THE MERGER CONTROL REVIEW

Eighth Edition

Editor
Ilene Knable Gotts

THE LAWREVIEWS

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EIGHTH EDITION

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CONTENTS

Chapter XX

BRAZIL

Cecilia Vidigal M de Barros, Paula Beeby M Barros Bellotti and António J da Rocha Frota[1]

I INTRODUCTION

The Competition Law[2] introduced a pre-merger control regime, whereby a transaction is subject to a pre-merger notification whenever a double turnover test is met and the transaction may generate effects in Brazil (thus including foreign-to-foreign transactions).

In contrast with the double turnover criterion above, which is objectively quantifiable, the former competition law (valid until May 2012) provided one additional criterion (i.e., that the transaction involves a horizontal overlap or vertical integration). This additional criterion requires merits analysis, the interpretation of which has varied pursuant to CADE's case law. Under the current Competition Law, in practice, a merger transaction is notifiable whenever the double turnover threshold is met, regardless of the assessment of effects in Brazil, as the Brazilian competition authorities tend to consider potential effects, even if not proven, as enough to assume the fulfillment of the effects test.

The assessment of potential or materialised effects in Brazil, or even the existence of horizontal overlap or vertical integration, is carried out upon analysis of the merits of the case.

Finally, even though the Competition Law provides for the assessment of the case with basis on the rule of reason, due to the high costs involved in an investigation, the new Guidelines for Analysis of Horizontal Overlap Transactions (the H Guidelines) set out that the review of horizontal transactions is subject to assumptions as to the occurrence of effects which are detrimental to the competition in the relevant market.

The rule of reason (i.e., the assessment of the efficiencies deriving from the transaction that would prevail over its detrimental effects), is typically only applicable to complex cases, under a close-scrutiny proceeding.

In extreme cases where the transaction derives a monopoly in the market, the Brazilian authorities tend to block the transaction. Other than these extreme cases, in cases where there are competition concerns, the Brazilian authorities tend to approve the transaction by imposing restrictions such as structural (for instance divestiture of assets or trademarks, or veto of part of the transaction) or behavioural remedies. In cases of gun jumping, the authorities may impose a fine and may also render the transaction null and void, thus reinstating the status quo ante.

1 Cecilia Vidigal M de Barros is a senior partner, and Paula Beeby M Barros Belotti and António J da Rocha Frota are associates at Motta Fernandes Advogados.

2 Law No. 12,529 in force as of May 2012.

II MAIN RULES AND CONCEPTS

i Main laws and regulations

The Brazilian pre-merger control is governed by the Brazilian Competition Law, Resolutions published by CADE, and guidelines, such as the H Guidelines (Guidelines for Analysis of Horizontal Overlap Transactions) issued in July 2016 and the Guidelines for the Analysis of Previous Consummation of Merger Transactions (Gun Jumping) issued in May 2015. The main resolutions are:

a Resolution No. 1/2012: provides for CADE's Internal Rules, including review proceedings;

b Resolution No. 2/2012, provides for the pre-merger control regime;

c Resolution No. 8/2014, introduces amendments to Resolution No. 1/2012, providing for transactions in the stock exchange and for CADE's second review of cases approved by the Superintendence General (SG);

d Resolution No. 9/2014: introduces amendments to Resolution 2/2012, including the definition of economic group for purposes of turnover thresholds, notifiable minority holdings, rules concerning investment funds, and transactions eligible to fast-track proceeding;

e Resolution No. 13/2015, provides for sanctions for gun jumping and the investigation of transactions by CADE;

f Resolution No. 16/2016, sets out a 30-day deadline for fast-track proceedings; and

g Resolution No. 17/2016, revokes Resolution No. 10/2014, and provides for notifiable 'associative agreements'.

ii Main concepts

Double turnover criterion

Since the coming into effect of the new Competition Law, as of June 2012, transactions are subject to prior clearance by the Brazilian antitrust authorities whenever the following double turnover is met: (1) one of the economic groups involved in the transaction has turnover derived in Brazilian equal or in excess of 75 million reais; and (2) another economic group involved in the transaction derived a turnover in Brazil equal to or in excess of 750 million reais, registered in the financial statements in respect of the fiscal year immediately preceding the transaction.

It is noteworthy that, in contrast to other jurisdictions, Brazilian law takes into account the turnover of the economic group of the acquirer as well as the economic group to which the target pertains, instead of the turnover of the target itself.

For the purposes of calculating the turnover, the following companies are deemed to pertain to a same economic group: (1) companies under common control; and (2) companies in which any company under common control holds, directly or indirectly, at least 20 per cent of the voting or total capital.

Investment funds are subject to a different definition of economic groups for purposes of the double turnover criterion, that was introduced by CADE's Resolution No. 9/2014. Whenever investment funds are involved in the transaction, the following entities are deemed as pertaining to a same economic group: (1) the fund directly involved in the transaction; (2) the economic group of each investor that holds, directly or indirectly, participation of at least 50 per cent of the fund directly involved in the transaction, individually or through an

agreement with other investors; and (3) portfolio companies that are controlled by the fund directly involved in the transaction, as well as the portfolio companies in which such fund is holder, directly or indirectly, of at least 20 per cent of the voting or total capital.

The effects test

'Effects in Brazil' include any transactions where the target company has assets, legal entities or revenues generated in Brazil. There is no definition of a minimum revenue amount that would be relevant to the antitrust analysis. Direct effects in Brazil are achieved, for instance, through local sales representatives, local subsidiaries or distributors, while indirect effects are verified, most frequently, through export sales to Brazil, whether by the parties themselves or third parties.

The most recent decisions on foreign-to-foreign mergers on the existence or not of potential effects in Brazil are the following.

Evonik/PeroxyChem[3]

Evonik intended to acquire all of PeroxyChem's capital. The double turnover threshold requirement was met. The target company had no activities in Brazil in the previous five years and could not start selling its products in Brazil due to high transportation costs. CADE decided not to assess the case.

WellsFargo/GE Capital[4]

WellsFargo intended to acquire GE Capital's worldwide commercial distribution finance platform. In line with the 2015 decision in the *Orion/Qingdao Evonik* case, CADE decided to assess the competitive effects of the transaction, due to the possibility all relevant market (factoring market for technology OEMs) was international and approved the transaction without restrictions due to the low resulting market share in the international market.

In view of CADE's recent case law, for a transaction to be deemed as potentially able to generate effects in Brazil, the market must be considered international in its geographical scope or the economic group of at least one of the companies involved in the transaction (acquirer's or target company's group) must be able to sell in or export into the Brazilian market.

Notifiable transactions

The Competition Law sets forth, in Article 90, that a notifiable transaction occurs upon (1) the merger of two or more companies; (2) the acquisition of direct or indirect control of companies through the acquisition of shares or assets or any other means; or (3) the entering into of an associative agreement, consortia or joint ventures, except if created for the specific purpose of participating in public bids.

In respect of transactions that have met the double turnover threshold requirement and relate to an acquisition of equity participation which falls under the specific event provided item (2) of the previous paragraph, CADE's regulation sets forth that any such transaction shall be mandatorily notified whenever:

3 Merger Case No. 08700.009274/2015-73 – decision by SG dated 9 October 2015.

4 Merger Case No. 08700.012536/2015-87 – decision by SG dated 20 January 2016.

a it results in the purchase of sole or joint control of the target;

b there is no horizontal overlap or vertical integration and:
- the acquisition grants the purchaser at least 20 per cent of the target's total or voting capital; or
- in case the purchaser already holds 20 per cent equity participation and the acquisition grants such purchaser at least additional 20 per cent of the target's total or voting capital;

c there is horizontal overlap or vertical integration and:
- the acquisition grants the purchaser at least 5 per cent, direct or indirect, equity participation in the target's total or voting capital; or
- in case the purchaser already holds 5 per cent equity participation, the acquisition (by means of one or a series of transactions) grants such purchaser at least additional 5 per cent participation in the target's total or voting capital (Resolution No. 2/2012, as amended by Resolution No. 9/2014).

Resolution No. 2/2012 (as amended by Resolution No. 9/2014) also provides that the acquisition of equity participation in the target's capital by a company that already has sole control of the target is not subject to mandatory pre-merger notification.

Resolution No. 17/2016 amended the concept of associative agreements, providing that any agreement with a term of two or more years shall be deemed as an associative agreement in case it establishes a joint venture for the development of a business activity, provided that, cumulatively: (1) such agreement establishes the sharing of risk and outcome derived from the business activity; and (2) the parties are competitors in the market that is the subject matter of the agreement.

This Resolution also provides that agreements the terms of which correspond to less than two years, but are subject to renewal, or agreements for undetermined periods of duration, are subject to notification prior to its renewal or whenever it achieves a duration of two years.

According to the new Resolution, vertical integration between the contracting parties (for instance, supply and distribution agreements) is no longer a trigger, *per se*, for the notification of associative agreements with CADE (as was provided under Resolution No. 10/2014, revoked by Resolution No. 17/2016).

Acquisition of convertible securities and stock exchange transactions

Resolution No. 9/2014 introduced rules applicable to the acquisition of convertible securities, providing that such acquisition is subject to mandatory notification whenever: (1) a future conversion into shares would result in the acquisition of control over the target company or falls under the definition of a notifiable minority shareholdings (acquisition of minority participation of 20 or 5 per cent, as the case may be, as provided under Resolution No. 2/2012); or (2) the convertible securities already provide the right to participate in the administrative bodies of the target company, or provide veto or voting rights in respect of matters that are relevant under competition law.

Should the acquisition of convertible securities meet the above criteria and the applicable notification thresholds only at the time of conversion, the transaction will be subject to notification at such time. In the event of a public offering of convertible securities, the subscription does not require a prior clearance by CADE, but the acquirer shall only exercise the relevant voting rights upon clearance.

The subscription of convertible securities in public offerings can occur prior to the pre-merger analysis; however, any voting rights attached to the acquired securities shall not be exercised until CADE's final approval. Pursuant to Resolution No. 8/2014, the same is applicable for transactions done via the stock exchange.

Any transactions in the stock exchange are exempted from pre-merger clearance, on the same terms applicable to public offerings, i.e., provided that the relevant voting rights may not be exercised prior to clearance. CADE may however exceptionally authorise the exercise of voting rights, in order to protect the full value of the investment (Resolution No. 8/2014).

Exemption

Exemptions to the pre-merger notification obligation exist for joint ventures, consortia or associative agreements created for the specific purpose of participating in public bids, provided that the voting rights derived from such transactions shall not be exercised until CADE's clearance.

Definition of control

The Competition Law does not provide a definition of control. Decisions rendered by CADE deem that an acquisition of control occurs whenever the acquirer of participation in the target company becomes its sole main investor or acquires significant influence on the business strategy of the target company, through the right to appoint managers, right to determine or influence commercial and sensitive competition policies, or veto rights in respect of any commercial and sensitive competition-related decisions.

Gun jumping

Brazilian antitrust law prohibits the consummation of transaction acts before clearance of the transaction by the antitrust authorities.

According to the Competition Law (Article 88), and the Guidelines for the Analysis of Previous Consummation of Merger Transactions[5] the following acts may be deemed 'consummation acts':

a exchange of commercially sensitive information between the parties involved in the transaction in excess of that strictly necessary for the execution of a binding agreement and that is non-historical (typically, more recent than one to three months, depending on the specific relevant market) and disaggregated (typically, information in respect of less than three competitors in the relevant geographic market);[6]

b establishment of contractual clauses that regulate the relationship between the parties; and

c acts performed by the parties, anticipating the implementation of the merger, before clearance, such as:

- assets or shares transfers;
- payment of the purchase price;
- exertion of influence over the target company; or

5 Available at www.cade.gov.br/acesso-a-informacao/publicacoes-institucionais/guias_do_Cade/guideline-gun-jumping-september.pdf.

6 Opinion edited by the Department of Economic Studies at the request of Sindicato Nacional da Indústria do Cimento, attached to the case records of Administrative Proceeding No. 08012.011142/2006-79.

- carrying out joint sales, marketing activities, product R&D, or reciprocal licensing of intellectual property.

CADE's recent case law deems the following information as sensitive, among other: disaggregated and non-historical data in respect of production costs, production capacity, marketing and commercial strategies, expansion plans, prices and rebates, main clients, main suppliers and supply conditions, employee wages, and R&D data.

Certain transactions may be implemented before CADE's clearance upon an exceptional approval, when at least one of the following requirements are met: (1) the transaction does not cause irreparable damages to the competition market; (2) the acts involved are entirely reversible; or (3) irreversible and imminent damages would be caused to the target company if the exceptional approval is not granted.

Review proceedings – fast-track or close-scrutiny review

Resolution No. 2/2012 (as amended) provides that transactions that involve one of the following aspects are eligible for a fast-track review:

a classical or cooperative joint ventures;

b replacement of the economic agent – whenever, before the transaction, the acquirer (or its economic group) was not engaged in the seller's relevant market, or in the seller's vertically related markets, or in other markets in which the seller or its economic group have participated;

c horizontal overlap with a low market share – when the transaction results in a market share up to 20 per cent in the relevant market, at the discretion of the SG, which may deem such transaction as irrelevant from a competition standpoint even when a party to the transaction ends up holding more than 20 per cent of the market share in the relevant market;

d vertical integration with low market share – when none of the applicants (or the relevant economic group) provenly controls more than 30 per cent of any of the vertically integrated relevant markets;

e lack of causation – horizontal concentrations which result in a HHI variation lower than 200 points, provided that the transaction does not result in the control of the market share in excess of 50 per cent of the relevant market; and

f other cases that, although not comprised in the above categories, may be deemed by the SG as simple enough so as to not require a thorough analysis.

In view of the above, transactions submitted for CADE's pre-merger analysis shall be subject either to a fast-track or close-scrutiny review proceeding.

Fast-track proceedings are applicable whenever there is low market concentration, pursuant to Resolution No 2/2012 as amended by Resolution No. 9/2014 (i.e., the transaction derives a market share corresponding to less than 20 per cent of the relevant market in respect of transactions with horizontal overlap and 30 per cent in the case of transactions involving vertically integrated relevant markets) or whenever there is a variation of the Herfindahl-Hirschman Index (HHI) lower than 200 points.

In cases of transactions which fall within the above, and thus the effects of which do not raise competition concerns, SG may render a definitive decision, approving the transaction without any restrictions, thus terminating the proceeding without its remittance to CADE's Tribunal.

Conversely, the H Guidelines expressly set out the grounds for a decision to initiate a close-scrutiny proceeding, incorporating CADE's practice in recent cases: the transaction derives a high variation in market concentration, assessed by reference to the Herfindal-Hirshman Index (HHI), whenever such variation exceeds 200 points. In the close-scrutiny proceeding the following shall be assessed by CADE, in addition to the information provided under a fast-track proceeding: relevant market under an offer structure and a demand perspective; analysis of monopsony conditions; conditions of entry in market, barriers and rivalry; analysis of coordinated power.

Proof of efficiencies shall be assessed under the rule of reason, in practice, only in a close-scrutiny proceeding, due to the high costs involved in an investigation. The competition authorities have the burden of proof of detrimental effects, if any, in which case the parties to the transaction have the burden of proof in respect of efficiencies deriving from the transaction, which are passed through to the consumers. Typically accepted by the competition authorities as efficiencies which are passed through to consumers are marginal cost reductions. Marginal costs are equivalent to the average variable costs, such as reduction of input pricesa and quality gains. For their acceptance by the competition authorities, the parties must show causation between the transaction and efficiency gains that are specific to this particular transaction. In cases where the efficiencies are insufficient for an approval of the transaction without restrictions, they may justify the imposition of less stringent behavioural or structural remedies.[7]

Complex cases will be subject to CADE's tribunal review after the issuance of the SG's non-binding opinion.

Other factors, other than market concentration, may be taken into consideration on a case by case basis, such as market structural conditions, previous decisions, willingness by the parties, clients or competitors to cooperate with the competition authorities.

CADE may impose structural or behavioural restrictions to the transaction and in extreme cases such as monopoly resulting from the transaction, the transaction may be blocked.

Market share in the relevant market

In order to assess the market share in the relevant market, it is first necessary to understand the concept of 'relevant market'.

The relevant market means, from a product standpoint, the group of products the consumers consider interchangeable or substitutable, that is, if one of them is not available, they are subject to substitution for other products in view of the characteristics, price and use of such other products. From a geographic standpoint, the relevant market means the area where the companies offer their products or where the products are available – for instance, the international market or Brazilian territory.

In accordance with CADE's H Guidelines issued on July 2016, to assess the relevant market in terms of geographic area, CADE may take into consideration factors such as: where the parties to the transaction are located; where their competitors are located; where the customers are located; where the sales take place; purchase habits of the customers – if customers go where the products are or the sellers go where the customers are, or both; the distance that the customers usually go to purchase the products; difference in the offer or

7 Furchin, Paulo F de Azevedo, Competition Defense: Principles, Rule of Reason, Concepts and Economic Efficiency, Practical Cases, Ibrac 2017 – class 2.

prices among neighbouring geographic areas, including the possibility of imports; costs in relation to the product price, distribution or transport; required time and other difficulties in the transport of the products (in terms of transport security, feasibility of transport, and issues related to regulation and tax); costs involved in the change of suppliers located in other geographic markets; need for proximity of suppliers in relation to the customers; participation in the domestic offer; and evidence of migration of customers among different geographic areas in response to a price increase or changes in relation to commercialisation.

III YEAR IN REVIEW

In July 2016, CADE issued the H Guidelines, adapting the previous 2001 guidelines to the pre-merger review system in force as from June 2012. The following steps of the transaction assessment were detailed: criteria for definition of the relevant market, analysis of the horizontal concentration level specially according to HHI and C4 indexes, assessment of the probability of exertion of market power after the transaction, valuation of the existing purchasing power in the market, and weighing of effects detrimental to the competition against economic efficiencies, including complementary assessment methods such as simulations, contrafactual analysis and elimination of mavericks.

i Recent rules

Resolution No. 16/2016 introduced a 30-day deadline for the review of fast-track proceedings, counted as from the filing date or any amendment to the notification. If this term is exceeded, the General Superintendent shall justify the reasons concerning the delay and prioritise the analysis of such merger case.

Finally, CADE edited Resolution No. 17/2016, clarifying the concept of notifiable associative agreements (see Section II.ii, *supra*).

ii Significant cases of merger filings

On 11 May 2016, CADE approved, with restrictions, a joint venture between Itaú Unibanco and Mastercard[8] for the creation of a new debit and credit card flag in the Brazilian market. Given the risks of anticompetitive effects from the transaction, CADE determined (1) the establishment of a new brand of payment cards in order to avoid the tumbling of current clients; (2) the creation of corporate governance rules in respect of the joint venture, in which new decisions are equally taken by both parties; (3) a period of seven years for the joint venture (contrary to the parties' request of 20 years), considering that this will allow CADE to re-examine the transaction in light of the future market structure, so as to assess whether efficiencies were effectively introduced in the market to the benefit of consumers; and (4) the obligation of transparency and non-discrimination.

On 13 April 2016, CADE approved, with restrictions, a joint venture between Saint Gobain Brazil and SiCBRAS Silicon Carbide Brazil,[9] created for the implementation of a silicon carbide plant in Paraguay. According to the Reporting Commissioner, the transaction raises competitive concerns such as the risk of sensitive information exchange and possible reduction of competitive incentives. As a result, a merger control agreement (ACC) was

8 Merger Case No. 08700.009363/2015-10.

9 Merger Case No. 08700.010266/2015-70.

executed to ensure the operational independence of the joint venture, by means of restrictions to avoid the exchange of sensitive information; and inspections conducted by CADE in the areas of activity related to manufacturing and commercialisation of the joint venture.

On 8 June 2016, CADE approved, with restrictions, the purchase of the HSBC by Bradesco bank.[10] Given that CADE concluded that the relevant market is not very competitive – not only in Brazil, but in many other countries – an ACC was executed between the companies. According to such ACC, Bradesco (1) cannot acquire any other financial institution for the next 30 months counted as from the execution date with CADE; (2) shall hire a company (out of Bradesco's economic group) to prepare a compliance programme to be implemented; (3) shall offer incentives to former clients of HSBC to transfer their credit operations to other financial institutions (with exception of some of the largest banks in the country); and (4) undertook the obligation to improve the transparency and quality of services to clients.

On 9 November 2016, CADE approved, with restrictions, a joint venture among Brazilian banks Banco do Brasil, Bradesco, Caixa Econômica Federal, Itaú and Santander[11] for the implementation of a credit bureau. In this case the SG concluded that the market of information on defaulting and non-defaulting individuals and legal entities would be affected due to an existing vertical integration between banks and credit bureaus, which in turn could entail anticompetitive conduct such as the discrimination in access to information provided by the banks to the credit bureaus that will be competitors after the relevant transaction. In view of this, the parties executed an ACC providing for, among other obligations, non-discrimination assurances for competing credit bureaus on credit information access and mechanisms of corporate governance to avoid the exchange of sensitive information between banks through the joint venture.

On 8 March 2017, CADE approved, with restrictions, the joint venture between TAM, Latam Airlines Group, Iberia and British Airways[12] in respect of cargo and passenger air transport between Europe and South America. By means of an ACC, the parties committed to, among other obligations, (1) make available without cost for potential competitors slots (timetable of arrivals and departures) at London Heathrow airport or at London Gatwick airport, according to the choice of the potential entrant; and (2) formalise interline agreements with the potential entrant, in the best conditions signed with a third party, from the cities of São Paulo and London.

On 17 May 2017, CADE approved, with restrictions, the merger between companies Dow Chemical and DuPont de Nemours.[13] Due to the high concentration of market share related to materials science used in a large variety of end-use applications and several crops, the parties executed an ACC, whereby: (1) the parties undertake to divest Dow's acid copolymer global business, such as the corn seed business in Brazil, to redress the overlap between the activities of the companies in these specific markets; (2) the parties propose to divest assets of DuPont's herbicides and insecticides business; and (iii) minimum requirements for potential buyers were established, aiming at defining the profile of the economic agent which would be capable of effectively compete with the new company.

10 Merger Case No. 08700.010790/2015-41.

11 Merger Case No. 08700.002792/2016-47.

12 Merger Case No. 08700.004211/2016-10.

13 Merger Case No. 08700.005937/2016-61.

iii Gun-jumping cases

On 20 January 2016, CADE's Tribunal imposed a fine on Cisco Systems Inc. and Technicolor S/A[14] for closing a transaction without the CADE's final approval, which was considered gun-jumping. Even though the parties executed a carve-out agreement, for the objective of preventing effects in a determined jurisdiction where the transaction was not yet approved – and that, according to the parties, would maintain the competitive conditions in Brazil, CADE did not consider it as an effective compliance with the parties' obligation not to consummate merger acts before competition clearance. The imposed fine was of BRL 30 million, representing the higher fine amount in relation to other gun-jumping cases analysed by CADE[15].

There are no provisions under the Brazilian law permit carve-out agreements as a means of avoiding gun-jumping. Based on the current understandings of foreign antitrust authorities[16], CADE has unofficially stated that they would be unlawful, in principle, but considering that its jurisdiction is limited to acts with effects (even if potential) to the Brazilian market, it should be possible to argue that partial foreign closings, with no effects whatsoever in the Brazilian territory, would be permitted. However, parties are advised to be extremely careful when assessing the possibility of carveouts as it is still unclear how CADE will deal with this matter.

On 17 August 2016, CADE's Tribunal imposed a fine on RR Participações Ltda., Douek Participações Ltda. and Shimano Inc.[17], due to fact that the companies' joint venture – Blue Cycle Distribuidora Ltda. – was operating before CADE's clearance. The imposed fine was of BRL 1.5 million.

IV THE MERGER CONTROL REGIME

Transactions must be submitted for CADE's analysis any time prior to its closing (or before the consummation of relevant acts related to the transaction) and, preferably, upon the execution of the final binding agreement. The overall statutory period to clear a transaction will be limited to 30 days for fast-track proceedings and 240 days for close-scrutiny proceedings – subject to an extension of 60 to 90 days upon request of the parties or of CADE. In practice, CADE has been clearing transactions up to 20 days for fast-track proceedings and up to 80 days for close-scrutiny proceedings.

In fast-track proceedings, in which the SG is solely in charge of deciding whether to approve or reject a transaction, the parties are required to stand still for an additional 15 days, during which the decision may be challenged by CADE's Tribunal. If the transaction is not challenged, then it may be completed by the parties.[18]

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14 Administrative Proceeding for Assessment of Concentration Act (APAC) No. 08700.011836/2015-49.

15 In comparison to the gun-jumping cases in the transaction between *OGX Petróleo e Gás and Petróleo Brasileiro SA* (Merger Case No. 08700.005775/2013-19); *Aurizônea Petróleo and UTC Óleo e Gás* (Merger Case No. 08700.008289/2013-52); and *Potióleo SA and UTC Óleo e Gás SA* (Merger Case No. 08700.008292/2013-76).

16 Such as from the European Economic Union, Canada, United States of America and Germany.

17 Merger Case No. 08700.002655/2016-11.

18 Depending on the case, CADE may impose remedies as a condition for clearance. These remedies can be, but are not limited to, structural and behavioural aspects. In these cases, CADE's Attorney General Office is responsible for monitoring the compliance of CADE's decision by the parties.

The implementation of a transaction before the issuance of CADE's final decision and the expiration of the 15-day term described above may be considered as gun jumping, in which case the parties will be subject to the sanctions mentioned in Section IV.ii, *infra*.

The notification contains a significant amount of information, including but not limited to the following: (1) a description of the transaction of up to 500 words; (2) all the applicants' information (corporate and financial data); (3) the relevant information about the transaction; (4) a copy of the documents in respect of the applicants and the transaction (agreements, MoU, companies' annual reports, the direction chart, shareholders' agreement, etc.); (5) a definition of the relevant market; (6) a description of the business and products offered by the companies; (7) structure of the demand; (8) assessment of monopoly in purchase power; (9) assessment of entry and rivalry conditions, (10) assessment of coordinated power; and (11) comments or information considered relevant.

i Confidential information

As a rule, the case records are public. CADE may treat certain parts of the transaction act as confidential such as:

a commercial bookkeeping;
b the economic and financial situation of the company;
c tax or banking secrets;
d the production process and industry secrets, notably industrial processes and formulas for the manufacturing of products;
e revenues of the interested person;
f date, amount and method of transaction payments;
g documents that formalise a merger;
h annual reports to shareholders or quotaholders, except when such document has a public aspect;
i value and volume of sales and financial statements;
j clients and suppliers; and
k costs and expenses with research and development of new products or services.

ii Fines for gun jumping

The consummation of a transaction prior to CADE's clearance subjects the parties to the sanction of nullity of the transaction and the imposition of fines ranging from 60,000 to 60 million reais, depending on the peculiarities of the case (such as the economic condition and bad faith of the parties and the anticompetitive potential of the transaction). CADE may also initiate antitrust investigations and impose fines ranging from 0.1 to 20 per cent of a company's (group of companies' or conglomerate's) gross revenues generated in the field of activity affected by the violation in the year prior to the commencement of the investigation. Please see above for sanctions imposed during 2016.

Administrative proceeding for assessment of merger transactions

The procedural rules concerning gun-jumping infractions and investigations of transactions were provided by Resolution No. 13/2015. This Resolution governs the investigation of: transactions that were filed with CADE, but that produced effects prior to CADE's clearance; transactions which were not submitted to CADE and produced effects without CADE's analysis and decision; and transactions that were not caught by the filing criteria but whose submission is requested by CADE.

The SG is in charge of the initiation of an administrative proceeding for assessment of a concentration act (APAC) *ex officio*, by request of any member of CADE's Tribunal, or due to a duly substantiated complaint by a third party. Upon the initiation of an APAC, the analysis of the concentration act shall be suspended until its decision.

iii Challenges in court

The Competition Law allows for a second review by the competition authorities in the event of false or misleading information, default on obligations undertaken before the competition authorities, or if the intended benefits have not been attained.

The parties may challenge CADE's decision in court mainly on the grounds of procedural matters. The extent of a review in court on the merits of CADE's decisions is still uncertain.

V OTHER STRATEGIC CONSIDERATIONS

i Multi-jurisdictional cases and cooperation with foreign authorities

In 2016, 105 transactions submitted to CADE had effects in multiple jurisdictions, such as United States, the European Union and China – considered as the jurisdictions where most of the transactions are notified. All of these transactions were approved without restrictions and in an average time of analysis of 59 days for close-scrutiny proceedings and 18 days for fast-track proceedings.[19]

CADE executed cooperation agreements or memoranda of understandings with authorities from the following jurisdictions: Canada, Chile, the European Union, Mercosur, Portugal, Russia, the United States, France, Peru, China, Ecuador, Colombia, Japan, Korea and India. Notwithstanding the above, in 2016 there were no cases in which CADE's decision expressly mentioned the review of the same transaction by a foreign authority, other than the opinion issued by SG in respect of the *Denali/EMC* case which briefly mentions the decision rendered by the European Commission.

The main multi-jurisdictional cases notified in 2016 were the following: *Denali/EMC* (subject to other 19 jurisdictions),[20] approved by CADE on 5 April 2016; *Dow/Du Pont* (subject to other 24 jurisdictions), approved by CADE on 17 May 2017;[21] and *Boehringer Ingelheim/Merial Saúde Animal* (subject to other 19 jurisdictions),[22] approved by CADE on 26 September 2016.

VI OUTLOOK & CONCLUSIONS

The 2016 H Guidelines and the continued amendment of previous resolutions, such as Resolution No. 17/2016 in respect of associative agreements, brought more predictability to Brazilian merger control review.

19 Article 'Chapter 2 – How does Brazil review multi-jurisdictional merger cases? An empirical study from the competition authority's perspective'. Prepared by Anna Binotto Massaro and Bruno Bastos Becker. Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2944112.

20 Merger Case No. 08700.001012/2016-41.

21 Merger Case No. 08700.005937/2016-61.

22 Merger Case No. 08700.005398/2016-61.

In 2016, CADE developed benchmarks with international agencies in relation to matters ranging from gasoline retail and banking markets to more general discussions such as gun jumping and remedies, which made the outcome of multi-jurisdictional merger cases more homogeneous.

Even though the Competition Law provides for the review of transactions with basis on the rule of reason, due to the high costs involved in an investigation, the review of transactions is subject to assumptions as to the occurrence of detrimental effects to competition. Those assumptions are applicable upon achievement of thresholds deriving from the application of the HHI or C4 index.

The rule of reason (i.e., the assessment of efficiencies that would prevail over the transaction's detrimental effects), is as a rule only applicable to more complex cases (close-scrutiny cases).

Extreme cases where the transaction would lead to a monopoly in the market tend to be blocked by Brazilian authorities. In cases where there are competition concerns (but which would not lead to a monopoly), the Brazilian authorities tend to approve the transaction by imposing restrictions such as structural (for instance divestiture of assets or trademarks, or veto of part of the transaction) or behavioural remedies.

In cases of gun jumping, the authorities may impose a fine and may also render the transaction null and void, thus reinstating the status quo ante.

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