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“Gun Jumping”: The New Antitrust Risk for M&A Transactions in Brazil

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Published on November 30, 2011, Law No. 12529/11 (the New Brazilian Antitrust Law – NBAL) has been the object of criticism and skepticism by players from several fronts. In short, important matters such as the challenge of structuring and training the staff of “Super CADE”, and “innovations” in the procedural arena may lead to disputes in the judiciary branch, for instance, whether the tacit approval from the running of the timeframe would or not become void. To better clarify: the law in force (Law No. 8884/94) determines that a case is automatically approved once the 60 days term, counted from the merger filing at CADE, has expired.

Despite intense dispute about the NBAL, not much is mentioned about “gun jumping”, which is considered to be “something that will raise no concerns”, according to the NBAL governing authorities. In fact, this refers to an important matter to be considered by private players that intend to carry out business operations (consolidations, mergers, and so on) once the NBAL becomes in force (in June 2012).

The current system counts on ex post analysis, where the parties to a transaction of mandatory submission would basically be concerned with two main risks: (i) the merits of the operation, i.e., if the operation generates excessive concentration to the extent of raising an unfavorable decision from CADE (from imposition of various conditions – such as in the *Sadia/Perdigão* case – 2011, to the highest possible level of rejecting the operation – such as in the *Saint-Gobain/Owens Corning* case – 2008); and (ii) the untimely notification of the operations (fines from R\$ 120 thousand to R\$ 12 million), taking into account that they must be notified within 15 working days from their performance, or “signing” (according to CADE case law, the performance takes place upon execution of the first binding documents between the parties). From 1998 to 2002, untimeliness was the cause of the large majority of the fines applied by CADE when forming case law on what would become “the first binding document”.

As to the risk of merits, the parties, whilst relying on the legal provision that the effectiveness of the deal would depend on CADE’s approval (Law No. 8884/94, article 54, paragraph 7), would accelerate the consummation of the deal (by incorporating shares, unifying managements, dismissing employees etc.) purely as a response to the economic incentives of the deal (i.e., receiving the price and transferring control over the object of the deal). This fast development, as a consequence, ends up creating an irreversible condition in most cases (“irreversible fact”), which would make a future decision on restraints or rejection from CADE less effective.

Aiming to adjust the incentives, in mid 2002 CADE created tools in the form of the Injunction and the Operation Reversibility Preservation Agreement (APRO), through which high risk deals in terms of competition were frozen through an injunction, preventing the parties from consummating the deal prior to CADE's analysis and judgment. Even so, the issue of the "irreversible fact" was not completely solved, mostly because of: (i) the flexibility of the APROs and Injunctions from CADE throughout the fact analysis of the case; (ii) the difficulty to monitor compliance with the requirements determined on the Injunctions and APROs; and, as a consequence, (iii) the constant failure from economic players to comply with such measures.

With the aim of absorbing the international model (USA and EU) to control structures, the NBAL implemented the prior analysis, or prior control system (*ex ante / a priori*) of business transactions. In this prior control, the operations cannot be consummated before CADE's final ruling (Article 88, of the NBAL – something similar to the known concept of "prior consent" from the regulated sectors, such as telecommunications and transports). Therefore, in addition to the risk related to the merits of the deal, i.e., the risk of CADE approving the deal with restrictions or even rejecting the deal, the economic players have to face what is internationally known as "gun jumping".

"Jumping the gun" (or "gun jumping") is the practice of consummating the deal (or "closing the deal", in opposition to "signing the deal") before the antitrust agency manifests itself for or against it. The international experience, which will probably serve as grounds for CADE's case law, lists some examples of "gun jumping": irreversible measures, or measures hard to reverse, such as the allocation of clients, interruption of competitive marketing between the parties, unification of management, sharing of price information, production capacity and trade strategies (*Gemstar/TV Guide*, 2003 and *Qualcomm/Flarion*, 2006, both cases in the USA); actions that change incentives between players, such as the commercialization of products of the acquired company by the acquiring company (*Bertelsmann/Kirch/Premier* case, 1998, EU); unification of power within companies, such as failing to make business and offering discounts arising from the possible closing of the deal (*Computer Associates / Platinum Technology* case, 1999, USA); sharing trade secrets (e.g., client portfolio, prices, strategies and others) for reasons beyond the due diligence questions (*Gemstar/TV Guide*, 2003, USA).

In addition to the high fine (varying between R\$ 60 thousand to R\$ 60 million) should a deal be consummated before receiving CADE's decision and given the nature of the factors considered to consummate a deal, the deals could be declared as null, and the parties can undergo an investigation for cartel formation. For example, in horizontal concentration deals (between competitors), the sharing of information such as client portfolio, prices, etc., may immediately change the incentives of the parties to compete between themselves. In this sense, a good way to avoid this risk would be to always consider the following question: "what would you tell your competitor if there was no ongoing deal?"

As the authorities in charge of governing the matter have already stated that they will leave it up to the case law to find the limits for the "gun jumping", Brazil, in the first period of the NBAL's enforcement, will face a (possibly hard) process of growth and cultural change in which the risk of "gun jumping" will be possibly bigger at times than the risk of the merit itself. For this reason, it is advisable that during the this initial period of the NBAL, the economic players adopt, whenever possible, more conservative measures as to ensure that deals that have been notified to the SBDC are not consummated.

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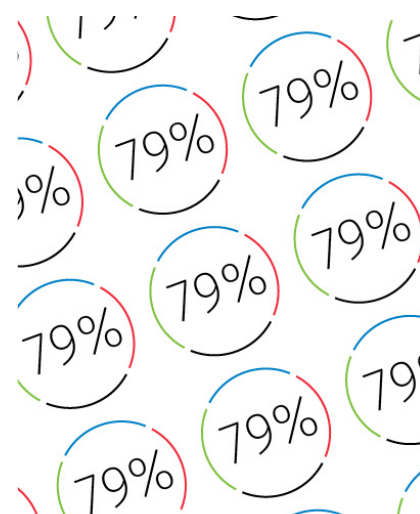
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