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Associative contracts: When to submit a merger filing in Brazil

Under Brazil's competition law, transactions subject to review include the acquisition of control and of minority stakes, as well as the formation of "*a joint venture, an association or a consortium*". The law does not distinguish between full function and non-full function joint ventures as regards to the duty to submit them to Brazil's competition agency, CADE.

Pursuant to CADE's enforcement practice throughout the years full function joint ventures have been generally viewed as economic concentrations and, as such, they are subject to mandatory filing if the applicable thresholds (turnover threshold and effects test[1]) are met. Conversely, non-full function joint ventures may be exempted from notification if (i) the JV does not amount to an economic concentration; and (ii) if it amounts to a cooperation among competitors that does not limit competition. This is usually the case of joint ventures and other associate contracts with a rather limited scope, where participants are allowed to act independently from each other with respect to key market-related issues (i.e., price, output, business plan, investments etc.) and are not bound by non-compete and exclusivity clauses.

While there is still significant uncertainty on determining the need for an antitrust filing of associate contracts in Brazil, particularly since May 2012, when Brazil's new competition law entered into force, and in the absence of a regulation on the subject, the agency has been providing some direction through case law. The cases discussed below highlight CADE's Directorate General (DG) recent assessment on whether the associative contracts fell under the mandatory review thresholds or not. Although the majority of the DG's decisions were not reviewed by CADE's Tribunal, they shed light on the types of joint ventures and associative contracts that are subject to mandatory filing in Brazil.

Monsanto and Bayer. In recent cases involving licensing agreements by Monsanto, CADE's DG took the view that non-exclusive licensing agreement that (i) did not contain non-compete clauses; (ii) did not provide for transfer of assets; and (iii) did not create corporate relationships (*i.e.*, shareholdings) did not constitute an economic concentration and would not require antitrust approval in Brazil. CADE's Tribunal, however, avocated the cases and ruled that (i) from a procedural perspective, the criteria to establish whether licensing agreements meet the thresholds are complex and should be further discussed by CADE's Commissioners with the purpose to promote consistency regarding its precedents; and (ii) on substance, the Monsanto transactions were subject to antitrust review in Brazil. Moreover, during the adjudication of the Monsanto cases, CADE's President stated that *"[…] the definition of a licensing agreement as an economic concentration is not related exclusively to the presence of cooperation or collaboration […] it includes more detailed considerations of the independency between the parties and possible effects that contractual clauses have on the possibility of one party to influence another on relevant contractual decisions and the way financial risk is shared*". In January 2014, CADE's Tribunal cleared the Monsanto/Bayer association under the condition that clauses that represent a barrier to entry in the transgenic seed market are excluded from the transaction agreement.

[1] Brazil's competition law provides for minimum size thresholds, expressed in total revenues derived in Brazil by each of at least two parties to the transaction. Ministries of Finance and Justice Joint Resolution No. 994/2012 established that one party must have Brazilian revenues in the last fiscal year of at least BRL 750 million and the other BRL 75 million – both acquirer and seller, including the whole economic group, should be taken into account. As for the effects' test, it is met whenever a given transaction is wholly or partially performed within Brazil or, if performed abroad, it is capable of producing effects within Brazil. This will be the case if the target to the transaction has a direct and/or indirect presence within the country. Direct presence is achieved through a local subsidiary, distributor, sales representative, etc. Although indirect presence is most commonly established through export sales into the country, we cannot rule out the possibility that CADE would consider third party sales (e.g., via a licensing agreement) as evidence of indirect presence in Brazil. In past decisions, CADE's DG concluded that the effects' test is not met when (i) the target had no activities in Brazil; (ii) there are no horizontal or vertical relationships between the parties that could affect Brazil; and (iii) the geographic market is local in scope.

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Bosch, ZF and Knorr-Bremse. In 2013, CADE adjudicated a case involving a greenfield project through a join venture entered into by Bosch, ZF and Knorr-Bremse for the provision of services to car maintenance and support shops in Europe. The DG dismissed the case based on the "effects test" provided for in the antitrust law. Although the parties to the joint venture met the statutory turnover thresholds, the joint venture was not deemed to be reportable in Brazil because (i) the joint venture would have no activities in the country or generate any revenue in Brazil; (ii) there were no horizontal or vertical relationships between the parties that could affect Brazil; and (iii) the geographic market was local in scope.

Vidigal Prado/Yasuda/Marítima. In this case, CADE for the first time assessed how to calculate the group's turnover in cases involving joint ventures. The parties argued that the acquisition was not reportable since the buyer, the seller, and the target individually considered would not meet the turnover thresholds and that CADE should not include the target's turnover in the economic group's turnover of both the buyer and the seller as this would result in double counting. CADE took a different approach and concluded that since both buyer and seller held over 20% of stock of the target, it was part of both economic groups and, therefore, its turnover should be considered for both buyer and seller.

Petrobras and MPEC Consortium. The case involved a partnership between Petrobras and MPEC Consortium, where the parties created a joint venture to offer environmental and risk management services to important consumers of oil products. CADE's DG concluded that a filing was mandatory, highlighting that although the parties would remain structurally and economically independent, they would jointly develop an economic activity and that could lead to elimination or reduction of competition in the affected markets. Moreover, the transaction agreement included an exclusivity clause preventing the companies from individually providing environmental and risk management services outside the partnership, which was considered a potential antitrust issue by CADE.

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