Economic Groups in CADE Case Law and New Brazilian Competition Regulation

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When ruling the proposal for a Cease and Desist Agreement (TCC) prepared by Unimed Araraquara, as it did not meet the convenience and legal requirements to conclude the agreement, CADE emphasized the need to check case law for the definition of economic group, and ordered the Attorney General Office (ProCADE) to execute Unimed Brasil provided services to other healthcare plans. In this case, CADE emphasized the need to check case law for the definition of economic group, and ordered the Attorney General Office (ProCADE) to execute Unimed Brasil's decision regarding the ongoing proceedings in the public interest, as it considered there was no party liable to be held jointly or severally liable to the other cooperators of the Internet network for competition violations practiced.

Based on that, there is an important underlying question: Will CADE be focusing on both the de facto and legal qualification of economic group? At times, instead of considering only the company that satisfied the economic system of companies that satisfied the merger regime. CADE has considered the economic group as an entity, which, in practice, enables greater access to the market for the economic group as a whole, thus enabling the company to react against the market system, at which time the liability becomes joint and not just a financial investment. This way, one may say that the approval of the economic group is now more than ever a crucial tool in the competition arena.

The topic is back on the agenda of CADE in the cases Grupo Amil/Casa de Saúde Santa Lúcia and CSN/Usiminas, at which time the Council concluded that the minority stake among dominant groups – where there could be impacts on competition, such as decreased rivalry – or simply a mere investment.

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The definition of economic group is not recent news at CADE. However, both the current law and the NBAL are silent as to its definition. This fact, together with the various types of relationship among companies, makes it necessary to analyze the concept in various contexts. It is not uncommon for companies to take over competitors to ensure the quality of their products or services, but is the (de facto) control exercised by these companies on the target companies a control that should be analyzed from the point of view of the power that could influence relevant market decisions, such as price and output strategies, in specific areas (in this case, telecommunication) and in a selected market.

Regarding item (ii) above, by adopting an objective criteria for defining economic group and considering the whole and the notion of equity interest acquired, CADE is following a presumption that 20% is sufficient to justify the ability to have real interference in the company, therefore resulting economic concentration and not just a financial investment.

CADE’s focus on the cases involving economic groups, along with the changes brought by the Bill (law as of there on the Resolution No. 02/2012), makes it clear that the relationship between self-aligned companies and companies about to change. With that, one should focus on the real fact, that, with the pre-merger analysis, the "clock will tick" for the proposal of merger filings described in the NBAL as well as the concept of economic group. According to the Resolution, the following shall be considered as part of the same economic group: (i) items "i" owns directly or indirectly at least 20% of equity interest.

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