

Cade Decides First Gun Jumping Case

On 28 August 2013, OGX Petróleo e Gás Participações (OGX) reached a settlement agreement with the Administrative Council for Economic Defense (CADE) to close its investigation regarding OGX's alleged violation of the premerger waiting period requirements of Brazil's new antitrust law (Law No. 12,529/2011). CADE concluded that OGX had taken steps to prematurely close the acquisition of Petróleo Brasileiro's (Petrobras) shareholding in a consortium formed to explore pre-salt oil & gas concessions in the city of Santos, and OGX agreed to pay BRL 3 million (approximately US\$ 1,3 million) in fines. This is the first instance that a gun jumping case was decided by Brazil's antitrust agency.

Brazil's new antitrust law introduced a mandatory premerger notification system, *i.e.*, transactions that meet the Brazilian merger filing thresholds cannot be consummated before CADE's clearance. Penalties for "gun jumping" include fines ranging from BRL 60,000 to BRL 60,000,000 and the transaction may be also declared null and void by the authority. The new law does not specifically determine what constitutes gun jumping, generally stating that "[t]he parties should maintain their physical structures and competitive conditions unaltered until CADE's final approval, being prohibited any transfer of shares or any influence of one party over another's business, as well as the exchange of competitively sensitive information outside of what is strictly necessary for the execution of the relevant binding agreement by the parties." Violations can occur even if the parties to the transaction do not compete in the same markets. In cases involving competitors, coordination of competitive activities or detailed information exchanges can also lead to a cartel violation, subjecting the parties to fines from 0.1% to 20% of a company's (group of companies' or conglomerate's) gross revenues generated in the "sector of activity" affected by the infringement in the year prior to the initiation of the investigation.

CADE's decision provides basic guidance on permissible and prohibited conduct prior to the completion of a transaction. CADE's position seems to be generally in line with the determination of other antitrust authorities worldwide, as the US and EC antitrust authorities.

Relevance of contractual terms. CADE's Directorate-General (SG) and Attorney General (ProCade) issued legal opinions in the case and closely examined the contracts filed by OGX and Petrobras. The absence of a contractual clause conditioning the closing of the transaction upon CADE's clearance was considered to be a determining factor by SG in finding a gun jumping violation.

Transactions that meet the notification criteria of Brazil's antitrust law shall, therefore, take into account the new premerger review system while drafting the relevant transaction documents. In addition to conditions precedent clauses that include CADE's clearance, clauses that regulate target company's conduct between the signing and closing dates must be carefully drafted. Such clauses must require that the target company will conduct its business in the ordinary course and guarantee that competition conditions among the parties to the transaction will remain unaltered until CADE's clearance.

Prohibited conduct. In its opinion, ProCade noted that OGX had participated in "concession consortium-related meetings" and that "OGX [...] was active in the decision-making process concerning the object of the concession, prematurely acting as a shareholder." Further, according to ProCADE's legal opinion, the notifying companies also shared non-essential commercially sensitive information prior to closing. Therefore, it was determined that OGX pay BRL 3 million in fines.

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

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Given the lack of explicit CADE guidelines as to what constitutes gun jumping, notifying companies must keep their management and commercial activities (including marketing), as well as their physical structures, separate and independent until CADE has cleared the transaction. Exchange of information should take place only when strictly necessary for the negotiation of the transaction, due diligence or transaction implementation planning. As a procedural safeguard, it is recommended that the parties execute a confidentiality agreement, limiting the use of information to the due diligence process and to related legitimate business needs.

Severity of the violation even when the transaction does not raises antitrust concerns.

In its decision, CADE has highlighted that *"gun jumping is always a serious violation, even in case of transactions that do not raise competitive concerns, as such conduct puts at risk the premerger notification system introduced by Law No. 12.529/11."*

Ana Paula Martinez
amartinez@levysalomao.com.br

Eric Hadmann Jasper
ejasper@levysalomao.com.br

São Paulo

Av. Brig. Faria Lima, 2601
12th floor - 01452-924
São Paulo, SP - Brazil
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Phone. + 55 61 2109 6070

contato@levysalomao.com.br