

CADE Launches Guidelines on Gun Jumping

On 20 May 2015, the Brazilian Administrative Council for Economic Defense (Cade) launched its [Guidelines for the Analysis of Gun Jumping](#). The guidelines among other things define (i) gun jumping and the activities that can lead to it; (ii) specific procedures for reducing its occurrence; and (iii) the fines applicable in gun jumping cases.

The following activities stand out as commonly recognized by Cade as leading to gun jumping:

Exchange of information between the merger transaction parties. Cade recognizes that any merger implies some level of information exchange but calls attention to the fact that the extent of such exchange cannot be abusive. The guidelines provides that a given information exchange may be considered abusive when involving segregated/specific information directly addressing the core-business performance of the companies, including, *inter alia*, costs, capacity and expansion plans, marketing strategies, pricing, clients and suppliers.

Under the guidelines, the creation of employee or external consultant independent committees (clean teams), the aggregation/anonymizing of data and the use of historical data are viable violation risk-reducing measures. Cade also recommends, especially regarding complex transactions, that the parties should adopt an "Antitrust Protocol" establishing specific clean team procedures for restricting manager, employee or company representatives of one company having access to the competitively sensitive information of the other until the closing of the merger transaction.

Definition of contractual clauses between the agents. The guidelines set forth that merger contract provisions shall ensure that competitive conditions shall be unaltered, without any premature integration of the parties' activities or any influence of one party over the other's business, until Cade's final clearance or until the fulfillment of the conditions imposed by Cade decision. Clauses that result in the reduction of competition between the parties within this time period are prohibited. Under the guidelines, the non-compete clause or the anticipated, non-refundable payment of a consideration for the object of the transaction are examples of clauses that may result in Cade scrutiny. Anticipated payment clauses are allowable when the anticipated payment: (i) serves as an advance payment, (ii) is made through an escrow account or (iii) serves as a break-up fee (payment due in the case the transaction is not implemented).

Activities engaged prior to and during the implementation of the merger. Effective completion acts, even if partial, are prohibited before antitrust clearance or before the fulfillment of the Cade decision-established conditions. These acts include, among others, the transfer and/or usufruct of assets, the exercise of voting rights or influence on the other party in commercial decisions the receipt of performance-related payment, the aligning of strategies, joint product development and investment interruption.

Penalties for gun-jumping include fines ranging from BRL 60,000 to BRL 60,000,000, depending on the economic condition of the party involved, if the conduct was intentional, if there was bad faith and the anticompetitive potential of the transaction. Cade may initiate an administrative investigative proceeding should the parties engage in anticompetitive conduct via respective structure integration before transaction clearance, and company acts within this time period may be declared null and void. Cade has already decided five cases involving gun jumping since the current Antitrust Law (Law No. 12,529/2011) came into force, resulting in fines totaling BRL 6.7 million. None of the transactions was declared null or void by Cade.

São Paulo

Av. Brig. Faria Lima, 2601
12th floor - 01452-924
São Paulo, SP - Brazil
Phone. +55 11 3555 5000

Rio de Janeiro

Praia de Botafogo, 440
15th floor - 22250-908
Rio de Janeiro, RJ - Brazil
Phone. + 55 21 3503 2000

Brasília

SBN Q 1, Bl B, n. 14, Ed. CNC
2th floor - 70714-900
Brasília, DF - Brazil
Phone. + 55 61 2109 6070

contato@levysalomao.com.br

Mariana Tavares de Araujo
mtavares@levysalomao.com.br

Rafael Szmid
rszmid@levysalomao.com.br