

**BRAZILIAN ANTITRUST LAW  
(Law N.º 12,529/11): 5 years**

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## **CHAPTER 6 - WHAT TO EXPECT [OR TO AVOID] WHEN YOU ARE EXPECTING: GUN JUMPING ISSUES AND CHALLENGES OF A PRE-MERGER CONTROL REGIME**

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### **1. Introduction**

When Law No. 12,529/11 came into full force and effect, on May 29, 2012, companies doing business in Brazil were naturally concerned about the implementation of a pre-merger control regime by CADE. Those concerns revolved not only around CADE's ability to review transactions at a reasonable clip, but also around the measures that could be taken and the information that could be shared with the other party of the deal until CADE was able to approve it.

After almost 20 years since the enactment of Law No. 8,884/94, the business community got used to the post-merger control regime in Brazil, which allowed a transaction to be closed before CADE's approval. In this context, rare discussions on the boundaries to be observed before CADE's approval for deals were held. The introduction of a pre-merger control regime, following a trend well established in most mature jurisdictions worldwide, was certainly the most important change introduced by the 2011 Brazilian Antitrust Law. On the authorities' side, this change represented new important challenges: How to deal with gun jumping issues? How to make sure that the companies involved in mergers, acquisitions and joint ventures would be able to avoid conducts that could be viewed as prohibited before consummation of the deals?

This chapter aims at evaluating how CADE has been dealing with gun jumping issues since the 2011 Brazilian Antitrust Law came into force. Section 2 addresses the legal aspects of the pre-merger review system and the general rules created to impede gun jumping in Brazil. Section 3 details the gun jumping guidelines issued by CADE after some investigations were conducted in this regard. Section 4 analyzes landmark decisions rendered by CADE in connection with some cases in which gun jumping issues were raised. Those sections will take us to the main conclusions and lessons learned during this initial period of implementation of the pre-merger control system, by CADE, hinting at the measures and conducts that companies doing business in Brazil should avoid before getting approval for their deals by CADE (Section 5).

### **2. Pre-merger control system and gun-jumping issues: general rules**

The Brazilian Antitrust Law (Article 90) sets forth that a given transaction constitutes a concentration act and, as such, may be subject to pre-merger review when:

- i there is a merger between two or more previously independent companies;
- ii there is a direct or indirect acquisition, by one or more companies, of control or parts

of one or more companies, through purchase or leasing of shares, membership units, convertible securities, tangible or intangible assets, or by means of any kind of agreement;<sup>1</sup>

- iii one or more companies absorb another company or companies; and
- iv two or more companies enter into an associative agreement,<sup>2</sup> consortium or joint venture<sup>3</sup> (except when intended for participation in bidding procedures opened by the direct or indirect government authorities and for execution of the ensuing contracts).

The transactions indicated above must be notified and submitted to CADE's prior approval whenever they meet the following cumulative thresholds:<sup>4</sup>

- i at least one of the economic groups<sup>5</sup> involved in the transaction registered gross revenues or volume of businesses in Brazil equal to or exceeding BRL 750 million in the fiscal year preceding the transaction, and
- ii at least one of the other economic groups involved in the transaction registered gross revenues or volume of businesses in Brazil equal to or in excess of BRL 75 million in the fiscal year preceding the transaction.

The main change in the merger review scenario was introduced by Article 88, Paragraph 3, of the Brazilian Antitrust Law, as further detailed by Articles 108 and 112, of CADE's Internal Regulations. Accordingly, transactions that are subject to mandatory filing with CADE cannot be consummated until the authorities render a final decision,<sup>6</sup> on pain of breaching the law and incurring in the so-called gun jumping.

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<sup>1</sup> Resolution CADE No. 2 provides for certain exceptions regarding the acquisition of shareholding interest, subscription of securities convertible into shares, and public offers of securities convertible into shares.

<sup>2</sup> Resolution CADE No. 17 regulates the events for notification of associative agreements.

<sup>3</sup> According to the Brazilian Antitrust Law, acts intended for participation in bidding procedures opened by the direct or indirect government authorities and for execution of the ensuing contracts are not deemed concentration acts, and therefore are not subject to mandatory filing.

<sup>4</sup> The threshold values were adjusted under Article 1 of Interministerial Ordinance No. 994/12.

<sup>5</sup> According to Resolution CADE No. 2, for purposes of calculating revenues, an economic group means: (i) companies under common control, either internal or external; and (ii) companies in which any of the companies dealt with in item i owns, directly or indirectly, at least 20% of the capital stock or voting capital. For investment funds, the analysis should encompass: (i) the economic group of each shareholder that directly or indirectly holds at least 50% of the shares in the fund involved in the deal, whether individually or through any type of shareholders' agreement, and (ii) the companies controlled by the fund involved in the deal as well as those in which such fund directly or indirectly holds an ownership interest equal to or higher than 20% of the capital stock or voting capital. The gross revenues registered by an economic group are the sum of the entire gross turnover of such entities (and not pro rata) in the year preceding the transaction.

<sup>6</sup> For transactions cleared by the General Superintendence, CADE's Internal Regulations also provide for a 15-day waiting period after the decision is rendered, which is the term for third-party appeals or requests for review by the Tribunal.

CADE's Internal Regulations<sup>7</sup> establish that the parties to a reportable transaction must keep the physical structures and competitive conditions unchanged until CADE's final decision. CADE's Internal Regulations also prohibit transfers of assets or any influence of one of the deal parties over the other, as well as any exchange of competition-sensitive information not strictly necessary for execution of the formal binding instrument between the parties. This is meant to prevent possible irreversible losses to the market, thus preserving the public interest.

The wording in both the Brazilian Antitrust Law and CADE's Internal Regulations concerning practices that could or could not be considered a violation, however, is not specific as to determine which acts could be materially interpreted as consummation of a transaction. Thus, companies negotiating concentration acts in Brazil were exposed to a significant degree of uncertainty as to what type of information could be exchanged during negotiations and which acts could be carried out without being considered gun jumping. These concerns became much more relevant in light of the sanctions legally imposed for breaching the law.

Penalties for gun jumping practices in Brazil comprise fines ranging from BRL 60,000 to BRL 60,000,000, in addition to possible annulment of the acts performed by the parties before obtaining CADE's approval and commencement of an administrative investigation into potential anticompetitive conducts. Such penalties may be imposed by CADE at its own discretion, taking into consideration such aspects as the parties' good-faith, the extent of competitive harm, the parties' economic capacity, among others.

In view of the broad terms of the rules introduced in 2012, considering the peculiarities of the companies' needs when doing business in Brazil, and also due to the uncertainty in relation to the need to notify some transactions that were not reportable in the previous regime, CADE had soon to deal with gun jumping issues. As it will be further addressed below, from 2013 to 2015, CADE's General Superintendence identified gun jumping issues in five cases and decided to enter into settlement agreements with the companies involved. Under such settlement agreements, companies decided to pay contributions to CADE, after acknowledging that they had taken measures that were not allowed before obtaining CADE's approval for their deals.

In June 2015, aiming at providing more legal certainty to investigations on gun jumping issues, CADE issued Resolution No. 13, which sets forth specific administrative proceedings to scrutinize (i) reportable transactions that have been filed and were consummated before CADE's clearance, and (ii) reportable transactions that have not been filed and were consummated before CADE's clearance. Almost simultaneously, in May 2015, CADE launched the gun jumping guidelines ("Gun Jumping Guidelines")<sup>8</sup> as a means of reducing conceptual uncertainties by laying down specific rules to prevent gun jumping practices. The main provisions of the Gun Jumping Guidelines will be detailed below.

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<sup>7</sup> Article 108, Paragraph 2.

<sup>8</sup> CONSELHO ADMINISTRATIVO DE DEFESA ECONÔMICA – CADE. Guia para análise da consumação prévia de atos de concentração. Available at [http://www.cade.gov.br/aceso-a-informacao/publicacoes-institucionais/guias\\_do\\_Cade/gun-jumping-versao-final.pdf](http://www.cade.gov.br/aceso-a-informacao/publicacoes-institucionais/guias_do_Cade/gun-jumping-versao-final.pdf) (original Portuguese version); and at <http://en.cade.gov.br/topics/publications/guidelines/guideline-gun-jumping.pdf> (English version). February 16, 2017.

### **3. The Brazilian Gun Jumping Guidelines**

The Gun Jumping Guidelines document is essentially divided into three sections: (i) details of activities considered to be gun jumping practices; (ii) procedures that may mitigate gun jumping risks, and (iii) penalties, which essentially resembles the wording of the Brazilian Antitrust Law.

#### *3.1 Gun jumping practices*

The first section of the Gun Jumping Guidelines divides the activities related to concentration acts that may raise certain concerns into three main groups: (i) exchange of sensitive information between market players; (ii) definition of contractual clauses that govern the relationship between market players, and (iii) activities carried out by the parties before and during implementation of the concentration acts.

##### *3.1.1. Exchange of sensitive information*

As for the first group, the authorities seek to prevent that commercially and competitively sensitive information be exchanged between the deal parties before antitrust approval. CADE recognizes that any pre-merger negotiation does imply a certain level of interaction between the parties, but defends that the extent and degree of such interaction should be carefully evaluated *vis-à-vis* the deal that is being negotiated.

According to the Gun Jumping Guidelines, competitively sensitive information relates to specific data about costs; capacity level and expansion plans; marketing strategies; product pricing (prices and discounts); main customers and secured discounts; payroll; main suppliers and contractual terms and conditions for the supply; non-public information about trademarks, patents and research & development; future acquisition plans; and competitive strategies.

##### *3.1.2. Contractual Clauses*

The second group focuses on the content of the rules that will govern the relationship between market players before a final decision is rendered by CADE. Again, it aims at maintaining the highest level of independence between the parties (and, by extension, the competitive environment as intact as possible).

Contractual provisions that may lead to gun jumping issues, as provided by the Gun Jumping Guidelines, include: full or partial advance payment of non-reimbursable consideration (except for typical down payments in business transactions, deposits in escrow accounts, or clauses dealing with break-up fees); clauses establishing that the contract effective date precedes its closing, implying some interaction between the parties; prior non-compete obligations; clauses providing for direct influence of one party on the strategic and sensitive business aspects of the other (such as prices, clients, commercial policies and other aspects that do not reflect a mere protection of the investment); as well as any clauses establishing activities that cannot be reversed at a later time or whose reversal would require significant expenditures.

### 3.1.3. Activities prior to clearance

The third and last group deals with activities performed by the parties before and during implementation of the transaction and that could be understood as total or partial consummation of the deal without prior clearance by CADE. In this specific regard, the Gun Jumping Guidelines document illustrates certain practices that could raise higher concerns: receipt of profits or other payments related to the other party's performance (ear-outs); transfer and/or usufruct of assets in general (including voting securities), exercise of voting rights or relevant influence over the other party's activities; development of joint sale or marketing strategies for products, characterizing 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.

### 3.2 *Mitigating the risks*

The Gun Jumping Guidelines document presents the main measures that companies could take to mitigate risks related to prohibited anticipatory practices. The recommendations -- which are quite common in other jurisdictions as well -- involve:

- i adopting an antitrust protocol, whereby specific procedures to be followed by the parties are detailed until a final decision is rendered by CADE;
- ii establishing clean teams and/or executive committees to deal with information that will be exchanged in connection with the concentration act;
- iii setting up the clean team as the only point of contact between the parties, and laying down an exclusive method for exchanging information;
- iv ensuring a confidentiality commitment by members of the clean team and of the executive committee;
- v guaranteeing that commercially and competitively sensitive information received by the clean team is disclosed to the executive committee on an aggregate and/or historical<sup>9</sup> basis, and only to the extent strictly necessary for a seasoned decision about the negotiations;
- vi monitoring the discussions held by members of the executive committee about the transaction (parlor room), in order to ensure that no sensitive information is disclosed nor measures are adopted to interfere in each party's ordinary course of business.

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<sup>9</sup> The Gun Jumping Guidelines document recommends a period of at least three months from its occurrence.

### 3.3 Penalties

Finally, the Gun Jumping Guidelines document reiterates the penalties set out in the Brazilian Antitrust Law, and establishes that the application of monetary penalties (fines) will take into consideration the status of the transaction (whether and when it was notified and consummated), the nature of CADE's decision (rejected, or cleared with or without restrictions), the existence of horizontal overlaps or vertical integration between the parties, and their respective economic conditions. Further investigations may also be carried out by CADE to evaluate whether possible anticompetitive conducts arise from the post-merger integration of structures, while the annulment of acts performed by the parties may also be declared, depending on the severity of circumstances involving the conduct.

## 4. Selected cases involving gun jumping

As mentioned, since the Brazilian Antitrust Law came into effect almost five years ago, CADE has had the opportunity to examine some cases in which gun jumping issues emerged. Some of those cases definitely served as grounds for certain statements made by CADE in its Gun Jumping Guidelines. In this context, recent precedents do provide important additional clarifications on how the authorities interpret the companies' conducts and apply the specific provisions dealing with gun jumping.

It seems fair to state that the leading case related to gun jumping practices in Brazil is *OGX/Petrobras*,<sup>10</sup> which essentially involved the acquisition, by OGX, of a 40% interest held by Petrobras in a concession agreement for exploitation, development and production of oil and gas. In its decision rendered in August 2013, CADE held that the agreement between the parties came into effect immediately after its signing, thus before CADE's approval. According to CADE, the agreement allowed the exchange of sensitive information between the companies; OGX participated in the decisions to be taken by Petrobras relating to the concession agreement; and OGX took part in meetings to discuss technical and operational aspects of the concession. Further, the agreement failed to establish that antitrust approval was a condition precedent to the closing. On the merits, the transaction was cleared. However, a BRL 3 million contribution had to be paid by the parties, which also had to acknowledge the gun jumping practice.

After *OGX/Petrobras*, CADE ruled on other cases<sup>11</sup> involving alleged gun jumping practices, and the main conclusions issued by the authority were compiled in the Gun Jumping

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<sup>10</sup> Concentration Act No. 08700.005775/2013-19. Notifying Parties: OGX Petróleo e Gás and Petróleo Brasileiro S.A.. Settlement agreement approved by the Tribunal on August 28, 2013.

<sup>11</sup> 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. In *Petrobras/Total E&P* (Concentration Act No. 08700.007899/2013-39 – Notifying Parties: Petróleo Brasileiro S.A. and Total E&P do Brasil Ltda.), CADE concluded that no gun jumping practices occurred and the transaction was approved by the Tribunal on April 9, 2014. In *JBS/Tramonto*, the parties contended that an antitrust filing was not mandatory in the context of a rental agreement involving cold storage facilities. CADE disagreed, ordered a merger notification, and imposed a fine for consummation of the transaction prior to antitrust clearance amounting BRL 388,718.45 (Procedure to Investigate Concentration Act

Guidelines. Within this context, CADE has held that the following acts constitute gun jumping if performed prior to antitrust clearance:

- Payment of the price, since it would alter the competitive dynamics amongst the parties in terms of profits and obligations;
- Effective participation of one party in the decisions to be taken by the other party, such as consolidation of management or interference in operational activities;
- Joint presentation of the companies before the public as if they were already one;
- Press releases to the media and investors publicizing the deal closing/consummation;
- Participation by the acquirer in the target company's costs and results;
- Sharing of information and decision-making power with regard to commercially and competitively sensitive matters;
- The absence of a clause in the agreement indicating that CADE clearance is a condition precedent for closing of the deal.

After the Gun Jumping Guidelines document was launched in 2015, and clearer recommendations to the parties involved in a transaction were thus in place, CADE ruled on three concentration acts that are worth mentioning here, since they provide additional clarification about the authority's understanding.

In *Reckitt/Hypermarcas*,<sup>12</sup> related to the acquisition of Hypermarcas' Brazilian condoms and lubricants business by Reckitt, the General Superintendence held that the parties incurred in gun jumping, because of a 20% down payment made by Reckitt. The Tribunal, however, disagreed with such view and ruled that the down payment was typical of businesses transactions and proportional in that specific case,<sup>13</sup> thus falling into the exceptions provided by the Gun Jumping Guidelines. In addition, the Tribunal concluded that down payments and break-up fees could coexist in the same agreement and even compensate each other if the transaction under analysis were eventually rejected. However, the Tribunal was emphatic in the sense that such provisions should be taken as an exception to the general rule that prohibits advance payments prior to CADE's clearance.

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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). In *Goiás Verde/Brasfrigo*, CADE also ordered the deal notification after press releases about its content, ultimately concluding that the parties consummated the transaction before antitrust clearance (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). In *GNL/Gasmig*, the transaction was filed with CADE almost one year after signing, and the authorities concluded that consummating acts, such as payments and rendering of services, were practiced before antitrust clearance (Concentration Act. No. 08700.000137/2015-73. Notifying Parties: GNL Gemini Comercialização e Logística Ltda. and Companhia de Gás de Minas Gerais. Settlement agreement approved by the Tribunal on June 24, 2015).

<sup>12</sup> Procedure to Investigate Concentration Act No. 08700.005408/2016-68. Parties: Reckitt Benckser (Brasil) Ltda. and Hypermarcas S.A.. Shelved by the Tribunal on August 17, 2016.

<sup>13</sup> The Reporting Commissioner of the case mentioned that CADE should not establish a fixed amount for down payments, on grounds that each case has its own specificities.

The second case, *Technicolor/Cisco*,<sup>14</sup> referred to the acquisition of Cisco's customer premises equipment (CPE) business by Technicolor, within a global transaction. The transaction was globally consummated made without CADE's approval, but the parties did inform CADE about the closing, arguing the urgent need to implement the deal and the absence of negative impacts on the Brazilian market. A specific aspect in this regard is that the Tribunal was called to voice its formal opinion on carve-out agreements, in which a jurisdiction (pending antitrust clearance) would be insulated from other markets to allow partial closing. The Tribunal rejected said arguments and stated that most competition agencies worldwide are reluctant to accept carve-out agreements to exclude or even mitigate gun jumping practices, considering the uncertainty of their effectiveness (especially regarding all the difficulties to control/impede the exchange of sensitive information). In other words, according to CADE's ruling, the parties should have awaited until CADE's approval and a carve-out agreement would not prevent the gun jumping characterization. A settlement was then negotiated between the Tribunal and the parties, ultimately resulting in the highest financial contribution in the context of gun jumping practices so far, BRL 30 million.

Finally, in *Blue Cycle/Shimano*,<sup>15</sup> which referred to formation of a joint venture for exclusive distribution of Shimano's cycling products in Brazil, the Tribunal for the first time applied the annulment provision envisaged in Article 88 of the Brazilian Antitrust Law. Even though the transaction itself was not voided, the Tribunal imposed such sanction on the supply agreement associated with the joint venture until a final decision on the merits were ultimately issued.

### **5. Conclusion: Important Dos and Don'ts until clearance by CADE**

After almost five years since the Brazilian Antitrust Law came into effect, CADE has indeed gone a long way in its efforts to identify what would constitute gun jumping and, thus, dispel the overall feeling of uncertainty by the parties to a deal.

In this regard, and following the criteria reflected by the Gun Jumping Guidelines, there are three main phases that should receive more attention by the parties to avoid possible gun jumping infringements:

- i *Negotiations preceding the deal*: during this phase it is important to ensure that any sensitive information to be exchanged by the parties is carefully evaluated and a protocol used to prevent possible misuse;
- ii *Drafting of contracts*: during this phase, in addition to the exchange of information issue, the parties should ensure that clauses are written in such a way that no interference between them is allowed until CADE's clearance.

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<sup>14</sup> 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.

<sup>15</sup> Procedure to Investigate Concentration Act No. 08700.002655/2016-11. Parties: Blue Cycle Distribuidora S.A., RR Participações S.A., Douek Participações Ltda. and Shimano Inc. Settlement agreement approved by the Tribunal on July 27, 2016.

- iii *After signing, before clearance*: during this phase, and also in addition to the exchange of information issue, the parties should maintain their respective ordinary course of business without any influence by any of them over the others.

Obtaining prior approval for a concentration act under the mandatory filing regime is crucial to avoid irreversible losses to the market and to consumers. Therefore, if, on one hand, the parties should ensure that the market conditions are maintained in the meantime, then, on the other hand, the authorities should engage their best efforts to assure that an accurate analysis is carried out and a final decision is rendered in due time. CADE has definitely made very good progress in this area, as the guidelines and decisions in the cases mentioned here have shown.