

## Gun Jumping: Lessons Learnt from CADE

Brazil's competition law (Law No. 12,529, of 30 November 2011), which entered into force on 29 May 2012, introduced a mandatory pre-merger notification system, aligning the Brazilian rules with international best practices. Under the current regime, transactions that meet the mandatory filing thresholds cannot be completed prior to receiving clearance from the competition authority (the Administrative Council for Economic Defense – CADE).

Penalties for “gun jumping” include fines ranging from BRL 60,000 (roughly USD 18,000) to BRL 60 million (roughly USD 18 million) and the transaction may be also declared null and void by the authority.

CADE's Internal Rules state that “[t]he parties should maintain their physical structures and competitive conditions unaltered until CADE's final approval, any transfer of shares or any influence of one party over the other's business being prohibited, 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.” Furthermore, Resolution No. 13/2015 sets forth the procedural aspects governing gun jumping investigations, establishing that the review on the merits shall be suspended while the gun jumping incident is pending. Finally, on May 2015, the agency launched [non binding guidelines](#) outlining its interpretation on (i) the definition of gun jumping and the activities that can lead to it; (ii) specific procedures to avoid the practice; and (iii) the applicable sanctions.

Since the first gun jumping case adjudicated by CADE in August 2013, the authority has reviewed other twelve cases, finding violations in nine of them. Fines imposed ranged from BRL 60,000 (roughly USD 18,000) to BRL 30 million (roughly USD 9 million), and the cases involved sectors as diverse as car manufacturing, oil and gas exploration and canned vegetables. The main aspects of those decisions are set out below.

**Settlements.** Seven out of the nine cases where a violation was found were resolved through settlement – the so-called Settlement on Merger Control, ACC in its Portuguese acronym – with proceeds directed to the Diffuse Rights Defense Fund. In such cases, CADE's Tribunal has also imposed to the parties obligations other than those set forth by the law. For example, in the Goiás Verde/Brasfrigo case, adjudicated on 22 April 2015, it was decided that the buyer could not use a certain brand (Jurema) neither create new ones for the canned corn, canned peas and mixed vegetables markets during a two-year period, which equaled the amount of time the parties failed to communicate the transaction to the antitrust authority. Those conditions were required even though the transaction did not raise any antitrust concern. According to CADE, their aim was primarily to deter gun jumping practices.

**CADE's clearance as a contractual condition precedent.** In some cases (OGX/Petrobras, UTC/Aurizônia and UTC/Potióleo), the absence of CADE's clearance as a condition precedent to the transaction led CADE to assume the existence of gun jumping.

**Fine/monetary contribution calculation.** CADE's guidelines note that the agency should consider the following factors when calculating the amount due: (i) the transaction context (mostly whether it was voluntarily submitted or not and whether it had already been consummated or not at the time of the submission), (ii) the nature of CADE's decision (veto, conditional clearance or unconditional clearance), (iii) the amount of time since the transaction has been consummated; and (iv) the economic status of the parties. The guidelines do not indicate what weight should be given to each of these factors, and in practice the Tribunal has considered the value of the transaction as a basis for calculation of the fine in merger and acquisitions cases. In the Blue Cycle/Shimano case, which referred to a joint venture formation, reviewed on 17 August 2016, the agency indicated that the share capital and the joint venture revenues could serve as a basis for calculating the amount due.

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Finally, during the same session, CADE's Tribunal reviewed the JBS/Tramonto case, involving the failure to submit a leasing contract, and applied a non disclosed percentage to the value of the transaction plus an additional 1% increase for each year the parties failed to notify the transaction. CADE has collected over BRL 35 million (roughly USD 11 million) in gun jumping cases to date.

**Declaration of the transaction as null and void.** In gun jumping cases, the transaction may be also declared null and void by the authority. Such sanction has often been rejected by CADE due to its high social costs, mainly related to the difficulties associated to the dissolution of complex deals and the interests of third parties acting in good faith. Another aspect taken into consideration is the parties' financial situation (eg, in OGX/Petrobras and JBS/Tramonto, some of the parties were at a pre-bankruptcy stage). In the Gaslocal/Gasmig case, CADE made reference to the essentiality of natural gas supply public services to justify the non-imposition of the sanction. Finally, in the Blue Cycle/Shimano case, although the transaction itself was not declared null and void, the Tribunal decided to direct such sanction to a key supply agreement associated to the transaction until the review on the merits of the transaction was concluded.

**Conflicting positions within CADE.** Given the novelty of the subject and the absence of settled case law, it is not uncommon for the Directorate-General (DG) and CADE's Tribunal – and even CADE's Commissioners amongst themselves - to have conflicting positions. For example, during the session held on 17 August 2016, the Tribunal found that a down payment of 20% of the value of the contract would not amount to gun jumping, contrary to the DG's view on the issue (Hypermarcas/Reckit Benckiser). During that same session, the majority of the Tribunal's members disagreed to the BRL 5 million (roughly USD 1,5 million) fine proposed by the Reporting Commissioner, reducing the amount to BRL 1,5 million (roughly USD 500,000), due to proportionality concerns (Blue Cycle/Shimano).

**Carve-outs and other arrangements not previously agreed with CADE will not be accepted.** The need to urgently close a transaction was a justification presented in two gun jumping cases before CADE (Fiat/Chrysler and Cisco/Technicolor). The Brazilian authority rejected the argument, indicating that, in such cases, the parties are rather expected to formally request a derogation under CADE's Internal Rules. Furthermore, in the Cisco/Technicolor case, the agency indicated that carve out agreements in global transactions aiming to exclude from closing the jurisdictions where the antitrust review is pending would still amount to gun jumping and would not be taken as a mitigating factor when sanctions are to be imposed. In this case, CADE imposed the record fine of BRL 30 million (roughly USD 9 million) to indicate the seriousness of the violation.

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