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Economic Groups in CADE Case Law and New Brazilian Competition Regulation

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At the end of 2011, the Administrative Council for Economic Defense (CADE) rejected a proposal for a Cease and Desist Agreement (TCC) prepared by Unimed Araraquara, as it did not meet the convenience and timeliness required by the Council. The administrative proceeding, subject matter of Unimed Araraquara's attempt to execute a TCC, was filed by the Secretariat of Economic Law (SDE/MJ) in 2007, in view of signs of an alleged practice of discriminated fees to boost exclusive cooperation from its members in case they also 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 regarding all the ongoing proceedings in the judiciary branch, as it considered Unimed Brasil jointly liable before all the other cooperatives of the Unimed network for competition violations practiced.

In the ordinary trial session of CADE held in April 2012, three council members approved the deal (Grupo Amil/Casa de Saúde Santa Lúcia) limited to Amil Group's disposal of its stake in the capital of Medise, a company of the FMG Group. The decisions arose from the following claims: High level of concentration, insufficient entry and rivalry in the hospital medical services industry in the municipality of Rio de Janeiro. In essence, the failure to comply with the definition of economic group – already determined by CADE case law – was particularly emphasized by the council members that were against the deal. The case is still pending a final position from CADE's Plenary.

In the same trial session, CADE unanimously approved a provisional remedy in the CSN/Usiminas case (acquisition of Usiminas shares by CSN), at which time it vetoed CSN's purchase of new Usiminas shares and suspended any rights that CSN and its group companies held in view of the shares belonging to them, except for the receipt of dividends. Although the discussion, in this case, is related to stock ownership in a direct competitor, CADE conservatively considered that the companies of the CSN economic group could not enforce any rights arising from shares belonging to them.

Based on that, there is an important underlying question: Will CADE be focusing on both the *de facto* and legal qualification of economic groups? At these times, instead of considering only the

company that violated the economic system or companies that submitted Merger Filings (ACs), CADE has considered the economic group, *de facto* and legally, to which they belong, which completely changes the initial scenario, be it when making the company liable for violations against the economic system, at which time the liability becomes joint before the economic group, be it when analyzing the market concentration related to the companies involved with M&A transactions.

With the new Brazilian Antitrust Law (NBAL), these matters will be even more important, as the parties will need to pay more attention when submitting the deals before the Brazilian Antitrust Authorities (SBDC), as the deal effect (AC) analysis will be prior to the consummation of the deal, and the companies may only become part of their assets after CADE's approval.

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 the definition of economic group to have different nuances. For the Antitrust Law, which aims to ensure a safe environment to the competition and consumers, the economic reality overcomes the formal content. In the Ideiasnet/Flynet case (February 2006), for instance, CADE held that to qualify an economic group it should focus its analysis on the power of those that could control or influence relevant market decisions, such as pricing and economic strategies, in specific areas (like R&D and sales) and in a centralized fashion.

When ruling the proposal for a TCC filed by Unimed Araraquara (December 2011), the Council concluded that two elements must be present to define an economic group, to wit: (i) maintenance of the personality of the participating companies; and (ii) existence of a central competition guidance (the presence of a central decision-making unit that impacts the competitive strategy of the group and from which other members of the economic group expect performance).

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 indicated the need to assess minority stakes in a context, that is, if there is a minority stake among dominant groups – where there could be impacts on competition, such as decreased rivalry – or simply a mere investment.

Even before CADE's case law, on May 29, 2012, CADE passed Resolution No. 02/2012, which, among other things, regulates the notification 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) companies under the same control, internal or external; and (ii) companies in which any of the companies of item "i" owns directly or indirectly at least 20% of equity interest.

Regarding item (ii) above, by adopting an objective criteria for defining economic group and considering the *intent* and the *volume* of equity interests acquired, CADE is typifying a presumption that 20% is sufficient to qualify the ability to have real interference in the company, therefore constituting economic concentration and not just a financial investment.

CADE's focus on the cases involving economic groups, allied with the changes brought by the NBAL (one of them on the Resolution No. 02/2012), makes it clear that the relationship between antitrust authorities and companies is about to change. At first, one should focus on the fact that, with the pre-merger analysis, the "*clock will tick*" against the companies, because as a rule they aim at approving the deal in the shortest time possible to then include them in their assets and get

the expected synergies. This way, the more cooperation with the authority, the better and faster will be its analysis. In other words, one may say that the approval request of mergers filed with CADE, as regards the information and documents required for its analysis, should have the best content available at the time of the request in terms of quality and quantity so that the deal is unconditionally approved by the Superintendence or by the Tribunal (both in CADE's realm), as fast as intended. If not, the authority may require, in short, its amendment, under penalty of shelving of the case, or determine the conduction of a supplementary investigation (discovery), specifying the inspections to be made, which will postpone the conclusion of the case.

In addition, any attempt to practice consummation acts before the approval of the antitrust authority ("gun jumping") may lead to fines varying between R$ 60 thousand to R$ 60 million and/or the cancellation of the deal. Moreover, the exchange of commercially significant information between the parties before the authority's approval of the deal may lead to the qualification of cartel according to the circumstances of each case. This way, the parties will have to be more transparent when submitting mergers to avoid risks.

Being clear and building a trustworthy relationship between the authority and the parties will be more than necessary for the new SBDC to be able to share with society the expected economic efficiencies on the new system. If not, the undesired effects of an *"arm wrestling"* with the authorities may affect society as a whole.

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