. Efficiencies may also derive from lower distribution costs, if the merger involves two companies that sell closely related products commonly purchased together, and thus could be distributed together. Moreover, there are efficiencies in marketing and advertising, considering greater brand awareness derived from the brand exposure maximization by the supply of a vast product range.

Notwithstanding the efficiencies, anticompetitive effects can also derive from conglomerate mergers. Most of the concerns expressed by competition agencies either stem from the elimination of potential competition or from the enlarged portfolio or product range, that could facilitate exclusionary practices.

As for the elimination of potential competitors, it is analysed if the merger can facilitate oligopolistic pricing or collusion in the post-merger market, by means of acquiring a firm that was perceived to be a likely entrant.

Regarding the facilitation of exclusionary practices, it should be pointed out that this kind of conduct is usually related to foreclosure due to negative portfolio effects. The main negative effects derived from an enlarged portfolio and product range are: (i) hindering effective entry; (ii) reducing the capacity of rivals to effectively compete in the market, and (iii) increasing the incentives to certain anticompetitive practices, such as bundling and tying and cross subsidies, that is, a situation in which a firm lowers its prices in a market where it wants to acquire market power while compensating the loss practicing higher prices in other markets, in a form of strategic pricing.

Another frequently mentioned portfolio effect is that, although a larger portfolio could generate efficiencies, in the long run the firm could abuse the market power it achieves with the portfolio effects, later increasing its prices.

Therefore, in order to assess the effects of a conglomerate merger and effectively evaluate the competitive concerns of a specific case, it is essential to estimate the actual efficiencies promoted by the merger by measuring the total cost savings that it can generate. Although this is a very difficult task, it can provide empirical evidence of the net effects of a specific case, in order to assess if the cost savings resulting from the merger outweigh the possible reduction in consumer welfare.

In regards to the Brazilian practice on the matter, we framed the research from 2012, when Law No. 12,529/2011 came into force to March 2018. Within this period, CADE has so far analyzed conglomerate power and portfolio effects as a variable in at least 17 merger cases,[3] even

[3] Concentration Acts No. 08700.003843/2014-96 (Parties: Companhia Brasileira de Cartuchos and Forjas Taurus S.A.); 08700.001437/2015-70 (Parties: Dabi Atlante S/A Indústrias Médico Odontológica and Gnatus Equipamentos Médico-Odontológicos); 08700.003544/2015-32 (Parties: Duratex and Durachona); 08700.009988/2014-09 (Parties: Condor Tigre); 08700.006185/2016-56 (Parties: Kroton and Estácio); 08700.005937/2016-61 (Parties: Dow Chemical and Dupont); 08700.008483/2016-81 (Parties: Weg Equipamentos Elétricos S.A. and TGM Indústria e Comércio de Turbinas e Transmissões Ltda); 08700.6606/2017-20 (Parties: Safran Zodiac); **08700.001097/2017-49 (Parties** Bayer and Monsanto); 08700.003462/2016-79 (Parties: Reckit and Hipermarcas); 08700.001221/2016-95 (Parties: Coty Inc. e Procter and Gamble Company); 08700.007191/2015-40 (Parties: Halliburton Company and Baker Hughes Incorporated); 08700.005534/2017-01 (Parties: Saint-Gobain do Brasil Produtos Industriais e Para Construção Ltda., ATB Indústria e Comércio de Adesivos S.A.); 08700.006269/2016-90 (Parties: China National Agrochemical Corporation and Syngenta Ag); 08700.007707/2016-37 (Parties: Stanley Black & Decker, Inc. and Newell Brands, Inc.); and 08700.004446/2017-46 (Parties: Essilor International S.A. and Luxotica Group S.p.A.). Besides the mentioned cases, the research also considered Concentration Act No. 08700.001390/2017-14 (Parties: AT&T Inc. and Time Warner Inc.), because even though the portfolio power was not specifically analyzed, it was a variable that revolved the case.

though none of these mergers are solely conglomerate, comprising also horizontal overlaps and/or vertical relations.

We studied those 17 cases and concluded that neither CADE nor the H Guide have established a specific methodology on how to assess portfolio effects on conglomerate mergers, which is being analyzed in and *ad hoc* basis. However, an examination of the case law shows that the authority often uses certain set of criteria in its analysis.

All the decisions rendered by the Tribunal or the GS considered the statements of competitors during the assessment of the case, and most decisions regarded the statements of customers and third parties.

Several cases[4] quoted or at least mentioned CADE case law, especially the Condor/Tigre and Perdigão/Sadia cases[5]. Besides, CADE also mentioned other authorities' understanding on the issue, such as the EU Guide and decisions made by other jurisdictions on the same merger, in the decisions issued in the mergers between Kroton/Estacio, Zafran/Zodiac and Bayer/Monsanto. The GS also mentioned OECD policy roundtable (2001) when reviewing the Taurus/Companhia Brasileira de Cartuchos merger.

Various decisions also considered markets specificities[6], such as a potential competition within the scope of the companies' portfolios (cases Zafran/Zodiac, Coty/Procter Gamble and Duratex/Duchacorona) and/or how customers purchase the products – if they are bought separately or in a combined set, if the products are bought through public procurement, and if clients have bargaining power and/or if there are alternative suppliers (merger Stanley/Black).

[4] Cases Essilor/Luxotica, Saint Gobain/ATB, Reckit/Hipermarcas, Halliburton/Baker Hughes, Duratex/Duchacarona, Dabi/Gnatos, Weg/TGM, Condor/Tigre, Companhia Brasileira de Cartuchos/Taurus.

[5] Even though this case was decided before 2012.

[6] Mergers between Dabi/Gnatus, Companhia Brasileira de Cartuchos/Taurus, China National/Syngenta, Stanley Black/Newell Brands.

Some cases highlighted the positive effects stemming from the increased portfolio, such as the decrease in prices and transaction costs,[7] potentially benefiting customers in a short term. Nevertheless, the decisions, in particular those made by the GS, took into consideration whether these effects would be perpetuated both in the medium and long term. On this matter, the H Guide also argues that the efficiencies achieved with the merger could increase the market power of the merged firm, which could later abuse its increased market power by means of exclusionary practices and increasing prices.

As for the negative effects of the increase in the portfolio of the merged firm, CADE frequently analyzes possible exclusionary practices such as tying and bundling, coordinated effects and market foreclosure.[8]

In cases in which the merging parties claimed that the merger would create efficiencies with the portfolio increase, CADE has rigorously stated that it is not sufficient to merely claim that the merger results in efficiencies: the parties should prove that efficiencies would indeed benefit consumers and competition itself.[9]

It is also important to highlight that although CADE prohibited some mergers since 2012, none of these prohibitions were based exclusively on the extent of the negative effects of conglomerate relations. The blocked mergers under the regime of Law No. 12.529/2011, namely, Kroton/Estácio and Condor/Tigre, were prohibited based on several competition concerns, among which portfolio effects were included.

Furthermore, it is worth noting that in complex mergers that demand further analysis, CADE may request studies from its Department

[7] Mergers between Taurus, Dabi/Gnatus, Duratex/Durachona, Condor/Tigre, Reckit/Hipermarcas, Essilor/Luxotica.

[8] Those variables, together or separately, were analyzed in the following mergers: Condor/Tigre, Reckit/Hipermarcas, Stanley/Newel Brands, Safran/Zodiac, China National/Syngenta, Bayer/Monsanto, Essilor/Luxotica.

[9] The following mergers decisions analyzed efficiencies: Kroton/Estácio, Weg/TGM, Condor/Tigre, Bayer/Monsanto.

of Economic Studies (DEE). These studies can also be a variable on the decision regarding portfolio effects (see cases Kroton/Estácio and Condor/Tigre).

Finally, among those 17 cases, the ones that have analyzed portfolio effects in more depth using the above-mentioned set of criteria are the decisions on the mergers between Condor/Tigre, Bayer/Monsanto, Weg/TGM and Essilor/Luxótica.[10]

In conclusion, the cases researched indicate that portfolio effect by itself is usually not enough to block a merger, but is considered in addition to horizontal and vertical relations effects in CADE's assessment of the merger. Additionally, although conglomerate mergers and portfolio effects can be a controversial matter, the recent cases show that it is a recurrent topic, and that the analysis of its efficiencies by the parties should receive more attention.

[10] Another relevant vote is the one made by former Commissioner Carlos Ragazzo in the merger between Sadia and Perdigão (Case 08012.004423/2019-18), judged in the previous regime of Act n. 9.884/94.

WHAT'S THE ROLE PLAYED BY EFFICIENCIES IN THE BRAZILIAN MERGER CONTROL SYSTEM?

Aurélio Santos
Ricardo Botelho
Andréa Cruz

1. Introduction

According to the Brazilian Antitrust Law, concentration acts entailing substantial restrictions of competition in the relevant markets shall only be allowed if they promote compensatory efficiencies, increasing productivity or competitiveness, improving the quality of goods or services, and/or fostering technological or economic development, as long as a relevant portion of the benefits arising from the transaction at stake is transferred to consumers.[1]

The Horizontal Merger Guidelines (Guidelines)[2], a non-binding manual issued by CADE on July 2016, foresees certain criteria for the consideration of efficiencies by the antitrust agency in merger control, namely: (1) efficiency claims shall relate to probable and timely benefits, that can be tangibly verifiable; (2) an important part of the benefits deriving from the transaction must be profited by consumers; and (3) there should be a clear link of causality between the alleged efficiencies and the concentration act (i.e., if the same benefits can be reached by other means less restrictive to competition, within a time period inferior to two years, then such benefits should not be considered for the purpose of outweighing potential anticompetitive damages).

[1] Article 88, Paragraphs 5 and 6, of Law No. 12,529/11.

[2] CADE. *Horizontal Merger Guidelines* (July 2016). Available at: <http://www.cade.gov.br/acesso-a-informacao/publicacoes-institucionais/guias_do_Cade/guia-para-analise-de-atos-de-concentracao-horizontal.pdf>. Access on March 3, 2017.

The assessment of CADE's case law after the entry into force of Law No. 12,529/2011 reveals that the Brazilian agency has been adopting high standards of proof in the analysis of efficiency claims and, as a rule, efficiencies will not be decisive for the clearance of a given transaction, especially if it involves significant concentration in the markets involved. Even though, CADE is receptive to consider efficiency claims on a quantitative and/or qualitative basis as arguments favorable to the approval of a transaction and as reference to design applicable behavioral remedies. In this scenario, the parties' engagement in carefully describing and, preferably, quantitatively demonstrating efficiencies linked to the transaction is crucial and should occur as soon as possible.

2. Efficiencies analysis in CADE's case law

Amongst the 204 cases analyzed in our survey[3], CADE actually engaged in efficiencies analysis in only 18 of them (8.8%), as shows the table below:

Final decision	**Cases**	**Efficiencies analysis(*)**	
		Yes	No
Approved without restrictions	164	4	160
Approved with restrictions	18(**)	11	7
Dismissed	5	1	4
Blocked	2	2	0
Rejected without prejudice	1	N/A	
Pending final decision	14(***)	N/A	
Total	204	18	171

[3] Our survey encompassed only those concentration acts reviewed by the CADE under the regular procedure between May 29, 2012 – date on which the Brazilian Antitrust Law entered into force – and February 10, 2017. Transactions reviewed under the fast-track procedure were excluded from the research because, normally, the consideration of efficiencies is subject to CADE's attention in more complex cases, involving higher risks of harming competition, usually assessed under the regular procedure. It should be noted that our analysis was limited to public information available for consultation on CADE's website.

(*) Methodology: qualitative analysis of CADE's final and majority opinion on the case issued between May 29, 2012 and February 10, 2017.

(**) There have been other two cases cleared with restrictions, but, as the object of the settlement agreements between the parties and CADE was dedicated to deal with the failure to comply with the standstill obligation (gun jumping), they were excluded from the scope of the survey.

(***) Up to February 10, 2017, the analysis of efficiencies had already been conducted by CADE's lower unit (General Superintendence) in five cases and in the other nine cases neither the GS nor the Tribunal had issued a decision.

2.1 Transactions approved without restrictions

Within the realm of transactions approved without restrictions (164), only four cases involved efficiencies analysis conducted by CADE and, in all of them, at least one of the parties' claims were accepted:

Efficiency claims accepted by CADE	**Case**
Countervailing power	Joint venture between the International Retail & Trade Services Sàrl, from Casino Group, and Dia World Trade for the negotiation of international on top services[4]
Costs reduction due to the sharing of the distribution structures	Granting of Universal Studios Limited's exclusive rights on home entertainment equipment, in Brazil, to Sony Pictures Home Entertainment[5]
Costs reduction due to the sharing of infrastructure	Term of commitment between TIM Celular S.A., Telefônica Brasil S.A. (Vivo), Claro S.A. and Oi Móvel S.A. for the evaluation of a joint procurement agreement among them that would enable the construction, installation and non-exclusive transfer of telecommunications infrastructure in closed spaces[6]

[4] Concentration Act No. 08700.003252/2016-81, approved by the General Superintendence on August 5, 2016.

[5] Concentration Act No. 08700.012062/2015-73, approved by the General Superintendence on February 12, 2016.

[6] Concentration Act No. 08700.010033/2015-77, approved by the General Superintendence on December 18, 2015.

Scale economies due to the complementarity of the parties' activities	Acquisition control of TNT Express N.V. by Fedex Corporation[7]

In none of the four cases listed above the efficiencies recognized by CADE were decisive for the approval of the transaction since the agency had already verified that an abusive exercise of market power was unlikely. Moreover, it should be noted that the TNT/Fedex case was the only one in which there has been a quantitative analysis of efficiencies – in the other three cases, the analysis was merely qualitative.

2.2 Transactions approved with restrictions

Amid the cases **approved with restrictions** (18), 11 involved efficiencies analysis, but CADE accepted efficiencies claimed by the parties in only four of them, indicated below:

Efficiency claims accepted by CADE	Case
Costs reduction due to access to cheaper electrical energy, scale economies and increase in supply	Joint venture between Saint Gobain do Brasil Produtos Industriais e para Construção Ltda. and SiCBRAS Carbeto de Silício do Brasil Ltda. for the manufacture of metallurgical silicon carbide[8]
Investment plan for the expansion of railway infrastructure (expansion of access to essential infrastructure)	Incorporation of ALL – América Latina Logística S.A. shares by Rumo Logística Operadora Multimodal S.A.[9]

[7] Concentration Act No. 08700.009559/2015-12, approved by the General Superintendence on February 1, 2016.

[8] Concentration Act No. 08700.010266/2015-70, approved with restrictions by the Tribunal on April 13, 2016.

[9] Concentration Act No. 08700.005719/2014-65, approved with restrictions by the Tribunal on February 11, 2015.

Logistic gains, costs reduction, investments in Research & Development and vertical integration	Acquisition of Innova S.A. by Videolar S.A.[10]
Positive externalities (development of the Brazilian system for enrollment of good payers and expansion of the market for the concession of credit and financial inclusion)	Joint venture between Banco Bradesco S.A., Banco do Brasil S.A., Banco Santander S.A., Caixa Econômica Federal and Itaú Unibanco S.A. for the creation of a credit bureau[11]

These four cases reveal that CADE tends to consider efficiency claims properly substantiated by the parties, albeit only in qualitative terms, as strong arguments for the approval of concentration acts, even though they are not sufficient to exempt the imposition of remedies. For example, in the case regarding the creation of a credit bureau among several competing financial institutions, CADE verified that the positive externalities related to the transaction would only be possible if the competition concerns identified were duly addressed by the agency.

Besides that, in some cases, the efficiencies identified during the antitrust analysis can be helpful for the definition of the best remedies to address the competition concerns derived from the transaction. To illustrate, it is worth mentioning that, pursuant to CADE, the *Innova/Videolar* case involved clear efficiency gains, but there was not enough evidence that such benefits would be passed on to consumers. Recognizing that the lack of proof in this regard was due to the standstill obligation, which prevented Videolar from having access to Innova's information, CADE decided that, among other remedies necessary, Videolar would have to present a plan with a reasonable estimate of the benefits to be shared with consumers.

[10] Concentration Act No. 08700.009924/2013-19, approved with restrictions by the Tribunal on October 1, 2014.

[11] Concentration Act No. 08700.002792/2016-47, approved with restrictions by the Tribunal on November 9, 2016.

2.3 Transactions blocked

In the two **cases blocked** by CADE during the time-frame of the present study, the efficiencies claimed by the parties were entirely rejected by the Brazilian agency. Both these cases are indicated in the table below together with short extracts from CADE's rulings that summarizes the reasons why such efficiencies could not be accepted:

Case	Reason for the rejection of efficiencies claims
Acquisition of Solvay S.A. by Braskem S.A.[12]	*'From the calculations presented, the level of efficiencies necessary for the approval of this transaction is very high, and there is no assurance that the efficiencies promised may result in the alleged reduction of marginal cost. Moreover, the Applicants claimed a series of efficiencies, but they did not show how such efficiencies affect its cost structure per ton produced, nor how they would be passed on to consumers*' (free translation)[13]
Acquisition of Condor Pincéis Ltda. Tigre S.A.[14]	'*The alleged improvement of the society's welfare has not been proven since it has not been demonstrated that potential gains would be passed on to consumers. This is because the Applicants did not prove that the increase in market share would not result in a simple transfer of revenues between the parties to the transaction. (...) Therefore, the liquid effects of the present transaction are negative and they cannot be outweighed by efficiencies that can be quantifiable, measurable or transferable to consumers in the relevant markets.*' (free translation)[15]

[12] Concentration act No. 08700.000436/2014-27, rejected by the Tribunal on November 12, 2014.

[13] Vote of the Reporting Commissioner Gilvandro Vasconcelos Coelho de Araujo, paragraph 311, p. 128.

[14] Concentration act No. 08700.009988/2014-09, rejected by the Tribunal on September 2, 2015.

[15] Vote of the Reporting Commissioner Márcio de Oliveira Júnior, paragraph 448, p. 39.

These precedents indicate that CADE tends to be considerably rigid with regard to the standard of proof required for the acceptance of efficiencies when the concentration act involves high risks of anticompetitive damages. Notably, it seems that, in these cases, efficiency claims shall only be accepted by CADE when there is solid quantitative proof of its existence, as well as strong quantitative evidence of a non-negative liquid effect on society's economic welfare.

3. Conclusions

CADE adopts a very rigorous approach when it engages in efficiencies analysis and the standard of proof tends to be higher as antitrust concerns are greater. Indeed, if the transaction is likely to increase market power, efficiencies will probably not be accepted by CADE as a justification for unconditional approval.

From the parties' standpoint, producing quantitative proof of efficiency gains can be expensive and risky, as it may depend on commercially sensitive information of the other party to the transaction and, therefore, trigger inquiries related to the occurrence of gun jumping. In this context, both CADE and the parties to the transaction have strong incentives to start the negotiation of remedies without resorting to efficiencies analysis, as it is not a mandatory step of the antitrust analysis.

Nonetheless, the figures presented herein show that even when a concentration act involves serious risks of harming competition, CADE is receptive to consider efficiency claims on a quantitative and/or qualitative basis as arguments favorable to the approval of the transaction and as important references for the purpose of designing the best remedies to address antitrust concerns at stake.

Therefore, it is advisable that the parties to more complex transaction present studies concerning the efficiencies linked to the concentration act as soon as possible. Efficiency claims shall be carefully described in the notification even if deprived of further quantitative

analysis, as even qualitative arguments shall be considered by CADE and positively impact the antitrust analysis conducted by the agency.

WHAT HAS BEEN CADE'S PREFERENCE IN REMEDIES: STRUCTURAL, BEHAVIORAL OR A COMBINATION OF BOTH?

Patricia Semensato Cabral[1]

Remedies in merger cases are usually classified as structural or behavioral. The most common definition of structural and behavioral remedies is the one that is based on the allocation of property rights. [2]

Structural remedies modify the allocation of property rights in order to re-establish the competitive structure in the market, either by creating a new competitor or by strengthening an existing competitor. Examples of structural remedies are the divestment of an entire business unit and in operation, the divestment of part of an existing business, the divestment of certain physical assets or other rights.

Behavioral remedies, on the other hand, do not alter the allocation of property rights, but impose restrictions on those rights, limiting the behavior of the firms that hold them. Typical examples of behavioral remedies are licensing intellectual property rights or brands, firewalls to prevent dissemination of information within a firm, transparency provisions, non-discrimination provisions and others.

Sometimes, to guarantee the effectiveness of a given decision, a package of remedies may contain a combination of both structural and behavioral measures. It is the case, for example, of transitional agreements for supply of some input or technical assistance (behavioral) from the merged company and the buyer of a given divestiture package (structural), in order to guarantee the viability of the divestment business.

[1] This article represents the opinions of the author. It is not meant to represent the position or opinions of CADE or its Members, nor the official position of any staff members. Any errors are the fault of the author.

[2] Motta et al. (2003, p. 108).

A combination of structural and behavior remedies may be also necessary when a merger affects multiple markets with different degrees of harm to competition.[3]

In many jurisdictions, there is a clear preference for structural remedies, especially in horizontal mergers.[4] The general preference for structural remedies, however, does not mean that this kind of intervention is always applicable.[5] Behavioral remedies may be recommended in certain specific situations, especially in vertical mergers.[6] Therefore, determination of the most appropriate remedy depends on the characteristics of the merger under analysis and on the nature of the identified competitive problem.

An examination of CADE's past practice in the last years allows a good understanding of the authority's preferences in terms of types of

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[3] ICN 2016. http://www.internationalcompetitionnetwork.org/uploads/library/doc1082.pdf .

[4] According to OECD (2011), "*In many jurisdictions there is a strong presumption, at least for horizontal mergers, that a structural remedy is preferable to behavioral remedies. Many jurisdictions believe that a structural remedy, such as divestiture, is likely to be more effective, as it addresses the cause of the competitive detriment directly, and will incur lower ongoing costs of monitoring or possible market distortion*." Policy Roundtables – Remedies in Merger Cases (2011), http://www.oecd.org/daf/competition/RemediesinMergerCases2011.pdf .

[5] Some limitations usually related to the design and implementation of structural remedies are the risk of the divestment of assets to an unsuitable buyer; the risk of excessive intervention; and the elimination of significant efficiencies that otherwise would result from the merger. In addition, in some cases it is not possible or desirable to apply a structural solution, for example, unfeasibility of a divestiture due to specific characteristics of the industry.

[6] This is the case of mergers that generate substantial efficiencies that could be undermined through the adoption of structural intervention; mergers whose anticompetitive effect should be limited in time by reason of fast changing technology or other factors; transitional measures to ensure the effectiveness of structural remedies, as mentioned above; or when behavioral measures are in line with the regulatory system, so that monitoring may be undertaken by a specialized regulatory agency.

remedies. This analysis should consider two distinct periods: the rule of Law No. 8,884/1994, from 1994 to 2011; and the rule of Law No. 12,529/2011, the competition law that came into force in 2012. This change in the legal framework had important implications both in CADE's capacity to require more substantial remedies, and in the Parties incentives to offer better remedies in reasonable timing.

Under the previous regime (Law No. 8.884/1994), Brazilian merger control was *ex post*, which means that the firms involved were allowed to consummate a merger before the end of CADE's reviewing process. In that context, by the moment of CADE's decision, the integration between the parties usually had already taken place; the feasibility of structural solutions was reduced, since it was much more difficult to revert (totally or partially) the integration process between the merging firms.[7] [8]

[7] In this sense, see OECD "Competition Law and Policy in Brazil – A Peer Review", 2010 (http://www.oecd.org/daf/competition/45154362.pdf) : "*Substantively, consummation of the transaction may affect the remedies that are available to CADE should it find the merger unlawful. Specifically, CADE's ability to prohibit a transaction entirely is complicated by having to undo a consummated merger, a notoriously difficult task.*[…]"

[8] PEREIRA NETO and AZEVEDO argue that the *ex post* notification system was determinant in the adoption of less rigorous remedies. To confirm this view, the authors cite some Commissioners speeches during the judgement of Votorantim's acquisition of Polimix (Concentration Act No. 08012.008848/2005-72): "*During the judgment, Reporting Commissioner Ricardo Cueva asserted that the proposed TCD solved 'an issue that had been pendent for three years in the Brazilian competition defense system'. The Reporting Commissioner also affirmed that 'a unilateral decision determining the divestment of assets or any other structural remedy would probably be difficult to implement.' From this assertion, it is possible to infer that, in the absence of implementation costs, a structural decision recommending the divestment of assets in the markets with substantial competitive concerns would be preferable, even if unilaterally imposed. What happens is that those costs exist e had been taken into consideration in the choice and negotiation of the remedy. By the end of the judgment session, CADE's president Elizabeth Farina affirmed that 'this is a paradigmatic case to the evaluation of the pre-merger notification and post-merger notification', since after a long investigation*

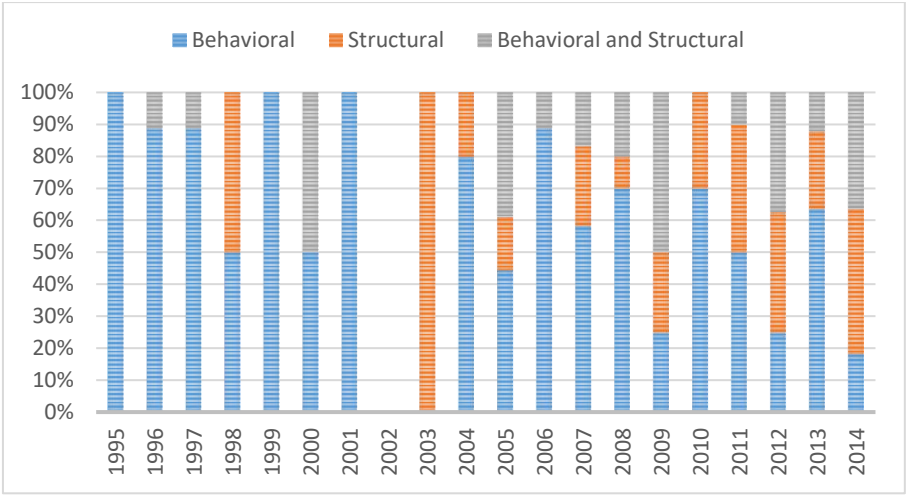
The analysis of CADE case law under Law No. 8,884/1994 shows a predominance of behavioral remedies, especially in the first years of the implementation of merger review in Brazil. At the same time, it is interesting to note that in a number of years - from 2005 onwards more consistently - decisions have been taken that combined structural and behavioral measures. This indicates that, although the number of behavioral remedies exceeded that of structural remedies during this period, the former had been often used along with the latter in order to improve their efficacy.[9] The graphic below shows the proportion between "behavioral", "structural", and "structural and behavioral" remedies in merger cases from 1995 to 2014:[10]

period, the Parties had already merged and there was no mean to revert competition to the previous status quo. In sum, there was a recognition of the limits imposed by the legal framework, which hindered a more incisive practice by CADE (...)". PEREIRA NETO, Caio Mario, and AZEVEDO, Paulo Furquim. *Remédios no âmbito de Acordos em Controle de Concentração (ACCs): um balanço dos primeiros anos da Lei 12.529/2011*. In: CARVALHO, Vinícius Marques (org.). A Lei 12.529/2011 e a Nova Política de Defesa da Concorrência. São Paulo: Editora Singular, 2015.

[9] For a detailed analysis of remedies adopted by CADE from 1994 to 2013, see CABRAL, Patricia, *Remédios em Atos de Concentração: uma análise da prática do CADE*. Prêmio SEAE 2014 (http://seae.fazenda.gov.br/premio-seae/edicoes-anteriores/edicao-2014/ix-premio-seae-2014/tema1-1lugar-patricia.pdf).

[10] This graphic considers only cases notified under Law No. 8,884/1994, even if those cases had been decided after the year 2011. Law No. 12,529/2011 cases decided in 2013 and 2014 were excluded.

Graphic 1. Types of remedies applied in merger cases, 1995-2014 (Law No. 8,884/1994)



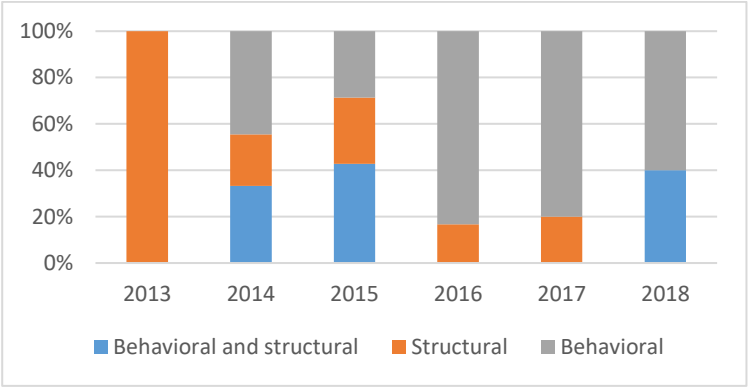
It is necessary to highlight the difference of profile in the remedies adopted at the beginning compared to the end of the mentioned period. The first remedies often required behavioral commitments related to the achievement of efficiencies, without making clear the relationship of such efficiencies and mitigating eventual competitive concern.[11] The remedies adopted at the end of Law No. 8,884/1994, on the other hand, are clearly more complex and sophisticated and tend to seek solutions to clearly identified problems, a clear advance in the perception of the role of antitrust.[12]

[11] Albarus S.A. Indústria e Comércio/Rockwell do Brasil S/A and Albarus S/A Indústria e Comércio (Concentration Act No. 0026/1995); Fairway Filamentos S.A./Rhodia S.A. and Hoescht do Brasil Quím.Farmacêutica (Concentration Act No. 41/1995); and others.

[12] An illustrative example of a complex remedy adopted in the end of this period is Sadia/Perdigão, in which the Parties committed to divest a package of assets containing trademarks and intellectual property was determined, as well as assets and rights related to certain production units and distribution centers. At the same time, ancillary behavioral measures had been taken.

In the current regime (Law No. 12,529/2011), Brazil has a pre-merger notification system. As firms are not allowed to consummate a merger before CADE's approval, they may have more incentives to seek for a settlement in earlier stages of the reviewing process, thus reducing the reviewing period and actively participating in the design of a negotiated solution (as opposed to a remedy imposed unilaterally by the authority). Besides, since the assets must be kept separate while CADE is analyzing a merger case, the competition authority is able to design more effective structural remedies. The graphic bellow shows the proportion between "behavioral", "structural", and "structural and behavioral" remedies in merger cases from 2014 to March 2018:

Graphic 2. Types of remedies applied in merger cases, 2014- March 2018 (Law 12,529/2011)



It is possible to observe that in the first three years, remedies with structural provisions (alone or combined with behavioral measures) prevailed over purely behavioral remedies. In the following three years, however, the number of cases with essentially behavioral remedies (without any structural provision) overcomes the amount of cases subject to structural/structural + behavioral remedies.

According to the data above, remedies that combine structural and substantive behavioral provisions (classified as "behavioral and structural") respond to an important part of the cases approved subject to

restrictions under Law No. 12,529/2011.[13] It is important to note that even in the cases approved subject to essentially structural remedies (classified above as "structural"), ancillary behavioral commitments have usually been adopted, such as transitory measures to ensure the effectiveness of structural remedies, hold-separate provisions and commitments to preserve viability of the divestment package until the divestiture effectively happens. [14]

[13] For example, in Kroton Educational S.A./Anhanguera Educacional Participações S.A. (Concentration Act No. 08700.005447/2013-12), besides divesting Uniasselvi, the Parties have committed to limit their growth in several relevant markets in which the merger raised competitive concerns. In Votorantim S.A./Acelormittal Brasil S.A. (Concentration Act No. 08700.002165/2017-97), besides divesting assets related to the production of drawn and ordinary long rolled steel and to the markets of wire drawing and steel wire rod machines, the Parties have assumed a "Performance Commitment" with annual minimum sales volumes. In Bayer Aktiengesellschaf/Monsanto Company (Concentration Act No. 08700.001097/2017-49), besides the main structural provision (divestiture of Bayer's assets in the cotton and soybeans seeds business; and non-selective herbicides), the Parties have committed to adopt some behavioral remedies, such as transparency in their commercial policy; prohibition of imposing exclusivity to distribution channels; prohibition of tying and bundling; broad and non-discriminatory licensing policy.

[14] For example, in Continental/Veyance (Concentration Act No. 08700.004185/2014-50), the Parties have committed to divest assets and to celebrate agreements for transitory services (back-office and post-sales services) and technical support to the buyer. In Dow/DuPont (Concentration Act No. 08700.005937/2016-61), the Reporting Commissioner's vote mentions that for the acid copolymers market there are "behavioral remedies, transitional and complimentary to the main remedies, which are structural" (paragraph 180), although the details of such behavioral remedies had been kept confidential. In Reckitt Benckiser Ltda./Hypermarcas S.A. (Concentration Act No. 08700.0034642/2016-79), the Parties have committed to preserve economic viability of the divestment package, making efforts to minimize risks of potential loss of competitiveness, according to regular business course; and not to take any measure that could have an adverse impact over the divestment business value, management or competitiveness.

It is also important to note that purely behavioral remedies had been accepted in many cases, even in horizontal mergers, especially from 2016 to 2018 (until March). Behavioral remedies under Law No. 12,529/2011 include a wide range of different types of commitments, such as prohibition of restrictive practices,[15] licensing of certain technologies or other assets,[16] transparency provisions,[17] non-discrimination commitments,[18] firewalls,[19] commitments to maintain a certain level of supply/quality,[20] limitations to the growth of a dominant agent,[21] and others.

The acceptance of essentially behavioral remedies, however, does not mean a real preference for this type of remedy. On the contrary: in addition to all the advantages generally associated to structural

[15] Rumo Logística/ALL (Concentration Act No. 08700.005719/2014-65), Itaú Unibanco/XP Investimentos (Concentration Act No. 08700.004431/2017-16).

[16] Videolar S.A./Petróleo Brasileiro S.A./Innova S.A. (Concentration Act No. 08700.009924/2013-19), and others.

[17] Bradesco/HSBC (Concentration Act No. 08700.010790/2015-41), ItaúUnibanco/Citibank (Concentration Act No. 08700.001642/2017-05), and others.

[18] Rumo Logística/ALL (Concentration Act No. 08700.005719/2014-65), Banco Bradesco S.A./Banco do Brasil S.A./Banco Santander/Caixa Econômica Federal/Itaú Unibanco S.A. (Concentration Act No. 08700.002792/2016-47), and others.

[19] Banco Bradesco S.A./Banco do Brasil S.A./Banco Santander/Caixa Econômica Federal/Itaú Unibanco S.A. (Concentration Act No. 08700.002792/2016-47), AT&T/Time Warner (Concentration Act No. 08700.001390/2017-14), and others.

[20] Estácio Participações S.A. and TCA Investimento em Participações Ltda. (Concentration Act No. 08700.009198/2013-34), Videolar S.A./Petróleo Brasileiro S.A./Innova S.A. (Concentration Act No. 08700.009924/2013-19), Telefônica Brasil S.A./Telefónica S.A./GVT Participações S.A./Vivendi S.A. (Concentration Act No. 08700.009732/2014-93), and others.

[21] Estácio Participações S.A./TCA Investimento em Participações Ltda. (Concentration Act No. 08700.009198/2013-34), Videolar S.A./Petróleo Brasileiro S.A./Innova S.A. (Concentration Act No. 08700.009924/2013-19), and others.

remedies, in some opportunities Commissioners have publicly expressed a preference for structural solutions.[22]

In the same sense, the adoption of non-structural remedies does not mean that CADE has been adopting a less rigorous approach to merger cases. Actually, since the final years under Law No. 8,884/1994 regime, it can be observed that remedies are in general more complex and rigorous, and the number of merger rejected increased, in comparison to the first years of merger control in Brazil.[23]

[22] For example, during the judgment of Concentration Act No. 08700.004860/2016-11 (BM&FBOVESPA S.A. and CETIP S.A.), Commissioner Paulo Burnier made comments on the importance of the antitrust authority seeking, whenever possible, definitive structural remedies in mergers, without establishing long-term obligations. Also, during the judgment of Concentration Act No. 08700.004163/2017-32 (Grupo Petrotemex, S.A. de C.V. and Petróleo Brasileiro S.A.), Commissioner Cristiane Alkmin observed that the remedy adopted "*unfortunately does not consist in a structural remedy, but is a strong and innovative behavioral remedy, which will guarantee, for a reasonable period of time, that M&G will not be discriminated by the new integrated company. This was a second-best solution.*"

[23] The same view was expressed by PEREIRA NETO e AZEVEDO: "*There are, however, other evidence indicating a more rigorous approach in remedies in merger cases by the end of Law No. 8,884/1994 rule.*"

HOW IS CADE APPROACHING REMEDIES IN HORIZONTAL MERGERS?

Renata Zuccolo
Frederico Martins

1. Introduction

Over the past year, CADE reviewed a considerable number of domestic and cross-border cases that have been approved subject to remedies[1]. As it can be seen from these cases, CADE is being more rigorous in the review of complex transactions. Between January 2017 and March 2018, 14 complex cases were reviewed by CADE's Tribunal. Four were blocked and the remaining approved with substantial remedies.[2] In many cases approved with remedies,

[1] The vast majority of the Concentration Acts reviewed by CADE is approved without remedies. Only a small percentage becomes the subject of restrictions. *See* Ribeiro, A. C. & Martins, F. B. P. (2018, April). Antitrust remedies in Brazil: Legal framework and trends. Paper presented at the 66th ABA Section of Antitrust Law Spring Meeting, Washington, DC.

[2] Cases approved with remedies from January 2017 to March 2018: Concentration Act No. 08700.004860/2016-11 (BM&FBOVESPA S.A. – Bolsa de Valores, Mercados e Futuros and CETIP S.A. – Mercados Organizados), Concentration Act No. 08700.004211/2016-10 (TAM Linhas Aéreas S.A., Iberia Líneas Aéreas de Espana, S.A. Operadora, Sociedad UnipersonaI and British Airways Pico), Concentration Act No. 08700.001642/2017-05 (Itaú Unibanco S.A. and Banco Citibank S.A.), Concentration Act No. 08700.001097/2017-49 (Bayer Aktiengesellschaft and Monsanto Company); Concentration Act No. 08700.004163/2017-32 (Grupo Petrotemex S.A de C.V and Petróleo Brasileiro S.A); Concentration Act No. 08700.002165/2017-97 (Arcelormittal Brasil S.A. and Votorantim S.A.); Concentration Act No. 08700.001390/2017-14 (AT&T Inc. and Time Warner Inc.); Concentration Act No. 08700.005937/2016-61 (The Dow Chemical Company and E.I Du Pont de Nemours and Company); Concentration Act No. 08700.004431/2017-16 (Itaú Unibanco S.A and XP Investimentos S.A);

Commissioners have issued different opinions, or even votes, to block the transaction, as opposed to the remedies agreed by the majority of Commissioners[3].

On the other hand, CADE has been showing some flexibility with respect to the construction of the remedies package, the nature of the remedies imposed and how they will be implemented, taking into consideration specificities of each case and industry. CADE has also been more open to accept less traditional and/or behavioral remedies, although this is more often seen in cases where competition concerns are related to vertical overlaps.

The purpose of this article is to briefly discuss the recent cases regarding remedies required and negotiated in the context of horizontal mergers.

Concentration Act No. 08700.007483/2016-81 (WEG Equipamentos Elétricos S.A. and TMG Indústria e Comércio de Turbinas e Transmissões Ltda.), and Concentration Act No. 08700.001642/2017-05 (Itaú Unibanco S.A. and Banco Citibank S.A.). Cases blocked from January 2017 to March 2018: Concentration Act No. 08700.006185/2016-56 (Kroton Educational S.A. and Estácio Participações S.A); Concentration Act No. 08700.006444/2016-49 (Ipiranga Produtos de Petróleo S.A. and Alesat Combustíveis S.A); Concentration Act No. 08700.007553/2016-83 (JBJ Agropecuária Ltda. and Mataboi Alimentos Ltda.) and Concentration Act No. 08700.002155/2017-51 (Companhia Ultragaz S.A. and Liquigás Distribuidora S.A). Amongst these cases, this article will only cover cases where remedies where negotiated due to horizontal concerns.

[3] For instance, Concentration Act No. 08700.001097/2017-49 (Bayer Aktiengesellschaft and Monsanto Company); Concentration Act No. 08700.004163/2017-32 (Grupo Petrotemex S.A de C.V and Petróleo Brasileiro S.A); Concentration Act No. 08700.002165/2017-97 (Arcelormittal Brasil S.A. and Votorantim S.A.); Concentration Act No. 08700.004431/2017-16 (Itaú Unibanco S.A and XP Investimentos S.A); and Concentration Act No. 08700.004860/2016-11 (BM&FBOVESPA S.A. – Bolsa de Valores, Mercados e Futuros and CETIP S.A. – Mercados Organizados).

2. Recent cases

We have summarized below the most relevant cases[4] where remedies were required as a result of horizontal overlaps arising from that transactions[5]:

(i) Latam / Iberia / British Airways Case:[6] a joint business agreement between these airlines in order to operate flights between Europe and Brazil. The transaction was subject to "temporary" remedies that aimed at guarantying the entry of new competitors on the route between São Paulo and London, by making slots available at Heathrow Airport, free of charge to rivals, for a period of 10 years. The remedies package also included additional behavioral remedies, including commercial terms for making the slots available, in order to minimize the risk of any market power being imposed by the parties and also to guarantee that part of the transaction efficiencies would be shared with consumers.

(ii) Itaú Unibanco /Citibank Case:[7] domestic deal regarding the acquisition of Citibank's retail operation in Brazil by Itaú

[4] Cases approved with remedies from January 2017 and up to March 2018.

[5] We have not included the Concentration Act No. 08700.004860/2016-11 (BM&FBOVESPA S.A. – Bolsa de Valores, Mercados e Futuros and CETIP S.A. – Mercados Organizados), as we consider that the concerns raised by CADE were more related to vertical issues and access to the infrastructure held by the companies. We also have not included the Concentration Act No. 08700.004431/2017-16 (Itaú Unibanco S.A and XP Investimentos S.A), as the concerns were more related to possible antitrust concerns due to the disruptive business model developed by XP than purely horizontal issues and Concentration Act No. 08700.007483/2016-81 (WEG Equipamentos Elétricos S.A. and TMG Indústria e Comércio de Turbinas e Transmissões Ltda.), which discussed remedies due to concerns regarding conglomerate effects.

[6] Concentration Act No. 08700.004211/2016-10 (TAM Linhas Aéreas S.A., Iberia Líneas Aéreas de Espana, S.A. Operadora, Sociedad UnipersonaI and British Airways Pico).

[7] Concentration Act No. 08700.001642/2017-05 (Itaú Unibanco S.A. and Banco Citibank S.A.).

Unibanco. The merger was approved subject to behavioral remedies, basically regarding improvements on the quality of services provided. Itaú Unibanco also undertook the commitment of not acquiring players in the banking sector for a period of 30 months. No structural remedy was required.

(iii) Dow/ DuPont Case[8]: cross broader deal regarding the merger of the two groups. It was subject to complete packages of structural remedies: the divestment of Dow's acid copolymer and ionomers global business, divestment of certain assets of Dupont's global herbicides and insecticides business, including intellectual property rights, customer records, agreements with third parties, and divestment of Dow's corn seed business in Brazil (including the germplasm bank, part of the hybrids in Pipeline, R&D centers, and commercial hybrids of Dow in Brazil). The assets included production facilities, brands, staffs and sales/work force. The remedies also determined the profile for potential buyers.

(iv) Arcelormittal/ Votorantim Case[9]**:** domestic deal regarding the acquisition of local long steel producer Votorantim Siderurgia by ArcelorMittal's Brazilian subsidiary. The merger was approved subject to two packages of structural remedies combined with behavioral remedies (including a performance commitment). The first package related to the drawn and ordinary long rolled steel business and the second related to wire drawing and steel wire rod machines. The packages could not have the same potential buyer, which also could not have a share above 20% on the relevant markets.

[8] Concentration Act No. 08700.005937/2016-61 (The Dow Chemical Company and E.I Du Pont de Nemours and Company).

[9] Concentration Act No. 08700.002165/2017-97 (Arcelormittal Brasil S.A. and Votorantim S.A.).

(v) Bayer/Monsanto:[10] global merger between two of the major players in the chemical sector with considerable overlaps in crop protection segment. The merger was approved subject to severe remedies that included structural remedies with the objective to eliminate certain horizontal overlaps (i.e, the sale of all Bayer's tangible and intangible assets regarding the soybean seeds and cotton businesses, as well as the unit of non-selective herbicides based on ammonium glufosinate to a up front buyer) and strong behavioral remedies towards the commercial policies of the companies aiming to avoid exclusionary or discriminatory behaviors.

3. Conclusion

Based on the precedents listed above, it is our opinion that CADE takes a stricter approach towards remedies in horizontal mergers *vis a vis* vertical mergers, with a clear preference for structural remedies, as it is the case of most antitrust authorities worldwide. In many cases regarding horizontal mergers, CADE actually negotiated a combination of behavioral measures and we identified the following trends:

- It is clear that CADE will be looking to complete packages of structural remedies (including tangible and intangible assets such as patents, R&D, know-how), by which a new player (or a small player) will be able to enter (or increase its presence in) the market and compete effectively. In cases where both parties held a considerable high market share, remedies may even aim to completely eliminate the overlap, as in the Monsanto/Bayer case. In other cases, the remedies' package included even work force and sales force[11]. This

[10] Concentration Act No. 08700.001097/2017-49 (Bayer Aktiengesellschaft and Monsanto Company)

[11] *See* Concentration Act No. 08700.005937/2016-61 (The Dow Chemical Company and E.I Du Pont de Nemours and Company)

shows that CADE is not only looking to a way to decrease the combined share post transaction but is also looking on ways to increase rivalry in the market.

- On the other hand, CADE has sent a clear (and important) message that it will not make use of remedies to address concerns that are not strictly related to the transaction under review, but it is rather the result of the market characteristics and current structure[12].
- It is also clear that CADE tends to determine the profile of possible buyer for divested business, for instance, by imposing limits to the buyer's market share, or requiring a certain level of financial health to the company and/or maybe even some expertise in the market.[13]
- Specifically in cross-border cases, it is already an established proceeding that parties will be required to sign a waiver in order to allow CADE to contact antitrust authorities from other jurisdictions, but the recent cases clearly shows that CADE is coordinating with other antirust authorities and aiming to guarantee that any remedies in Brazil will be consistent with the one(s) adopted elsewhere[14].

[12] *See* Concentration Act No. 08700.002165/2017-97 (Arcelormittal Brasil S.A. and Votorantim S.A.).

[13] *See* Concentration Act No. 08700.005937/2016-61 (The Dow Chemical Company and E.I Du Pont de Nemours and Company) and Concentration Act No. 08700.002165/2017-97 (Arcelormittal Brasil S.A. and Votorantim S.A.).

[14] In the Dow/DuPont Case, CADE closely coordinated the remedies negotiation with other jurisdiction since the most important assets where not located/based in Brazil

HOW CADE'S REMEDIES PRACTICE ADDRESSES VERTICAL CONCERNS?

Lorena Nisiyama
Maíra Rodrigues

This article sets out CADE's practice regarding remedies applicable to transactions with competition concerns resulting from vertical integration, considering the transactions notified under Law No. 12,529/2011, which introduced a premerger control regime in May 2012. For this purpose, we will analyze CADE's practice in cases that resulted solely in vertical integrations (the "pure vertical integration cases") as well in cases that resulted in a mix of vertical/horizontal overlaps (the "hybrid cases"). Section 1 provides an overview of CADE's remedy practice until the end of 2016, both in pure vertical integration cases and in hybrid ones, to lay the groundwork for the analysis of the recent cases. Section 2, as a result, discusses CADE's remedy practice from 2017 onwards, which reiterated the direction followed by the authority in the vertical precedents discussed in Section 1, and to some extent also expanded the alternatives available to notifying parties in terms of remedy packages.

Summary of CADE's remedies practice in vertical integration cases before 2017

Pure vertical integration cases

Since the beginning of its activities in 1994, CADE's review of transactions raising solely vertical concerns resulted in the adoption of behavioral remedies, exclusively[1] – except for one case, where approval

[1] CABRAL, Patrícia Semensato. Remédios em Atos de Concentração: uma análise da prática do CADE (convenience translation: "Remedies in Merger Review:

of the transaction was conditioned upon the modification of contractual clauses in the licensing agreement[2].

Under Law No. 12,529/2011 in particular, and up to March 2018, CADE has adopted remedies in three decisions in which the concerns involved solely vertical integrations. The main concerns identified in such decisions were market foreclosure[3], refusals to supply[4], and anticompetitive price discrimination to limit competition in a downstream or upstream-related segment[5].

When such exclusively vertical concerns were identified, CADE's remedies intended to reduce the parties' ability and incentives to limit competition, by imposing a general prohibition against

analysis of CADE's practice"), Available at <http://seae.fazenda.gov.br/premio-seae/edicoes-anteriores/edicao-2014/ix-premio-seae-2014/tema1-1lugar-patricia.pdf>. Access on March 14, 2017. The conclusions of the cited paper covered cases from 1994 to 2013, and were supplemented by our own review of cases under the Law No. 12,529/2011.

[2] *See* Concentration Act No. 08700.004957/2013-72. Parties: Monsanto do Brasil Ltda and Bayer S.A. Decided on January 23, 2014. This transaction concerned an agreement in which Monsanto would grant Bayer the license for development, production and commercialization of soybean seeds with a certain technology. CADE concluded the agreement could grant Monsanto the ability of unduly controlling and influencing Bayer's activities in the soy market, due to the existence of a clause granting Monsanto preference rights in the event of an acquisition, by Bayer, of related companies in the soybean market. The transaction was conditioned upon the modification of certain clauses, including the preference right provision.

[3] *See* Concentration Act No. 08700.004083/2012-72. Parties: American Chemical I.C.S.A and Oxiteno S.A Indústria e Comércio. Decided on November 26, 2013 (hereinafter *Oxiteno/American Chemical*). *See also* Concentration Act No. 08700.002372/2014-07. Parties: Cromossomo Participações II S.A and Diagnósticos da América S.A. Decided on July 7, 2014 (hereinafter *Cromossomo/Dasa*).

[4] *See* Concentration Act No. 08700.000344/2014-47. Parties: Bromisa Industrial e Comercial Ltda., Vale Fertilizantes S.A. and ICL Brasil Ltda. Decided on December 10, 2014 (hereinafter *ICL/Fosbrasil*). *See also Oxiteno/American Chemical*.

[5] *See Oxiteno/American Chemical*; *ICL/Fosbrasil*.

discriminatory treatment and refusals to supply[6], long-term obligations to supply[7], and direct interventions on price adjustments[8]. They also intended to limit the parties' ability to foreclose competitors, by prohibiting additional acquisitions in the affected markets[9]. Remedies also included obligations aimed at facilitating monitoring of compliance with these undertakings, such as biannual reports attesting the fulfillment of the commitments[10].

Hybrid cases

In a number of other cases, the vertical concern arose in the same transaction where a horizontal concern was also identified. When that happened, either a hybrid solution – a combination between structural and behavioral remedies – or only a behavioral remedy applied. Nonetheless, the structural remedies were invoked to tackle strong concerns with horizontal aspects of the transaction[11], rather than to intend to address the vertical relationship in particular.

The vertical concern more frequently identified in such hybrid cases was the possibility of market foreclosure[12], incentives for

[6] *See ibid.*

[7] *See ibid.*

[8] *See ibid.*

[9] *See Cromossomo/Dasa.*

[10] *See ibid. See also ICL/Fosbrasil.*

[11] *See* e.g. Concentration Act No. 08700.010688/2013-83. Parties: JBS S.A., Rodopa Indústria e Comércio de Alimentos Ltda and Forte Empreendimentos e Participações Ltda. Decided on August 20, 2014 (hereinafter *JBS/Rodopa*); Concentration Act No. 08700.009731/2014-49 and 08700.009732/2014-93. Parties: Telefônica Brasil S.A., GVT Participações S.A. and others. Decided on March 25, 2015 (hereinafter *GVT/Telefonica/Vivendi*).

[12] *See* Concentration Act No. 08700.005719/2014-65. Parties: Rumo Logística Operadora Multimodal S.A and ALL - América Latina Logística S.A. Decided on February 12, 2015 (hereinafter *ALL/Rumo*); Concentration Act No. 08700.002792/2016-47. Parties: Banco Bradesco S.A.; Banco do Brasil S.A.; Banco Santander (Brasil); Caixa Econômica Federal; Itaú Unibanco S.A. Decided

discrimination[13] at the upstream or downstream levels and refusals to supply[14] or anticompetitive bundling[15]. In these cases, the behavioral remedies were similar to the ones adopted in pure vertical cases, such as a general commitment not to discriminate[16], obligation to keep existing contracts[17], commitments to keep capacity utilization levels[18], obligations to keep the quality/efficiency levels of the services/products[1920] and prohibition of bundling[21]. Less frequently, the Tribunal also accepted corporate governance measures to tackle concerns with the potential access to information from a competitor[22].

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on November 17, 2016 (hereinafter *Bradesco/Banco do Brasil/Santander/Caixa/Itaú Unibanco*).

[13] *See ALL/Rumo;* Concentration Act No. 08700.009363/2015-10. Parties: Itaú Unibanco S.A. and MasterCard Brasil Soluções de Pagamento LTDA. Decided on May 17, 2016 (hereinafter *Itaú/Mastercard*); Concentration Act No. 08700.010266/2015-70. Parties: Saint-Gobain do Brasil Produtos Industriais e para Construção Ltda. and SICBRAS Carbeto de Silício do Brasil Ltda. Decided on April 19, 2016 (hereinafter *Saint Gobain/SiCBRAS*).

[14] *See SaintGobain/SiCBRAS.*

[15] *See ALL/Rumo.*

[16] *See ALL/Rumo; Bradesco/Banco do Brasil/Santander/Caixa/Itaú Unibanco.*

[17] See *GVT/Telefonica/Vivendi; Bradesco/Banco do Brasil/Santander/Caixa/Itaú Unibanco*

[18] *See ALL/Rumo*.

[19] *See ALL/Rumo; GVT/Telefonica/Vivendi; Bradesco/Banco do Brasil/Santander/Caixa/Itaú Unibanco.*

[20] Including corporate governance measures to reduce incentives for discrimination, such as transparency measures and the adoption of independent committees to monitor the adherence to non-discriminatory provisions. *See ALL/Rumo.*

[21] *See ibid.*

[22] *See ALL/Rumo, GVT/Telefonica/Vivendi, Saint Gobain/SiCBRAS* and *Bradesco/Banco do Brasil/Santander/Caixa/Itaú Unibanco*. In all these cases, except for *ALL/Rumo*, the concern with access to competitor information resulted from a horizontal relationship between the parties of the agreement – rather than from a proper vertical relationship. The behavioral remedies put in place mostly involved corporate governance measures aimed at precluding access to information

CADE's recent practice in vertical cases

From the beginning of 2017 to date, CADE has conditionally cleared a pure vertical integration[23] and three hybrid cases[24] with behavioral remedies[25]. CADE's recent practice reiterated the direction followed by the agency in vertical precedents, as detailed in Section 1 above, and some cases also expanded CADE's portfolio of accepted remedies, as explained below.

or the exercise of any sort of influence in the activities of the merged entity (such as the prohibition of interlocking directorates to avoid that sensitive information from the merged entity's clients reached entities of the group active in the same markets of the clients).

[23] *See* Concentration Act No. 08700.001390/2017-14. Parties: AT&T Inc. and Time Warner Inc. Decided on October 18, 2017 (hereinafter *AT&T/Time Warner*).

[24] *See* Concentration Act No. 08700.004860/2016-11. Parties: BM&FBovespa S/A-Bolsa de Valores, Mercados e Futuros and Cetip S/A – Mercados Organizados. Decided on March 22, 2017 (hereinafter *Bovespa/Cetip*); Concentration Act No. 08700.004163/2017-32). Parties: Grupo Petrotemex, S.A. de C.V. and Petróleo Brasileiro S.A. Decided on February 7, 2018 (hereinafter *Petrotemex/Petrobras*); Concentration Act No. 08700.004431/2017-16. Parties: Itaú Unibanco S.A. and XP Investimentos S.A. Decided on March 17, 2018 (hereinafter *Itaú/XP*).

[25] In the following recent hybrid cases, CADE found that the resulting vertical integrations did not raise competitive concerns. Therefore, remedies adopted addressed horizontal concerns: Concentration Act No. Parties: The Dow Chemical Company and E.I Du Pont de Nemours and Company. Decided on May 17, 2017; Concentration Act No. 08700.001642/2017-05. Parties: Banco Citibank S/A and Itaú-Unibanco S/A. Decided on August 16, 2017; and Concentration Act No. 08700.008483/2016-81. Parties: WEG Equipamentos Elétricos S.A. and TGM Indústria e Comércio de Turbinas e Transmissões Ltda. Decided on February 28, 2018. Moreover, in Monsanto's buyout of Bayer (Concentration Act No. 08700.001097/2017-49. Parties: Monsanto Company and Bayer Aktiengesellchaft. Decided on February 7, 2018) CADE held that the structural remedies eliminated the transaction's horizontal concentration and thus also addressed competition concerns related to the reinforcement of vertical integrations, refraining from designing specific behavioral remedies as a result.

a. Vertical integration cases

AT&T/Time Warner[26] concerned the acquisition of Time Warner by AT&T, resulting in a vertical relationship between channel licensing to pay-tv operators, by the Time Warner Group, and pay-tv services via satellite provided by Sky Brasil, controlled by the AT&T Group. CADE's main concern in *AT&T/Time Warner* related to exchanges of sensitive information and potential discrimination and exclusion of competitors in the markets of television programming and pay-tv operation. To tackle these concerns, AT&T undertook to keep Sky Brasil's and Time Warner's programming channels as independent companies in Brazil so as to prevent the exchange of competitively sensitive information between them. Moreover, the commitments prohibited Sky Brasil to refuse broadcasting or to impose discriminatory broadcasting conditions to the providers of programming channels not affiliated to AT&T (compared with those conditions applicable to Time Warner[27]). Finally, CADE also accepted an arbitration mechanism to resolve disputes should AT&T be found to be refusing to negotiate appropriate agreements with rivals[28].

b. Hybrid cases

Bovespa/Cetip[29] concerned the buyout of the clearinghouse Cetip S/A by BM&FBovespa S/A, Brazil's sole stock exchange operator, reinforcing an existing vertical integration between the stock and over-the counter markets, and resulting in a monopoly in both of them. The

[26] *See* footnote 23 above.

[27] AT&T also agreed to adjust contracts valid at the time of the decision in order to comply with this condition.

[28] This arbitration mechanism was similar to the condition accepted in Bovespa/Cetip, which will be further detailed ahead. Additionally, the settlement agreement provided that an independent counsel would be in charge of monitoring the parties' compliance with CADE's decision, and sets forth fines and other measures for non-compliance.

[29] *See* footnote 24 above.

vertical concerns identified were market foreclosure and incentives to discriminate competitors in the securities market. CADE accepted an arbitration clause by which potential entrants could resort to a third party to arbitrate prices and conditions for access to the market should negotiations with the merged entity after 120 days fail. For the first time a remedy proposal included such a far-reaching arbitration clause granting an arbiter broad powers to solve conflicts between the merged entity and third parties.[30]

Petrotemex/Petrobras[31] referred to the group Petrotemex's acquisition of PET resins producer Citape and PTA supplier Suape, with a resulting vertical relation between these two markets. The concerns arose from Suape's potential, as the single national supplier of PTA, to discriminate and to refuse supplies of the raw material used in the production of PET resins against M&G Polímeros do Brasil, the only rival in the national PET resin market. The deal was conditioned to behavioral remedies designed to prevent discrimination against M&G, which actively participated in the review as an interested third party and directly agreed with CADE on the conditions for approval of the deal[32].

Finally, in *Itaú/XP*[33], the acquisition by Itaú Unibanco of a stake in XP Investimentos, CADE accepted a number of remedies to address concerns relating to the possibility of market foreclosure and incentives to discriminate. Companies agreed to keep an independently-managed

[30] The arbiter decision is binding and non-appealable. The settlement agreement also included obligations to keep the efficiency level of the services, including governance measures, in accordance with the clauses provided in AT&T/Time Warner, GVT/Telefônica, Rumo/ALL and Bradesco Santander BB Caixa cases, and the sharing of gains with consumers.

[31] *See* footnote 24 above.

[32] The remedies package also included conditions that will regulate a supply contract between Petrotemex and M&G related to price, PTA volumes, parity in the mix of imported and national PTA supplied to Citepe (one of the targets) and M&G, payment conditions, contract duration, arbitration, fines for violations and monitoring by independent auditor.

[33] *See* footnote 24 above.

online channel for third parties to report actions in violation of the conditions and exclusionary practices. *Itaú/XP*, the first conditional clearance involving financial institutions after the signing of the Memorandum of Understandings between CADE and Central Bank of Brazil, revealed an increased interaction between these agencies – together with the Brazilian Securities Exchange (CVM) – in the assessment of the transaction and design of remedies.

Conclusion about the remedies adopted by CADE to address vertical concerns

CADE's remedy practice indicates that the agency has preponderantly adopted behavioral remedies to address concerns arising from pure vertical transactions, such as long-term obligations to supply or direct interventions in price adjustments, as well as prohibiting additional acquisitions in the affected markets to limit the parties' ability to foreclose competitors. With respect to hybrid cases, the vertical concern more frequently identified was the possibility of market foreclosure and the incentives for discrimination at the upstream or downstream levels. In such cases, CADE adopted general commitments not to discriminate, to keep existing contracts and capacity utilization levels, obligations to keep the quality/efficiency levels of the services/products, and prohibition of bundling. When CADE also identified concerns with the potential access to information from a competitor, the behavioral remedies put in place mostly involved corporate governance measures aimed at precluding access to information or the exercise of any sort of influence in the activities of the merged entity.

CADE's practice in recent vertical mergers not only indicates the current Tribunal members' nod as to applicability of these remedies already tested and accepted by the previous panels, but also signals to a consolidation of alternative measures, such as the provision of arbitration mechanisms, as set forth in *Bovespa/Cetip* and *AT&T/Time Warner*, and the participation of third parties in the design of remedies, as seen in *Petrotemex/Petrobras* and *Itaú/XP* cases.

THE PRACTICAL GUIDE ON REMEDIES: HOW DOES THE PROCESS OF NEGOTIATION WORK?

Vivian Fraga
Venicio Pereira
Luiz Eduardo Jahic

1. Introduction

The main legislation applicable to merger cases in Brazil is Law No. 12,529/2011 plus a series of resolutions issued by CADE. Guidelines on remedies are expected to be issued later this year[1]. Since the enactment of Law No. 12,529/2011, all deals that fall under its provisions are subject to mandatory pre-merger approval of CADE.

CADE has been reviewing complex[2] and high profile mergers in Brazil, such as Bayer-Monsanto and Dow-DuPont[3]. A small but increasing portion has been approved without restrictions (or "remedies")[4], as shown in Figure 1[5].

[1] CADE had already issued relevant guidelines for merger reviews in Brazil. Guidelines on gun-jumping were published on May 20, 2015, and Guidelines on horizontal mergers were published on July 27, 2016.

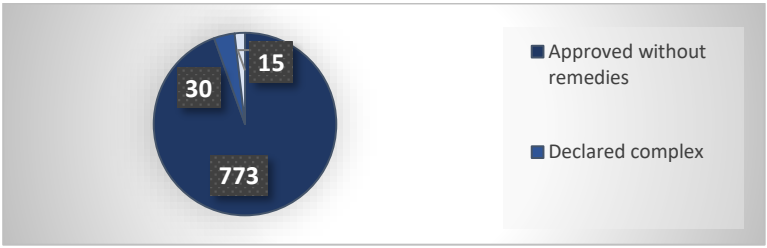
[2] As per Article 56 of Law No. 12,529/2011 "*The General Superintendence may, by means of a reasoned decision, declare the operation as complex and require new complementary fact-finding, specifying the measures to be taken*." In this scope, once the operation is declared as complex, CADE's GS may require that the Tribunal extended up to 90 (ninety) days.

[3] Concentration Act No. 08700.001097/2017-49 (Bayer Aktiengesellschaf and Monsanto Company.) and Concentration Act No. 08700.005937/2016-61 (Dow Chemical Company and E.I Du Pont de Nemours and Company).

[4] CADE has very broad enforcement powers, with the law expressly allowing it to take whatever measures are deemed necessary to remedy damages that could be caused by an anticompetitive transaction, including dissolution or break-up of a company.

[5] CADE's Tribunal has approved five mergers with remedies 2016 and five in 2017. However, it is worth noting that these numbers have been increasing rapidly in 2018, considering that until March 20 there have been five mergers approved with remedies.

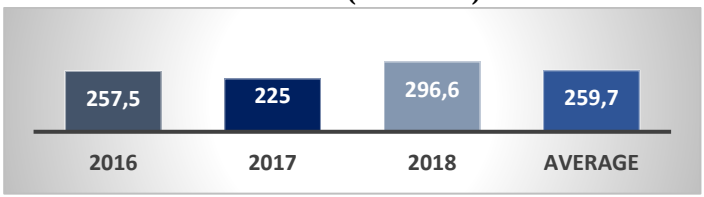
FIGURE 1 – MERGERS APPROVED IN BRAZIL (2016-2018[6])



Source: Authors

Parties have become more prone to discuss and negotiate remedies with the authority as a result of the growing interest of CADE to use remedies as a tool to clear complex transactions. The duration of the remedy negotiation and the non-trivial factors it entails[7] directly and substantially affect the time of the review and the incentives for the parties. In this process, parties must be very mindful of what they are willing to give up and especially when. If they take too long to act CADE may eventually impose remedies on a non-consensual basis or CADE may fully block the deal, which occurred in Kroton-Estacio and Alesat-Ipiranga[8], for instance. The average time of review in Brazil of the transactions cleared with restrictions (remedies) is illustrated below:

FIGURE 2 - AVERAGE TIME (DAYS) OF MERGER REVIEW IN BRAZIL WITH REMEDIES (2016-2018)



Source: Authors

[6] The estimates provided in this paper are based on 2016, 2017 and 2018 (up to March 20) data.

[7] For instance, parties have to reflect on when to engage in remedies negotiation, what they are willing to offer/accept, on the effectiveness of the remedies, on simultaneous negotiations in other jurisdictions etc.

[8] In both cases, Merger Reviews 08700.006185/2016-56 (Kroton Educacional S.A. and Estácio Participações S.A.) and 08700.006444/2016-49 (Ipiranga Produtos de Petróleo S.A. and Alesat Combustíveis S.A.), the parties and CADE did not reach an agreement and the authority blocked the deals.

This paper aims at clarifying common and procedural questions about the negotiation process on remedies with CADE.

2. Remedies: When and with whom to negotiate

Parties may identify specific relevant markets that are likely to give rise to antitrust concerns according to the peculiarities of the case. This is especially the case in global mergers whereas concerns identified overseas may indicate that similar discussions may take place in Brazil[9].

Identifying potential concerns beforehand may be positive for the parties. However, they still have to make a strategic decision on whether and, more specifically, when to trigger discussion on remedies with CADE.

The merger review starts at CADE's General Superintendence ("GS"), which is the technical body in merger investigations. Cases that are more complex normally take longer and are usually under the Ordinary proceeding[10]. They are analyzed by the CADE Tribunal if they are challenged on the merits by third parties or by the GS. There is room for negotiations both at the GS and at the CADE Tribunal, as illustrated below:

[9] The authority can ask for waivers during the pre-notification discussions stage to be able to consult with other agencies, and those are usually granted by parties.

[10] Transactions eligible for the fast-track proceeding include (i) classical or cooperative joint ventures; (ii) replacement of an economic agent; (iii) low market participation with horizontal overlap (below 20%); (iv) low market participation with vertical integration: (below 30%); (v) inexistence of causal connection (HHI variation inferior to 200 points, without control of more than 50% of the relevant market); and (vi) other cases considered to be simple enough, at the discretion of CADE's GS.

FIGURE 3 – FLOWCHART ON REMEDIES NEGOTIATIONS WITH CADE

Pre-filing phase	**CADE's GS**		**Challenge to CADE's Tribunal**	**CADE's Tribunal**	
	Public announcement + review phase	CADE's GS Opinion		Additional review phase	CADE's Tribunal Decision
Parties may submit a proposal on remedies ("ACC") beforehand, along with the filing form	During this phase, parties and CADE's GS may negotiate remedies within the scope of an ACC proposal	It may: 1) Recommend the approval without remedies; 2) Recommend the approval under the terms of the ACC; 3) Challenge the deal with CADE's Tribunal due to either the lack of an ACC proposal or the insufficiency of the proposal, from the authority's standpoint	The deal will be forwarded to CADE's Tribunal when: 1) An ACC proposal was negotiated and CADE's GS recommends its approval; 2) CADE's GS challenged the deal, if it does not approving the deal (with or without remedies)*; 3) Third-parties or a Commissioner of CADE's Tribunal challenge the decision of clearance made by CADE's GS.	During this phase parties and CADE's Tribunal may negotiate remedies (start discussions or negotiate further, if an ACC was proposed to CADE's GS). *Note that should CADE's GS challenge the deal; parties have 30 calendar days to submit an ACC proposal.	Potential scenarios during the Tribunal Plenary Session: 1) Unconditionally approve the deal; 2) Approve the deal under the execution of an ACC (remedies); 3) Block the deal.

Source: Authors

3. Negotiating Remedies with the GS

Parties may trigger the negotiation process with the GS during the review phase, whereas the authority identifies the antitrust concerns. The GS usually tries to look into the specific concerns brought up by the thirds parties (clients, suppliers, competitors) during the market test besides making a comprehensive substantive assessment on effects. The raised questions may also play a role when the authority suggests a certain design of the remedies. It is not rare for the GS to ask the parties to start formulating their proposal on remedies ("ACC"). During the negotiation process, CADE (either the GS or Tribunal) may ask the support of any department within the agency and it often relies on studies produced by the CADE's Department of Economic Studies ("DEE"). As anticipated, recent experience demonstrates that third parties can actively participate in the design of the remedies[1] and CADE may test the effectiveness of the remedies during the review phase[2].

Parties can proceed accordingly and formulate the proposal. They may also reject it should they be unwilling to negotiate or merely prefer to start the negotiation with the Tribunal. Nonetheless, remedies discussions can take place during the pre-notification phase under the

[1] A third intervene party supported CADE to design the remedies in the negotiation during the Concentration Act No. 08700.004163/2017-32 (Grupo Petrotemex, S.A. de C.V. and Petróleo Brasileiro S.A.). Commissioner Cristiane Alckmin acknowledged a positive progress in having the third party within the negotiation process. However, CADE takes into consideration the arguments brought by interested parties should they be useful for the merger review. For example, Concentration Act No.08700.009559/2015-12 (Fedex Corporation and TNT Express N.V. – Third Party: UPS do Brasil Remessas Expressas Ltda).

[2] For instance, Concentration Act No.08700.006567/2015-07 (Ball Corporation and Rexam PLC).

Ordinary proceeding[3]if the parties are willing, which allows the draft ACC to be submitted together with the filing form[4].

The main positive result in negotiating remedies as early as possible with the GS is that it can significantly shorten the period of review, as proposed remedies can be tailored between parties and the authority in advance. In addition, the negotiation of the remedies themselves may last weeks or even months, depending on the level of complexity of the case. This endorses the advantages of starting negotiations in advance.

The terms of the ACC must be ultimately confirmed by the CADE Tribunal[5]. One interesting point is that CADE's best practice demonstrates that it is possible to have the Tribunal aware of and monitoring the negotiations at the GS. This can certainly expedite the upcoming review and confirmation on the ACC by the Tribunal[6].

[3] These pre-notification discussions are not a statutory requirement but have become basically mandatory, especially in complex and high profile cases, in which they make take several weeks or even a few months. As the countdown for the authority's review deadline is only triggered after the authority deems the filing complete after submission, pre-notification discussions can avoid unnecessary delays in the merger review analysis after notification.

[4] Article 165 of Resolution CADE No. 2. For example, in Concentration Act No.08700.007621/2014-42 (Lafarge S.A. and Holcim Ltd.) the Reporting Commissioner Gilvandro Araújo stated that the ACC proposal was submitted along with the filling form. Considering it was a global transaction, the parties intended to speed up the merger review and for this reason started to design the remedies since the pre-notification phase, which had a positive impact on the time of analysis that counted exactly 90 days.

[5] According to Article 9, V of Law No. 12,529/2011 and Article 165, Paragraph 3, of Resolution CADE No. 2/2012.

[6] For example, Reporting Commissioner Paulo Burnier relied on the terms of the ACC proposed by parties and the GS in his decision in Concentration Act No.08700.005937/2016-61 (Dow Chemical Company and E.I Du Pont de Nemours and Company), highlighting that the Tribunal had been following up the negotiation with the GS.

4. Negotiating Remedies with the Tribunal

As indicated above, irrespective of any negotiation with the GS, the Tribunal ultimately renders decisions on ACC proposals[7]. The Tribunal will take the outcome of the additional review phase and the Commissioners' opinion to confirm, amend (approving the deal with restrictions) or even reject (blocking the deal) the terms of the ACC negotiated among parties. Figure 4 below demonstrates that the Tribunal has been amending proposals negotiated with the GS, but it has never rejected any recommendation on remedies by the GS.

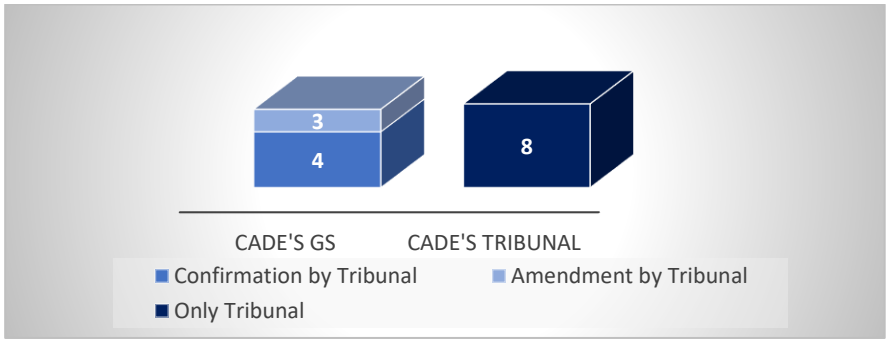
On the other hand, as mentioned, parties may decide to postpone the negotiation with the Tribunal, by not entertaining any discussion on remedies with the GS. Figure 4 also indicates that this has been the majority of the cases. This might be explained, because (i) parties may not agree with the GS antitrust concerns on the transaction (which would serve as basis for the ACC) or (ii) parties may not be ready to enter into discussions on remedies with the GS.

However, parties can submit an ACC proposal to the Tribunal (if the GS challenges the deal) only within 30 calendar days after the opinion issued by the GS. Once the case reaches the Tribunal, a Reporting Commissioner will be randomly assigned to the case. Remedies negotiations therefore take place directly with the Reporting Commissioner, yet parties often find themselves having to convince each one of other members of the Tribunal regarding the remedies under discussion. In addition, one should bear in mind that when the case is already under the CADE Tribunal review, parties have a shorter period to negotiate remedies, given the statutory limit of 240 calendar-days to have any merger cleared by CADE (extendable by up to 90 additional days[8]), including the time effectively consumed by the GS review.

[7] In this regard, it is noteworthy that Commissioner Cristiane Alckmin stated, in Concentration Act No.08700.004163/2017-32 (Grupo Petrotemex, S.A. de C.V. and Petróleo Brasileiro S.A) that it would be better if parties negotiate remedies directly with the Tribunal.

[8] The statutory limit can be extended by 60 additional days at the initiative of the parties or by 90 additional days if CADE deems it necessary to conclude the analysis

FIGURE 4 - NEGOTIATIONS WITH THE GS *VERSUS* TRIBUNAL ONLY (2016-2018)[9]



Source: Authors and statistics provided by CADE ("*CADE em números*").

Lastly, the Tribunal validates the ACC proposal and the envisaged transaction during a Plenary Session, with a majority vote. Afterwards, parties will have to execute the ACC. Five (5) days after the execution, a non-confidential version of the ACC will be available to the public in CADE's website[10].

5. Conclusion

This paper aimed at demonstrating the process of negotiating remedies in Brazil with CADE in the context of more complex and high profile mergers. Experience demonstrates that CADE has been using remedies in the context of complex transactions.

Negotiating remedies may be a burdensome process and it does not always reflect the parties' opinion of the antitrust concerns identified by CADE during the merger review. Nonetheless, reaching an agreement with the authority can significantly shorten the period of review. The remedies can then be tailored between parties and authority in advance, enabling for instance, the design of multi-jurisdictional packages of remedies.

[9] It was considered as negotiated with the GS only the cases in which the parties formally presented an ACC proposal.

[10] Article 165, Paragraph 9, ofResolution CADE No. 2.

Therefore, the decision on whether or when to start discussions on remedies with CADE may be quite sensitive and it should be discussed carefully with the involved parties, according to the specificities of the case.

CAN ANTICOMPETITIVE PRACTICES INVESTIGATION EMERGE FROM MERGER CONTROL?

Eduardo Caminati Anders
Leda Batista da Silva Diôgo de Lima
Guilherme Teno Castilho Misale

The study of antitrust/competition law[1] has traditionally been divided into two major groups: (i) merger control and (ii) anticompetitive practices.[2] In the merger control strand, the antitrust authority performs a preventive role by reviewing certain transactions (such as mergers, acquisitions, joint ventures etc.) that fall into the definition of Concentration Act. As a result of the review, the transaction can be approved (unconditionally or upon restrictions) or blocked. The primary purpose underlying the review is to prevent anticompetitive effects to the economic order (i.e., the creation of monopolies -- structural effects).

In the anticompetitive practices strand, in turn, the antitrust authority undertakes a repressive role. Indeed, investigations can be initiated in light of alleged anticompetitive practices with the aim of ascertaining whether a certain conduct has the potential of generating anticompetitive effects in a given market.

In summary, through different roles and lenses of analysis, the objective of the antitrust authority, under the spirit of the competition policy, is to enforce the antitrust law in order to maintain a healthy and safe competitive environment.

Although these two roles are distinct and performed through different lenses, more recently the antitrust community in Brazil has been shedding light on an apparently interplay between such roles, primarily

[1] For the sake of convenience, we will use those terms in an interchangeable way.

[2] One could also point a third group concerning the educative role, especially associated with competition advocacy.

due to the recent ruling of the Concentration Act No. 08700.001097/2017-49 (Monsanto Company/Bayer Aktiengesellchaft). In light of such case, CADE identified the existence of an alleged potential anticompetitive conduct and initiated a parallel investigation during the merger review of Bayer's acquisition of control over Monsanto.

In that case, the investigation of alleged anticompetitive practice in the markets of soy and cotton seeds was initiated from information provided by third parties in their answers to CADE's official letters within the scope of the market test. The investigation was initiated on January 15, 2018[3], while the Concentration Act was ruled at CADE's trial session of February 7, 2018. In sum, the Reporting-Commissioner Paulo Burnier da Silveira understood that the alleged anticompetitive evidence lacked causal link with the structural implications of the transaction, which justified the opening of a separate and autonomous investigative proceeding.

During the oral ruling of the aforementioned Concentration Act, Commissioner Maurício Oscar Bandeira Maia supported the argument that the block of a transaction simply due to evidence of anticompetitive conducts – not yet investigated nor proven –, would violate the presumption of innocence principle. Commissioner João Paulo de Resende, although stated that a mere investigation should not be sufficient to justify blocking a given transaction, sustained that the existence of former investigations could be an indicative to reinforce the antitrust concern. Commissioner Cristiane Alkmin Junqueira Schmidt, in a more critical approach, considered the opening of the investigation as one of the elements (amongst others) which would justify the need of including additional remedies into the Merger Control Agreement in complement to the ones already agreed with the applicants (she was, however, an overruled vote).

Ultimately, by majority, the Concentration Act at hand was approved under certain conditions negotiated between CADE and the

[3] Preliminary Investigation No. 08700.000270/2018-72.

applicants under a Merger Control Agreement. One should underline, in particular, that based on publicly available information, the said anticompetitive investigation is still underway, as an independent proceeding.

Given the emphasis raised by the Commissioners of CADE's Tribunal to such matter, not only in their written decisions but also as expressed verbally during the trial session, one could notice commotion over the nuanced intersection between CADE's preventive and repressive roles. In practical terms, there has been some noise in the market, showing certain apprehensions from the economic agents as regards the interconnections between two different sets of approaches in the antitrust framework; in other words, one could weigh in on whether CADE would take advantage of information collected under the course of a merger review to, concurrently, start investigating an eventual allegation of anticompetitive practice made by certain competitor of the applicants, for instance, and, if that would be the case, whether CADE would try to fix the alleged antitrust problem by requiring some more stringent remedies in the Merger Control Agreement (and how the latter measure would affect timing of review).

Undoubtedly, this subject reflects a very delicate topic that deserves full attention due to the variables at stake. The existing frontiers between the two legitimate roles established in the antitrust law and performed by the antitrust authority must be considered.

Furthermore, one should bear in mind that what occurred in the Concentration Act of Bayer/Monsanto was not a novelty, meaning that it was not the first time that CADE recommended the opening of a parallel investigation during the review of Concentration Act. In that regard, it is worth mentioning two Concentration Acts from which parallel investigations emerged: (i) the Concentration Act No. 08012.011323/2010-81 (Allpark Empreendimentos, Participações e Serviços S.A. / Bagattini Participações Ltda. / CGB Participações Ltda.), which was approved with restrictions by CADE's Tribunal in 2013; and (ii) the Concentration Act No. 08700.009988/2014-09 (Condor Pincéis

Ltda. / Tigre S/A – Tubos e Conexões), which was blocked by CADE's Tribunal in 2015.

- **Concentration Act No. 08012.011323/2010-81:** a parallel investigation was initiated as a result of information gathered by CADE during the conducting of the review: one of the competitors in the parking lot market, which was formally consulted as a third party, alleged that the prices were set by the players that operate in the region under a common agreement. CADE suspected of cartel behavior therein and initiated an independent investigation[4], which involved searches and seizures warrants. The corresponding Administrative Process is still pending judgment and a Cease and Desist Agreement has already been signed between Allpark and CADE, for instance.
- **Concentration Act No. 08700.009988/2014-09:** during the conducting of the review, the antitrust authority identified, from responses to CADE's official letters, that certain existing agreements executed by Tigre Group contained certain clauses that could have the potential to hinder competition. The proposed transaction was blocked, essentially because a Merger Control Agreement was not reached between CADE and the applicants (a composite of behavioral and structural remedies was required by CADE as a condition to approve the deal). Apart from other remedies, it is worth highlighting one in particular: in its written ruling, the Reporting-Commissioner Márcio de Oliveira Júnior mentioned the need to include a behavioral remedy to exclude price monitoring clauses from the current agreements executed by Tigre. Even though this was not the only negotiation deadlock, such demand could suggest an intention of CADE to regulate the conditions of existing agreements

[4] Administrative Process No. 08012.004422/2012-79 (Allpark Empreendimentos, Participações e Serviços S.A. / Garage Inn Estacionamentos Ltda. – EP / JLN-Estacionamento Ltda. (Multipark) / Netpark Administração e Serviços de Estacionamento Ltda. / Rod Estacionamento Ltda. – EPP / Zig Park Estacionamentos Ltda. and some individuals).

(supposedly with potential to be anticompetitive) under the scope of a Merger Control Agreement[5].

Therefore, against this backdrop, and objectively addressing the question posed in the beginning, the answer is Yes; that is, conduct investigations can arise – and, in effect, have been arising – from Concentration Acts review, as one can adduce from the practice under the Brazilian antitrust landscape. Anticompetitive concerns may arise from evidence collected during the discovery phase, or may be brought to CADE's attention by a third party during the review/market test. In this context, one should stress the importance of (i) respecting timing and (ii) following legal procedure.

Firstly, since in Brazil Concentration Acts cannot be consummated until CADE's final approval[6], the duration of the analysis is usually a sensitive issue from a business viewpoint. In that respect, CADE must be cautious not to distract, lose track and end up wasting time of a merger review by investigating a non-related anticompetitive conduct, thereby with the potential to create negative externalities to the Brazilian M&A environment. In addition, and even more important, CADE cannot – and should not – use the parties' timing constrains as leverage to extract a settlement agreement from the parties. This last issue naturally leads us to the next point.

[5] The case files were sent to the General Superintendence for investigation, but there is no publicly available information in this respect so far.

[6] Since 2012, Brazil has adopted the pre-merger review system, which means that parties involved in a given transaction that falls into the frame of Concentration Act cannot close the deal until CADE's greenlight, otherwise legal violation regarding gun jumping ensues. The Law No. 12,529/11 – effective since 2012 – has also changed the structure of CADE, which is currently formed by the General Superintendence (which is the first level authority to review merger deals and, in simple cases, may approve the transaction directly) and the Tribunal, a body of Commissioners plus President responsible for issuing the final decision of more complex Concentration Acts. In terms of statute of limitations, the Law No. 12,529/11 grants CADE a total of 330 days to review and render its decision on Concentration Act.

Secondly, procedure provides guidance and must be always followed to secure legal certainty and transparency. Merger cases and investigations of anticompetitive practices have two different procedures (even though under the very same umbrella of the antitrust realm). Indeed, the antitrust authority must be very cautious not to neglect the parties' essential due process rights. Furthermore, in our view, blocking a transaction based solely on evidence of potential/alleged anticompetitive practices (not yet fully investigated and ruled), besides being a questionable measure, clearly jeopardizes and thus violates the presumption of innocence principle[7], as already expressly supported by at least one of CADE's current Commissioners.

Given the foregoing, we understand that if and when a supposedly anticompetitive practice arises from a Concentration Act review, it is imperative that CADE immediately separates the two instances of analysis: it should continue its merger control review and, in parallel and without the risk of "contaminating" the legal procedure, open an independent proceeding to investigate the allegations of anticompetitive practices. As stated, investigations to verify alleged anticompetitive practices should not affect timing of a merger review for the sake of maintaining legal certainty, clarity and, in a more holistic perspective, preserving the due process of law.

[7] An immutable clause of our Brazilian Constitution (Article 5, LVII).

ARE THERE ANY SPECIFIC ISSUES RELATED TO CONCENTRATION ACTS INVOLVING COMPANIES THAT ARE IN BANKRUPTCY PROCEDURE?

Ana Carolina Turato Carvalheira

In the recent years, Brazil has been going through an economic crisis. This has impacted several relevant markets and businesses and has significantly increased the number of companies involved in bankruptcy procedures: both liquidation[1] and judicial reorganization[2]. In this scenario, an increasing number of Concentration Acts are being submitted to CADE by economic agents in judicial reorganization.

There are two specific issues that may be specially impacted if the Concentration Act refers to a transaction involving a company in judicial organization: (*i*) the timeframe of CADE's review and; (*ii*) the acceptance of the failing firm defense as grounds for the case's clearance.

1. Timeframe of CADE's review

As the Brazilian Competition Law (Law No. 12,529/2011) establishes a pre-merger review, the timeframe in which CADE reviews a Concentration Act is a relevant matter to all transactions. The Brazilian Competition Law sets forth that CADE shall decide a Concentration Act

[1] The liquidation procedure refers to a proceeding that aims to end the company's activities. In this proceeding the company's assets will be sold in judicial auctions in order to pay the debtors debts in accordance to a priority list. This procedure is analogous to the proceeding set forth in the Chapter 7 of the US Bankruptcy Code.

[2] The judicial reorganization procedure refers to a proceeding in which the insolvent company may recover from a financial crises being supervised by a court. This proceeding aims that the company's activities remain in the market. This procedure is analogous to the proceeding set forth in the Chapter 11 of the US Bankruptcy Code.

within 240 days (extendable by 90 days); otherwise the applicants may close the transaction[3]. Additionally, CADE's Resolutions provide a non-binding shorter term for fast-track Concentration Acts[4]. The review of Concentration Acts involving companies in judicial reorganization is even more time sensitive, considering that the closing of the transaction may enable the company in reorganization to fulfill its financial obligations within the term provided in the reorganization plan.

The Brazilian Competition Law establishes as one of CADE's functions to preserve the competitive market, this means that it is CADE's duty to watch over competition, which may include preserving a sufficient number of players in the relevant market. Therefore, it is in accordance with CADE's role the maintenance of economic activities and assets in the relevant market, what in some cases may be achieved by the recovery of a company from its insolvent state[5].

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[3] Article 88, paragraph 2 of the Brazilian Competition Law provides that a Concentration Act will be reviewed In 240 days, counted from the submission of the filing form or its amendment. Furthermore, article 88, paragraph 9 sets forth that the term set forth in paragraph 2 can be extended for 60 days at the applicants' request; or for 90 days by CADE's Tribunal.

[4] According to article 7, paragraph 2 from Resolution CADE No. 2, updated by Resolution CADE No. 16, the General Superintendence has 30 days counted from the submission of the fast-track Concentration Act (or from the amendment of the filing form) to grant its recommendation. In case the recommendation is nor granted within the 30 days period, the General Superintend will have to justify the time taken in the review of the Concentration Act to CADE`s Tribunal and the case will be analyzed as a priority.

[5] In this sense, Professor Forgioni argues that the Competition Law does not solely aims at eliminating the self-destructive market effect, but it is also instrument of implementation of public policies (FORGIONI, Paula. **Os Fundamentos do Antitruste.** São Paulo: Editora Revista dos Tribunais, 2015). Also, the Brazilian Bankruptcy Law (Law No. 11.101/2015) focuses on the recovery of the entrepreneur activity (Article 47 of the Brazilian Bankruptcy Law provides that "*The purpose of judicial reorganization is to enable the overcoming of the economic and financial crisis of the debtor in order to allow the maintenance of the production source, the employment of workers and the interests of creditors, thus promoting the preservation of the company, its social function and the stimulus to*

Accordingly, CADE has been reviewing fast-track cases involving companies in judicial reorganization within a reasonable term, as summarized in the chart following:

Recent fast-track Concentration Acts involving companies in judicial reorganization[6]	
Applicants	**Time for clearance[7]**
Home Center Brasil Materiais de Construção Ltda. and DLD Comércio Varejista Ltda.[8]	25 days
Raízen Energia S.A.; Tonon Bionergia S.A. – In Judicial Reorganization; Tonon Holding S.A. - In Judicial Reorganization; Tonon Luxembourg S.A. - In Judicial Reorganization.[9]	31 days

economic activity." Free translation) ant it establishes the principle of the company preservation, which provides that the legal order ensures the maintenance of the companies activities rather than a liquidation proceeding, when possible (OLIVEIRA JÚNIOR, Fernando Antônio Alves de. **A empresa em crise e o direito da concorrência: a aplicação da teoria da Failing Firm no controle brasileiro de estruturas e seus reflexos no processo de recuperação judicial e de falência**. 2014. 159 f. Dissertation (Master in Law) — Universidade de Brasília, Brasília, 2014.)

[6] The research has taken into consideration the cases filed from 2016 made available in CADE's public database found by the research of the word judicial reorganization in Portuguese "Recuperação Judicial".

[7]The Brazilian Competition Law and CADE's Internal Regulation establish that after the issuance of the General Superintendence decision for the Concentration Acts approval, the applicants have to wait a 15 days period before closing the transaction. In the referred period it is possible that third parties, regulatory agencies or CADE's Tribunal Commissioner oppose to the approval of the Concentration Acts. The time considered in the table includes the 15 days waiting period.

[8] Concentration Act No. 08700.006139/2017-38, approved on October 24th, 2017. The transaction refers to the Acquisition by Home Center of 100% shares of New D&D, within D&D judicial reorganization.

[9] Concentration Act No. 08700.004571/2017-94, approved on August 8th, 2017. The transaction refers to the Acquisition by Raízen of assets from mills owned by Tonon by means of an auction within the latter judicial reorganization plan.

Recent fast-track Concentration Acts involving companies in judicial reorganization[6]	
Applicants	**Time for clearance[7]**
OGX Petróleo e Gás S.A. – In Judicial Reorganization; Settlement ShareCo L.P; and Pacific Investiment Management Company, LLC.[10]	29 days
GTEX Brasil Indústria e Comércio S.A. - In Judicial Reorganization; and CP Participações S.A.[11]	30 days
Sugar 1 Participações S.A., Sugar 2 Participações S.A. (companies owned by Glencore); and Unialco S.A. - Álcool e Açúcar - In Judicial Reorganization.[12]	29 days[13]
Nippon Steel & Sumitomo Metal Corporation and Usinas Siderúrgicas de Minas Gerais S.A.[14]	28 days[15]
OAS Infraestrutura S.A., Construtora OAS Ltda. and SPE Credores.[16]	22 days

[10] Concentration Act No. 08700.003971/2017-82, approved on July 28th, 2017. The transaction referred to Execution of an agreement between OGX and OGPar and certain creditors by which they have agreed on an operational and financial reorganization of OGX in which the liabilities of OGX held by the creditors would be paid and redeemed with Eneva shares and/or converted into OGX shares.

[11]Concentration Act No. 08700.008629/2016-98, approved on January 25th, 2017. The transaction refers to the acquisition by GTEX of CP Participações S.A.

[12]Concentration Act No. 08700.008005/2016-71, approved on December 30th, 2016. The transaction refers to the acquisition by Sugar 1 and 2 of a mill owned by Unialco by means of an auction within the latter judicial reorganization procedure.

[13] the Applicants had to submit further information during the case review

[14]Concentration Act No. 08700.003009/2016-62 approved on June 9th, 2016. The transaction refers to the subscription by Nippon of common shares of an increase of capital stock of Usiminas. The applicants reported that Usiminas were at risk of entering in a judicial reorganization proceeding.

[15] In this case, the Applicants had to amend the filing form and, therefore, the timeframe of the Concentration Act's review was counted from the filing of the amendment.

[16]Concentration Act No. 08700.003604/2016-06, approved on June 2nd, 2018. The transaction refers to the acquisition by SPE Credores (company owned by OAS'

Recent fast-track Concentration Acts involving companies in judicial reorganization[6]	
Applicants	**Time for clearance[7]**
Eneva S.A. – In Judicial Reorganization; Cambuhy I FIP and OGX Petróleo e Gás S.A. – In Judicial Reorganization.[17]	31 days
OGX Petróleo e Gás S.A. - – In Judicial Reorganization and Sinochem Petróleo Brasil Ltda.[18]	37 days[19]
9 West Finance SARL, OSX Brasil SA - In Judicial Reorganization, CCX Carvão da Colômbia SA, Companhia Industrial de Grandes Hotéis, REX Sul Empreendimentos Ltda. and REX Empreendimentos Imobiliários IV Ltda.[20]	24 days[21]

creditors) of 24.4% of Invepar capital owned by OAS, by means of an auction within the judicial reorganization plan.

[17]Concentration Act No. 08700.002372/2016-61, approved on May 5th, 2016. The transaction refers to the acquisition of shares of Eneva SA, without acquisition of control, by Cambuhy and OGX and acquisition of control of Parnaíba Gás Natural SA by Eneva. The operation proposes a scenario in which Cambuhy I FIP and OGX give Eneva the full ownership of PGN and, as a result, become shareholders of Eneva. The transaction enabled Eneva's capitalization and generated revenues for OGX to fulfill its financial obligations.

[18]Concentration Act No. 08700.002143/2016-46, approved on April 27th, 2016. The transaction refers to the assignment of 10% of certain oil and gas concession contracts owned by OGX to Sinochen in order for the first to clear its debits with the latter.

[19] The Applicants had to submit further information during the case review

[20]Concentration Act No.08700.000373/2016-71, approved on February 26th, 2016. The transaction refers to the acquisition of shares by 9 West and Mudabala Group of several companies from the EBX Group, as a way of the EBX Group to debt amortization by the sale of a portion of its assets.

[21] In this case, the Applicants had to submit further information before the General Superintendence starts the review (publication of the transaction in the official gazette); hence the time taken for the Concentration Act review was counted from the filing of the amendment.

It is worth mentioning that CADE's average timeframe for the approval of fast-track Concentration Acts is 31 days[22], therefore, it is possible to conclude that on most cases, CADE has been reviewing fast-track Concentration Acts involving companies in bankruptcy procedure in a time frame shorter than the agency's average.

In regards to complex Concentration Acts, the applicants have the option to request the authorization for early consummation23. In fact, since the pre-merger review rules have entered into force, in 2012, CADE has only granted a preliminary injunction authorizing the immediate closing of a Concentration Act once (Concentration Act Excelente/Rio de Janeiro Aeroporto/Concessionária Aeroporto Rio de Janeiro) [24], in a case that did not involve companies in bankruptcy procedure.

[22] According to CADE's estimates, the General Superintendence takes, on average, 16 days to review a fast-track Concentration Act. We have added to such estimate the 15 days waiting period for the closing of the transaction. CADE's estimates are available on <http://www.cade.gov.br/servicos/imprensa/balancos-e-apresentacoes/apresentacao-balanco-2016.pdf/view> Access on March 22nd, 2018.

[23] According to CADE's Internal Regulation, an authorization for early consummation may only be granted if, cumulatively: (*i*) there is no danger of irreparable damages for the competition conditions in the market; (*ii*) the measures whose authorization is requested are fully reversible; and (*iii*) the notifying party is able to evidence the imminent occurrence of substantial and irreversible financial damages for the purchased company if the early authorization for the consummation of the Concentration Act is not granted.

[24] Concentration Act No. 08700.007756/2017-51. According to the Reporting Commissioner's vote, if the transaction was not cleared, the target company would not be able to fulfill a financial obligation with the Brazilian Aviation Agency (ANAC), what would lead to the loss of an airport concession (this would jeopardize the continuity of the public service). The Concentration Act was submitted on December 8th, 2017 and clearance was granted on December 13th, 2017.

2. The acceptance of the failing firm defense as grounds for the case's clearance

The second matter that is important in Concentration Acts involving companies in bankruptcy procedure is whether CADE accepts the failing firm defense as grounds for the Concentration Act approval. This subject is addressed by CADE`s Horizontal Merger Guidelines, which provides that the failing firm argument has been cautiously applied by the antitrust agencies worldwide and that it shall be accepted by CADE only if the applicants are able to provide evidentiary support that the following conditions are met:

(i) That if the transaction is rejected, the company would go bankrupt or it would not be able to comply with its financial obligation due to its economic and financial difficulty;

(ii) That if the transaction is rejected, the company assets would exit the market, what would mean an offer reduction and an increased market concentration and a reduction in the economic welfare; and

(iii) That the company demonstrates that it has made its best efforts looking for alternatives less damaging to the competition (*i.e.* by means of alternative buyers or a judicial reorganization proceeding) and that there is no other solution left for the maintenance of its economic activities, other than the approval of the transaction.

Accordingly, in the Concentration Act Mataboi/JBJ [25], in which the companies argued that Mataboi would go bankrupt if they had not committed gun-jumping, CADE's Tribunal has rejected the failing firm defense once: (*i*) the Applicants were not able to prove that the company would have gone bankrupt (if the transaction had not occurred); (*ii*) there were other companies interested in buying the target and, therefore, an option less harmful to the competition; and (*iii*) if there were other

[25]Concentration Act No. 08700.007553/2016-83.

companies interest in buying the target, its assets probably would not exit the marker in case the company went bankrupt[26].

In the Concentration Act Petromex/Petrobras[27], CADE's Tribunal has approved the transaction that created a monopoly in the national market of Purified Terephtalic Acid (PTA) due to (*i*) the fulfillment of the failing firm defense conditions; and (*ii*) the execution of a settlement agreement containing only behavioral remedies. In a nutshell, according to the case's Reporting Commissioner Ms. Schmidt, the three conditions for the failing firm defense were met: (*i*) the companies were in a severe financial crisis; (*ii*) the assets were likely to exit the relevant market (since Petrobras would discontinue the companies' operations); and (*iii*) the only other possible transaction would be more harmful to the competition[28] [29].

[26] The General Superintendence and the Department of Economic Studies have also issued Technical Opinions rejecting the applicants' arguments.

[27]Concentration Act No. 08700.004163/2017-32.

[28]Ms. Schmidt has stated in her vote that *"The transaction does not create efficiencies that are likely to be passed on to the Brazilian market. (...) Notwithstanding that, it is the less harmful transaction for the community (...). The first is that - with reasonable probability - Petrobras will not keep the assets of these two subsidiaries (SUAPE and CITEPE) and will decide to discontinue its operations. This argument is based on the fact that Petrobras sought other buyers, but only Petrotemex and M&G made proposals (...) The second point is that if M&G had acquired the subsidiaries, the operation would have generated a 100% concentration in the domestic supply of PET resin, giving no alternative to consumers of this input. It would have been worse, consequently, to the extent that the consumer market of this segment is pulverized, and, therefore has little power of individual bargaining. In other words, this Transaction is the least expensive alternative for the Brazilian market.* (Free translation).

[29] It is worth mentioning that the Commissioner Mr. Resende has disagreed with the Reporting Commissioner's vote stating that it was not proved that the transaction was the less harmful option and that the transaction could increase the chances of coordination in the market.

3. Conclusion

It is possible to conclude that CADE has been taking into consideration the economic situation of companies involved in bankruptcy procedures in its Concentration Acts' review. As described in this article, this can be verified through: (*i*) the reasonable timeframe taken to the review of fast-track Concentration Acts involving such companies; and (*ii*) the acceptance of the failing firm defense in a specific case.

DOES CADE ACCEPT FAILING FIRM ARGUMENTS?

Bruno De Luca Drago
Guilherme Khouri Barrionuevo

In the past few years, the CADE had the opportunity to analyze a few cases in which involved parties sustained the applicability of the failing firm defense aiming to obtain a clearance decision from the Authority. As a matter of fact, in at least one of these cases[1] the antitrust authority actually concluded that one of the applicants was indeed a failing firm, grounding its approval decision in the failing firm defense, in addition to other elements identified in the case, such as rivalry and bargaining power.

Until very recently, the competition watchdog based most of its decisions regarding the failing firm defense in concepts and requirements borrowed from foreign antitrust doctrine and jurisprudence. In this sense, CADE's decisions usually mentioned the Guidelines drafted by the Federal Trade Commission and the Department of Justice in the United States, as well as the Horizontal Merger Guidelines produced by the European Commission.

Nonetheless, in July 2016, CADE published its Guidelines for Horizontal Mergers, which includes a provision that transactions may be cleared based on the failing firm defense *when and if* it meets the three requirements below:

i. Absent the transaction, the company would exit the market or would not be able to fulfill its financial obligations arising from its economic and financial difficulties;

ii. Absent the transaction, the company's assets would not remain in the market, which could represent a reduction in

[1] Concentration Act No. 08012.014340/2007-75 between Votorantim Metais Zinco S.A. and Mineração Areiense S.A., unconditionally approved on February 2008.

supply, a higher level of concentration and a reduction of economic welfare; and

iii. The company must demonstrate that it undertook reasonable efforts to identify alternatives less harmful to competition (for instance, detection of alternative buyers or engagement in judicial reorganization proceedings) and that there is no other solution to the preservation of its economic activities apart from the approval of the transaction.

In addition, the Guidelines also establish the non-negative liquid effects criterion. In a nutshell, this condition determines that clearance effects must be equivalent or more positive to the market than its blocking. In other words, if there is no causal link between the lessening of competition in the market and the transaction itself, CADE should not block the transaction.

It is important to keep in mind that CADE is typically skeptical when taking into consideration failing firm defense argument - as most of competition authorities elsewhere. This is not only because of the lack of sustainable jurisprudence involving the theory, but also because it has established a very high standard of proof for those cases.

Moreover, when assessing a failing firm defense case, CADE also determines that the burden of proof rests completely with the interested parties, which may not leave any uncertainties regarding the applicability of the theory.

Concerning the first requirement – the exit of the company from the market due to its economic and financial difficulties, CADE usually carries out a very detailed scrutiny of the company's economic health. The failing party's financial statements and/or reports for the last five (5) years may typically be able to demonstrate its actual state. Alternatively, CADE usually recognizes that the imminent bankruptcy of a company is also enough to validate a probable exit from the market. In the Concentration Act between Companhia Cervejaria Brahma, Buenos

Aires Embotelladora and Pepsico[2], the Reporting Commissioner mentioned that the mere existence of a bankruptcy proceeding, at the time of the transaction, should be enough to indicate the probable exit of that company from the relevant market.

In this sense, it is possible to conclude that, if a company is in a financial distress and has triggered any of the proceedings provided by Law No. 11,101/2005 (which describes the bankruptcy and corporate reorganization proceedings in Brazil), the first requirement would most certainly be considered fulfilled.

However, it is important to highlight that CADE may acknowledge the achievement of this condition even in the absence of a bankruptcy or similar proceeding, as those proceedings are not considered as exclusive circumstances able to attest companies' financial distress. In addition to that, CADE may consider the fulfillment of this requirement if the company is able to demonstrate, by means of overwhelming evidence, that it made the definite decision of ceasing its activities in the affected relevant market.

Moving on to the second requirement – the exit of the assets from the market – CADE's case law indicates that this condition may usually be examined in the same context as the company's forthcoming exit from the market. The main concerns of the antitrust authority in this regard are supplies shortage and/or services; increase of concentration in that market – as competitiveness may be substantially reduced; and, in general, a reduction of economic welfare.

For instance, in the aforementioned Concentration Act between Votorantim Metais Zinco S.A. and Mineração Areiense S.A., the exit of the assets from the market was very conspicuous. Firstly, because of the bankruptcy scenario that Mineração Areiense S.A. was inserted into – which indicated that it would not be able to recover from its financial crisis – and secondly, because a public auctioning took place in that case

[2] Concentration Act No. 08012.007374/1997-38 between Companhia Cervejaria Brahma, Buenos Aires Embotelladora S/A and Pepsico Inc., unconditionally approved on September 1998.

and Votorantim Metais Zinco S.A. was the only company that made an offer to acquire the failing business.

In an analogy to the first requirement, if a company is able to clearly demonstrate its definite decision of exiting a certain relevant market, CADE may also conclude that the assets are indeed exiting the market and that this may result in the aforementioned consequences.

On the other hand, considering the international experience in the analysis of the same condition for the failing firm defense, for instance in the Concentration Act between JCI and FIAMM[3], the European Commission was very strict in asserting that, if the assets could be sold separately to smaller companies, that would mean they would not actually exit the market. Ultimately, this could mean a more competitive scenario for that specific relevant market, particularly by bringing direct benefits to the consumers due to a decreased concentration level. As we have seen in the past, it is very common for CADE to borrow the rationale of foreign antitrust authorities, which means that it is very likely that the Brazilian watchdog would take similar action in an equivalent concentration act.

The third requirement established by CADE's Horizontal Merger Guidelines – which refers to the search for less anticompetitive alternatives – is one of the most difficult for companies to fulfill. Especially because it is not ordinary for a company, in an M&A context, to publicly announce or offer its assets in the market, but rather the negotiations occur through pre-identified targets.

In this sense, in the very few cases in which CADE concluded that there were no possible alternatives to the transaction, it was usually related to a public auction situation, where a company was undergoing bankruptcy proceedings, such as the transaction involving Votorantim Metais Zinco S.A. and Mineração Areiense S.A.

It is important to highlight that CADE, in addition to verifying the party's good faith in searching for a less anticompetitive alternative,

[3] Concentration Act No. M.4381 between Johnson Controls Inc. and FIAMM S.p.A., cleared by the European Commission on May 2007.

may also conduct a market test to confirm whether there are actually other possible alternatives for the transaction. The Brazilian watchdog may inquiry competitors and other potential buyers (for instance, other companies active in an industry with high levels of synergy with the one of the failing party) aiming to evaluate the presence of necessary conditions and genuine interest in the acquisition of the failing company or its assets.

Finally, regarding the non-negative liquid effects deriving from the transaction, CADE shall be focused in attesting whether those effects would be less harmful to the market and to consumers if compared to a blocking decision. In this regard, in the European Commission case of Kali & Salz[4], the watchdog concluded that it would be reasonable that all of the exiting firm's market share would be transferred to the buyer even in the absence of the transaction. So, to prevent over interventionism - *a Type 2 Error* - by the antitrust authority and considering that the transaction's effects were neutral, it was duly cleared by the authority.

In order to achieve that result, CADE should base its decisions in the counterfactual analysis. Concentration Act between Petrobrás and Petrotemex Group[5], recently decided by CADE's Tribunal, concluded that the only possible alternative for the acquisition of Petrobras' divested business would create a scenario much less competitive to the market.

It shall be also noted, in Concentration Act between Companhia Cervejaria Brahma, Buenos Aires Embotelladora S/A and Pepsico Inc., that the Tribunal's Reporting Commissioner emphasized that if requirements established in international case law were sufficient to create the necessary conditions to deprive markets from negative effects of a transaction, then they may be taken into account for the decision. In

[4] Concentration Act No. M.308 between Kali und Salz, Treuhandanstalt and Mitteldeutsche Kali AG, cleared by the European Commission on December 1993.

[5] Concentration Act No. 08700.004163/2017-32 between Petrobrás and Petrotemex Group, approved under conditions on February 2018.

other words, all the legal requirements described above must be cumulatively present in the case for a clearance decision to be based on the failing firm defense, especially the non-negative effect test.

In view of the above, it is possible to conclude that CADE may and should accept, in cases where all legal requirements above are fulfilled, failing firm defense arguments in order to clear certain transactions. For that, it must be evident, in particular, that the transaction will not pose a scenario more harmful to the market and consumers if compared to the scenario of a blocking decision.

ARE THERE ANY SPECIFIC ISSUES RELATED TO MERGER CONTROL IN THE NATURAL GAS INDUSTRY?

Elvino de Carvalho Mendonça
Alexandre de Oliveira Lima Loyo

Introduction

Historically, the Brazilian natural gas industry developed in a horizontally and vertically concentrated basis. Almost all of the natural gas assets in *upstream* (exploration and production) and *downstream* (processing, transmission and distribution) segments are hold by Petrobras. Furthermore, in the current regulatory framework (Law No. 11,909/2009), Petrobras is not required to give any access to natural gas essential facilities (pipelines, processing units and liquefaction and regasification terminals).

Recently, the Brazilian Government has been implementing several initiatives in the oil and natural gas in order to encourage the number of natural gas suppliers in the market. One of these initiatives is entitled "Gas to Grow", which plans to introduce several changes in the legal framework. The main change is related to the new regulatory framework proposal (Bill No. 6,407/2013).

The new framework introduces important change in the natural gas sector, which would have an impact on the regulatory and competition environment. In addition, it will contribute to mitigate the competitive concerns in natural gas productive structure.

According to the Regulatory Agency Law (Law No. 9,478/1997), the National Petroleum Agency (henceforth, ANP) is responsible to implement regulations with a view to ensuring competition in the natural gas market. However, the agency has no powers to evaluate mergers and acquisitions, as this is one of the distinctive capabilities of the CADE.

Five priorities aspects to increase competition in the new framework are: (i) a gas release program; (ii) negotiated access to essential facilities; (iii) prohibition of interlocking directorates in all chains of productive structure; (iv) Firewall mechanisms in the transmission and competition activities companies which are already in operation; and (v) capacity assignment. These priorities are in line with the best international practices and they have been adopted as part of structuring reforms in different countries.

In this context, this paper discusses the particularities of topic "capacity assignment". This practice is very important to competition in the natural gas industry, but in order to be economically efficient, it needs to be analyzed by antitrust agency such as a concentration act.

Besides this introduction, this paper is divided in four sections: (i) the natural gas under law n. 11,909/09, (ii) the competition aspects of the new regulatory framework; (iii) the capacity assignment as a specific issue related to merger control; and (iv) conclusion.

1. The Brazilian natural gas under Law No. 11,909/09

Law No. 11,909/2009 introduced important innovations with respect to the old natural gas regulatory framework (Law No. 9,478/1997), among which: (i) concession rules for transmission pipelines; (ii) participation rules for industry agents in the transmission pipeline network; (iii) access to the transmission pipelines following the end of initial exclusivity periods; and (iv) creation of new agents: self-producer, self-importer and free consumer.

These innovations, however, did not remove other important barriers in the Brazilian natural gas industry which hinder competitiveness, mainly those related to the natural gas transmission infrastructure. The actual development of the pipelines is a logistic barrier that limits the expansion of natural gas industry.

This lack of infrastructure is directly related to the verticalized structure of the current regulatory model, in which Petrobras has a strong presence in all segments along the chain, reinforcing the monopsony that

it exercised in the purchase of the natural gas molecule and its monopoly on the side of this energy supply in the national market.

2. The Brazilian natural gas under new regulatory framework

The proposed regulatory framework should contribute to mitigate the negative effects of the overconcentration in all chains of the natural gas productive structure. As already mentioned, the new regulatory framework addresses five important elements to expand competition in the natural gas segment: (i) a gas release program; (ii) negotiated access to essential facilities; (iii) prohibition of interlocking directorates in all chains of productive structure; (iv) Firewall mechanisms in the transmission and competition activities companies which are already in operation; and (v) capacity assignment.

According to European Federation of Energy Traders the gas release program can be defined as follows:

> *"Release programmes Release programmes (of which there can be various types) can be designed to overcome the problem of inadequate access to supplies or capacity, particularly in the early stages of market opening. EFET encourages such schemes where they would have an important 'catalytic' role in the context of developing sustainable competition in gas markets."*

Clearly, the gas release program will be an important instrument to mitigate the excessive market power of Petrobras in the Brazilian gas supply market. The company will be required to make available a volume of its production through auction mechanisms, seeking to generate a competitive price of natural gas to the consumers[1].

The second important element to intensify competition in the Brazilian new regulatory framework is related to the third party access to essential facilities. This mechanism deals with two important concerns

[1] Article 38, Paragraph 1, item II.

about the sale process: (i) it implements the deverticalization of the sale process; and (ii) it consequently allows competition in this activity.

The first concern will be solved because the transmission of natural gas is a natural monopoly and the commercialization activity and distribution of natural gas are highly affected by the absence of access to the pipeline network. The input control by only one company generates dependence and affect the final price to consumers. Additionally, the deverticalization of natural gas commercialization will be done by any different and independent companies that compete among themselves for the best prices.

The capacity assignment is the third important element to encourage competition. According to the proposed framework, the mechanism used by the owner to transfer the right of transport capacity is called capacity assignment[2], which will be regulated by ANP. This mechanism, together with the third party access to essentials facilities, facilitates the development of a secondary market, increasing competition in transmission.

The fourth and the fifth important aspects to ensure increased competition in the industry are related to the prohibition of interlocking directorates in all chains of productive structure and the imposition of Firewall mechanisms in the transmission and competition activities.

The prohibition of interlocking directorates will prevent that competitive sensitive information be exchange among directors and managers of different vertically and horizontal integrated companies. Moreover, in cases of preexistent interlocking directorate, companies will be required to impose the Firewall mechanisms in order to stop the exchange of sensitive information.

[2] Article 24. The ANP shall regulate and supervise the access of third parties to the transmission pipeline, disciplining the assignment of capacity by setting conditions and imposing criteria for release and contracting.

3. The capacity assignment as a specific issue related to merger control.

The proposed regulatory framework introduces the negotiated access to gas pipeline. As mentioned, it represents an important step to deverticalize the natural gas industry in Brazil. Any company will have the right to acquire natural gas in any part of the pipeline and it will have the right to use it freely. In other words, it can purchase for its own consumption or to do capacity assignment to any company, which will be regulated by ANP.

The ANP, as a regulatory agency, will have the mandate to regulate and inspect the gas capacity assignment However, the capacity assignment can be understood as transfer of market share to the company that acquires the rights and the Agency responsible for doing the merger control is CADE and not the ANP.

The Brazilian antitrust law (law No. 12,529/2011) sets forth in its Article 90, II that all acquisition of tangible assets by contract are defined as a concentration act, and, according to the Article 88 of the same legal instrument, any concentration act that meets the legal thresholds must be submitted to CADE.

Notwithstanding that capacity assignment seems to be an important element to increase the number of players in the gas commercialization market, its effectiveness might be questionable, as, in some circumstances, it can be used by players to exclude rivals from the market.

As mentioned, capacity assignment mechanism, as a concentration act, increases the market share of the company that assumes the contract. In this case, the mechanism can generate anticompetitive concerns and CADE must should review such concentration acts.

Conclusion

The new regulatory framework (Bill No. 6,407/2013) proposed by the Ministry of Mines and Energy incorporates several important

aspects to improve competition in the Brazilian natural gas industry. The main objective of the new framework is to deverticalize the natural gas transmission segment.

In order to deverticalize the natural gas transmission segment, the new regulatory framework introduces mentioned five rules: (i) a gas release program; (ii) negotiated access to essential facilities; (iii) prohibition of interlocking directorates in all chains of productive structure; (iv) Firewall mechanisms in the transmission and competition activities companies which are already in operation; and (v) capacity assignment.

These five rules strengthen the competition in the commercialization and distribution segments of the natural gas industry because (i) the gas release program contests the market power of natural gas producer, (ii) the third party access to the essential facilities and the capacity assignment incentivizes the entry of new players, and (iii) the interlocking directorate mechanism to new companies and the Firewall mechanisms to the established companies mitigates anticompetitive behavior.

Notwithstanding the rules proposed, it is important to mention that capacity assignment mechanism, as a concentration act, needs to be reviewed by CADE if it meets the legal threshold, since the market concentration can generate concerns in terms of competition.

ARE THERE ANY SPECIFIC ISSUES RELATED TO MERGER CONTROL IN THE PHARMACEUTICAL INDUSTRY?

Joyce Ruiz Rodrigues Alves

The pharmaceutical industry is an innovation intensive regulated sector in which acquisitions and collaborations between competing groups are frequent. These characteristics impact the antitrust assessment carried out by CADE in Concentration Acts. This section will focus in three issues: (*i*) definition of the relevant markets; (*ii*) key concerns; and (*iii*) remedies and commitments.

1. Definition of the relevant markets

1.1 Product dimension

CADE has traditionally resorted to different parameters to define relevant markets for finished pharmaceuticals.

The starting point of the definition of the relevant markets usually refers to the European Pharmaceutical Market Research Association Anatomical Therapeutical Chemical Classification ("EPhMRA ATC"). The EPhMRA ATC classifies pharmaceutical products according to their indications and use, distinguishing the following four levels: (a) the first level of the code indicates the anatomical main group (*i.e.*, the part of the human body that the medicine intends to address); (b) the second level of the code indicates the therapeutic main group (*i.e.*, the main disease groups that the medicine intends to address); (c) the third level of the code indicates the therapeutic and pharmacological subgroup (*i.e.*, the different drug actions that will address the disease in question); and (d) the fourth level

of the code indicates the chemical subgroup[1]. EPhMRA ATC has been developed for marketing purposes and it is used in the pharmaceutical sales IQVIA[2] database. IQVIA provides detailed data about the sales made by pharmaceuticals companies in different channels and it is often used by pharmaceutical companies and competition authorities in econometric market analysis.

More specifically, CADE's review usually starts with the list of pharmaceuticals affected by the notified transaction, their therapeutic indications and their ATC4 level classifications in order to verify if there are horizontal overlaps. If ATC4 level classification level is not applicable, CADE usually reviews the ATC3 level[3].

In addition, CADE applies tests to verify the closeness of substitution of the pharmaceuticals included in the same ACT4 level in order to verify if the ATC4 is a good definition of the relevant market(s) or if it should be altered. Accordingly, CADE requires that the merger control filing forms include information about the active ingredients of the pharmaceuticals affected by the notified transaction, if the pharmaceuticals are ethical or sold over the counter[4], their indicated uses, pricing and drug administration information. The review of this information aims at verifying if (a) another ATC level should be considered as part of the relevant market; (b) pharmaceuticals classified in other ATC4 level should be included in the relevant market; and (c) pharmaceuticals classified in the same ATC4 level should be excluded from the relevant market. Only pharmaceuticals that can be used to treat the same illnesses and medical conditions should be considered as close substitutes and should be regarded as part of the same relevant market.

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[1] For additional information, please refer to https://www.ephmra.org/classification/anatomical-classification/.

[2] The new corporate name of Intercontinental Medical Statistics (IMS Health) after its merger with Quintiles Transnational Holdings Inc is IQVIA (https://www.iqvia.com/about-us).

[3] Reference is made to the Concentration Act No. 08012.004168/2009-11 (Aspen Global Incorporated and Glaxo Group Limited).

[4] **Ethical** pharmaceutical are sold with a doctor's prescription or consent.

In a number of cases, CADE has left the exact product market definition open, while nonetheless taking into account the closeness of substitution due to overlaps at ATC4 level and/or the active ingredient, both as one criterion contributing to the conclusion of lack or existence of competition concerns[5].

1.1.1 Sales to hospitals

Sales to hospitals have a difference dynamic. In principle, the acquisitions made by hospitals are led by experts that understand fully the all information contained in the medical guide, such as the active ingredients, side effects, drug interactions. Furthermore, hospitals also hold bargaining power in contrast with individuals. Accordingly, in certain cases in which sales to hospitals were relevant, General Superintendence has decided that the ATC4 level can be regarded as a relevant market and that no further assessment of alternative definitions of the relevant market were necessary[6].

In certain cases, in particular if hospitals procured pharmaceuticals by means of competitive tenders, participation in the tenders were limited to pharmaceuticals based on the active ingredient. Accordingly, CADE has adopted a strict scenario in which the relevant market comprises solely pharmaceuticals with the same active ingredient. If this definition of relevant market led to a scenario of relevant concentration, CADE issued requests for information to the

[5] Reference is made to the following Concentration Acts: (*i*) 08700.002894/2017-43 (Grünenthal Pharma GmbH & Co. KG and IPR Pharmaceuticals Inc.); (*ii*) 08700.002782/2017-92 (Mylan N.V. and Novartis AG); (*iii*) 08700.001346/2017-04 (Brest International LP and Instituto Biochimico Indústria Farmacêutica Ltda); (*iv*) 08700.010731/2015-72 (Laboratórios Pfizer Ltda. and Bristol-Myers Squibb Farmacêutica Ltda); (*v*) 08700.008757/2015-51 (Genzyme Corporation and AstraZeneca UK Limited); (*vi*) 08700.006310/2015-47 (Pfizer Inc. and Astrazeneca AB); (*vii*) 08700.011030/2015-51 (BioMarin Pharmaceutical Inc. and Ares Trading S.A), among others.

[6] Reference is made to the Concentration Act No. 08700.007226/2016-21 (Aspen and GSK).

hospitals in order to investigate which other pharmaceuticals were regarded by the hospitals as close substitutes[7].

1.2 Geographic dimension

CADE's decisions have consistently defined geographic markets for pharmaceutical products to be national. Even though many pharmaceutical companies may have a single plant or a local production, the transportation costs are not relevant and the channels of distribution are national[8].

2. Key competitive concerns in cases involving the pharmaceutical industry

Competition concerns in merger control filings have focused on potential effects arising from direct overlaps in the relevant market(s) affected by the notified transaction.

As the pharmaceutical industry is heavily regulated in Brazil, CADE usually does not consider that import of pharmaceuticals is sufficient to maintain competition pressure in the relevant markets. Accordingly, CADE's assessment of the conditions of the relevant market is usually focused in the possibility of entry and level of the rivalry in the affected relevant markets.

Several factors impact the possibility of entry: (*i*) timeframe to obtain regulatory registry of new products; (*ii*) patents and intellectual property rights; (*iii*) access to active ingredients and timeframe to obtain regulatory licenses to import active ingredients; (*iv*) required investments and sunk costs; and (*v*) importance of investments in marketing, among other factors.

The assessment of the level of rivalry in the relevant markets usually focus on the number of independent economic groups active in

[7] Reference is made to the Concentration Act No. 08700.001346/2017-04 (Brest UK and Instituto Biochimico).

[8] Please refer to footnote No. 05.

the relevant markets, number of pharmaceuticals launched by the economic players in the last years as well as pricing and market share variation in the last five years. It is important to note CADE usually considers that both generics and biosimilar pharmaceuticals are close substitutes to originator drugs[9]:

In addition, CADE usually assesses if the merger control filing is likely to impact the incentives for innovation. In certain cases, CADE has reviewed carefully the potential risks that a concentration entails for the development of pharmaceuticals and the launching of new products. In the Concentration Act involving Sanofi-Aventis and Medley, CADE's Tribunal has reviewed carefully the potential portfolio effects that a transaction case involving a pharmaceutical company between an originator and a generic company could lead to[10]. In a Concentration Act regarding the formation of a joint venture between pharmaceutical companies focused on the development of biologic pharmaceuticals[11], the Reporting Commissioner argued that the joint venture could raise concerns as CADE's Tribunal did not fully understand if biological pharmaceuticals would compete with pharmaceuticals and the impacts in the applicants' future behavior[12].

[9] Generic products are based on the same active principle (or active ingredient) as that of their equivalent small-molecule originator pharmaceuticals. Biosimilar pharmaceuticals are highly similar to the originator pharmaceutical and have no clinically meaningful differences from an existing originator pharmaceutical. Generic and biosimilar products are produced and offered upon patent expiry of the originator that they aim to reproduce.

[10] Reference is made to the Concentration Act No. 08012.003189/2009-10 (Medley and Sanofi Aventis).

[11] Biologic pharmaceuticals can be defined as a pharmaceutical drug product manufactured in, extracted from, or semi synthesized from biological sources. Biologic pharmaceuticals can be produced through biotechnology in a living system, such as a microorganism, plant cell, or animal cell.

[12] Pharmaceuticals are synthesized by chemical processes.

3. Remedies and commitments in merger control

To date, CADE has rejected only a very limited number of merger control cases. None of them refer to the pharmaceutical industry.

In a few cases, CADE has imposed remedies relating to the pharmaceutical industry. When CADE has identified concerns that result from the horizontal overlap created by a Concentration Act, it has traditionally required the divestiture of entire product lines or businesses in order to reduce the concentration levels caused by the notified transaction in a determined market and to ensure an appropriate rivalry level in the affected markets in the post- transaction scenario[13]. When the concerns refer to the change of the characteristics of collaboration agreements, CADE's Tribunal has imposed the duty to report to CADE any changes made in the joint venture[14].

4. Conclusions

In our understanding, the substantive review of merger control filings in the pharmaceutical sector are not fundamentally different from that carried out in other innovation-intensive regulated industries. Notwithstanding, there are three matters that should be highlighted:

a) CADE usually considers alternative relevant market definitions, which includes EPhMRA ATC4 level and the indicated use of the pharmaceuticals. Other aspects such as patents, need of prescription (in contract with over the counter sale), can also impact the definition of the relevant markets;

[13] In the Concentration Act No. 08012.003189/2009-10 (*Medley and Sanofi Aventis*), CADE's Tribunal has approved the acquisition of Medley by Sanofi-Aventis subject to the condition that Sanofi-Aventis divested three pharmaceuticals.

[14] Reference is made to the following the Concentration Acts No. (*i*) 08012.002467/2012-17 (Aché Laboratórios Farmacêuticos S.A.; EMS Participações S.A., Hypermarcas S.A., União Química Farmacêutica Nacional S.A. and Bionovis S.A. – Companhia Brasileira de Biotecnologia Farmacêutica) and (*ii*) 08012.006121/2012-80 (Biolab Sanus, Cristália, Eurofarma and Libbs).

b) the antitrust assessment usually is focused on the actual overlaps in the relevant market or markets. In certain cases, CADE may take into consideration innovation and other aspects of dynamic competition; and

c) if any potential concerns are identified in the review, CADE's Tribunal may require divestitures.

WHAT ARE THE SPECIFIC ASPECTS OF MERGER CONTROL IN THE HIGHER EDUCATION MARKET?

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The Brazilian higher education sector has been the stage of numerous mergers in the past twenty years, mostly due to regulatory changes that welcomed private investors and economic stability. In recent years, international and domestic investment funds have had an important role in this process and the most important players in the sector received large investments that provided capital for consolidation. The higher education market in Brazil does not seem to be mature and new waves of consolidation can be expected in the coming years.

In this context, CADE analyzed the higher education market in various opportunities[1], giving the authority a chance to dwell on its particularities. Looking to this set of decisions, it can be said that some of these specificities have been reiterated, while others have evolved over time. Having this in mind, this brief contribution aims at offering a general overview of CADE's case law on the higher education market.

[1] From 2001 to 2015, CADE reviewed 62 merger cases in the higher-education sector. Please refer to CADE's market study "Atos de Concentração no Mercado de Prestação de Serviços de Ensino Superior" available at: http://www.cade.gov.br/acesso-a-informacao/publicacoes-institucionais/dee-publicacoes-anexos/caderno-de-educacao-20-05-2016.pdf/view

1. CADE's definition of relevant product market in the higher education sector

CADE separates relevant product markets for (i) graduate and undergraduate education[2]; (i.1) within graduate education, there are *strictu sensu* courses and *lato sensu* courses; (i.2) within undergraduate education, there are bachelor and technology (vocational) courses[3]; (ii) on-campus and distance learning[4]; and (iii) each education program is seen as an independent relevant product - either course for undergraduate education, or thematic axis for graduate education or vocational courses[5].

The table below summarizes the relevant product markets' definition CADE adopts:

Relevant product market				
Type of education	Undergraduate		Graduate	
	Bachelor	Vocational	*Strictu sensu*	*Lato sensu*
Form	On campus/Distance Learning		On campus/Distance Learning	
Education program	Course	Thematic axis	Thematic axis	

This product market definition also depends on the type of higher education institution that is presenting the case: CADE never considers public education institutions as competitors of private institutions; within private institutions, CADE differentiates elite universities (that charge a high fee and are considered high quality education institutions) from

[2] Concentration Act No. No. 08012.000046/2011-62; No. 08012.008706/2011-53 and No. 08700.004112/2012-04.

[3] Concentration Act No. 08012.003886/2011-87.

[4] CADE established the difference between on-campus and distance education for the first time in the analysis of the Concentration Act No. 08012.003886/2011-87.

[5] Concentration Act No. 08012.000046/2011-62.

mass higher education institutions (that charge a low or moderate fee and have a large amount of students)[6].

Even though all these categories are based on evaluations of demand and supply substitution, CADE usually departs from the separation between on-campus and distance learning on its analysis. In short, this market segmentation derives from three main points: (i) regulatory requirements concerning specific accreditation for distance learning; (ii) less expensive expansion; (iii) student profiles: the lower rates provided by distance learning usually attracts older, already employed and lower income students.

2. CADE's definition of relevant geographic market in the higher education sector

Relevant geographic markets are defined according to municipalities (CADE considers the limits of a municipality as a proxy for the distance that students take into account when they are evaluating which higher education institution to attend)[7] or nationally. There are interesting aspects of the antitrust analysis concerning the definition of relevant geographical market in the education sector.

Firstly, regarding the **distance learning** market, in its first review, CADE defined it as national in 2012, mostly as a consequence of price uniformity and low barriers to entrance. However, when CADE took over the merger review of the Concentration Act No. 08700.005447/2013-12, in 2014, the General Superintendence challenged this definition. The Reporting Commissioner Ana Frazão, following CADE's General Superintendence analysis, considered that an exclusively national analysis would not account for important features of distance undergraduate education, of which she highlighted regulatory rules that impose a minimum personal attendance rate for distance

[6] Concentration Act No. 08012.009947/2011-10.

[7] Exceptionally, in 2011, Cade considered the relevant geographical market according to influential zones (using spatial statistics) of different sizes depending on the type of higher education course offered.

learning, demanding that the student be able to access the campus in many circumstances, like test applications and laboratory activities. Stemming from these considerations, CADE adopted a double analysis for the distance learning market: the market should be considered both in its municipal and national scopes. CADE also highlighted that in the national market there is a competition between big players through the development of teaching platforms, new courses, prospecting of areas not served, and mass advertising that reverberates in the capacity of these educational centers in raising the largest number of students at their facilities located throughout the national territory.

Although this level of competition has been specifically addres[8]sed in distance learning markets, the evolution of the education sector, in terms of the use of alternative technologies, more efficient processes and even the evolution of sector regulation, allows to transpose, to some extent, some of these arguments to **on-campus education** markets as well. The on-campus market has also experienced a process of consolidation in recent years, with active participation of some economic agents in the expansion of its activities in the national territory. This expansion was achieved through acquisitions of local institutions, transactions with others economic groups, or even through organic growth and opening of new *campi*.

CADE has always defined the geographical market of **on-campus education** from the point of view of a municipality.[9] In its last decision regarding the matter, however, on the merger review of the Concentration Act No. 08700.006185/2016-56 (the two largest private players in the Brazilian higher education market), CADE changed its standard and considered that there was also a national dynamic on the on-campus education market competition.

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[9] Concentration Acts No. 08012.008463/2011-53, No. 08700.005447/2013-12, No. 08700.010605/2014-37, No. 08700.003385/2014-95, No. 08700.000070/2015-77, No. 08700.002643/2015-05, No. 08700.005067/2015-40, No. 08700.007413/2015-24 and No. 08700.010943/2015-50.

3. CADE's analysis after relevant market definition

CADE usually takes a traditional analysis of market data to evaluate transactions in the higher education market. The standard review considers market shares and the overall level of concentration to assess the competitive situation in a market. It applies the Herfindahl-Hirschman Index ("HHI"), and the variation in the HHI from pre-merger to post-merger ("delta") scenarios as first indications of the change in competitive pressure in the market following the transaction.

Regarding barriers to entry, since 2013[10], CADE started considering that the previous high growth presented by these markets were being reduced. In 2014, the Reporting Commissioner of Concentration Act No. 08700.005447/2013-12 highlighted that the enforcement of the regulation of the Ministry of Education and Culture made the regulatory approval of distance education slower and more restricted. CADE's review of Concentration Act No. 08700.005447/2013-12also highlighted two other barriers to entry: economies of scale and brand investments.

Economies of scale in the business of higher education, especially in distance learning, are observed when they increase the number of students to attenuate the costs of the infrastructure needed to provide the service (on-site places, communication, professors, production of content and didactic material, distribution logistics, etc.). Thus, CADE noted that as the number of students increases, the average cost of providing services per student decreases. On the other hand, economies of scale can be considered as an efficiency of the transaction, since it can represent a reduction of production costs and reduction of prices to the consumer. CADE considers that this reduction of costs will only be passed on to consumers if the market, after the merger, maintains reasonable levels of rivalry and the possibility of sufficient entrants to

[10] Please refer to CADE's Commissioner Eduardo Pontual Ribeiro vote in Concentration Act No. 08012.003886/2011-87.

stimulate competition and distribution, if not at least in part, of the economies obtained by enterprises from consumers.[11]

Regarding brand investments, CADE's review in Concentration Act No. 08700.005447/2013-12 concluded by endorsing the analysis of the Department of Economic Studies in the sense that the new companies intending to compete in the distance learning market will have to advertise for a long period of time, incurring high sunk costs and that the more competing brands are perceived by consumers as next to the merged leading brands, the greater the need for other competitors to invest heavily in marketing strategies.

CADE's most recent rivalry analysis, Concentration Act No. 08700.006185/2016-56, in the market of on-campus education both at the municipal level and at the national level tried to verify the following points: evolution of market shares, evidence of competitive behavior among installed companies; analysis of existing idle capacities and the possibility of expansion, with the objective of verifying the ability to absorb demand deviations; price and quality of applicants compared with competitors assessing the degree of substitutability between these agents economic; size of companies involved, applicants and/or competitors, and how these characteristics affect factors such as the reputation of the companies and availability of professor.

Regarding distance learning markets both nationally and at the level of municipalities, CADE's review considered the following strategic variables in assessing rivalry: price - the main competitive variable in the distance education market; scale - allows dilution of fixed costs, as described above; capillarity of the network of places - reflects the geographic reach of the companies (having a large network of places means great ability to attract students, especially at the undergraduate level, due to the need for some activities compulsory presence); investments in advertising and marketing - brand and reputation consolidation of the companies are essential to attract new students; quality - considering the evaluation indexes of the Ministry of Education

[11] Concentration Act No. 08700.005447/2013-12.

and Culture. As there is a certain standardization of quality, this criterium is used to discard the companies which do not reach this threshold because it indicates that they do not meet minimum requirements determined by the regulatory body.