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1. Introduction

1. Competition authorities around the world adopt safe harbours² for merger analysis, be it at the case submission phase or for deepening the analysis of notified matters. Safe harbours are commonly adopted to create objective and easy to understand criteria that permit separating the operations that raise major competition concerns from those with a minor potential to harm competition.

2. The use of safe harbours is common and increasing in Brazil. The New Brazilian Competition Law N° 12.529/2011 adopts the 20% market share criteria as an assumption of dominance in investigations regarding abuse of market power. However, the bill also mentions the possibility of adopting higher thresholds of market share to indicate dominance in certain economic sectors. In recent years, the latter has been increasingly used in opinions and votes.

3. Besides that, other criteria are used, in bigger or lesser extent, as the Herfindahl–Hirschman Index (HHI)³, C4⁴, or the adoption of thresholds to be used together with qualitative aspects. The trend is the more intense use of these criteria in order to make the analysis faster and more efficient. This is because of the increase in the number complex operations, which require a cost-benefit analysis to comply with the mandated timelines stated by Law⁵, and, above all, to deliver better results to Brazilian society through CADE's analysis.

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² The definition adopted in this article is the one suggested by OECD in this roundtable, which is: “these are rules that preclude a finding of a competition infringement and/or make it unnecessary to assess market circumstances in order to find a conduct lawful if certain pre-determined conditions are met (e.g. the company does not enjoy a certain degree of market power, or its market share is below a certain threshold). Safe harbours are particularly relevant in merger control, where they serve as screens regarding transactions that are unlikely to prove problematic, and in vertical relationships, where they identify situations where vertical restrictions are unlikely to produce foreclosure or other anticompetitive effects” (OCDE, COMP/2017.224).

³ The HHI - Herfindahl–Hirschman Index is calculated by squaring the market share of each firm competing in the market. The result of the sum of these squares is the HHI of the market, and there is a comparison of the situations prior and after the analysed merger. The HHI levels and its resulting variation are compared to a default analysis criterion. CADE used to adopt the criteria set by DOJ/FTC from the United States and from European Commission until 2016. Since then, CADE's guidelines for the analysis of previous consummation of merger transactions brought parameters for the use of HHI, which are similar to those used by DOJ/FTC.

⁴ Concentration ratio of the four biggest players in the market

⁵ The term for merger analysis in Brazil is up to 240 days, extendable for 90 more days. For fast track eligible cases, which represents about 85% of CADE's decisions, the stated term is 30 days.

4. The current scenario and the projected future use of safe harbours in merger case analysis by CADE are presented throughout this article.

1.1. The use of *safe harbours*

5. Using certain criteria to identify mergers which require analysis is a common practice among competition authorities. The goal is to set up a filter in order to direct the use of public resources to the analysis of merger cases that raise more competition concerns, rather than to the ones that have no or little possibility to harm market competition.

6. Some competition authorities use only revenue as a criterion to determine the need to notify mergers, varying regarding the amount and the parties that must accomplish the established criteria. Other authorities use both revenue and market share, as independent criteria, to determine the need to notify merger transactions. After the notification, the authorities establish criteria to separate the cases with more potential to harm the competitive environment from those that, despite the need to notify, do not raise competition concerns. These criteria, once more, vary among countries authorities.

7. The former Brazilian Competition Law, N° 8.884/1994, valid until 2012, established two parameters for submitting “acts, by any mean manifested, that could limit or harm by any means the free competition or result in the abuse of dominance of relevant good or service markets⁶”. The two criteria to check this were: (i) if any of economic groups involved in the merger have revenue of more than 400 million Brazilian Reais⁷ in the year before the operation or (ii) the operations resulted in a market share of more than 20%. The New Brazilian Competition Law, N° 12.521/2011, extinguished the 20% market share as a criterion that entails the need to notify merger operations. In addition it has included the need for another economic group involved in the merger to have a certain level of revenue in the year before the operation. Currently, this criterion is revenue-based, in the year before the operation, of at least 750 million Brazilian Reais by one of the economic groups involved in the operation and of at least 75 million Brazilian Reais⁸ for another.

8. Although there had been changes in the criteria that entail the need to notify merger operations, the criterion that defines dominance was not changed. CADE is using the market power threshold, which is 20% share of the relevant market affected by the merger operation, stated by former and maintained in the New Brazilian Competition Law to separate the cases identified as ‘summary’ from those identified as ‘ordinary’. According to the current analysis template, if the combined market share is below 20%, the company can notify the merger using the so-called ‘simple’ form and the timeline for CADE’s analysis is up to 30 days⁹. On the other hand, if the market share is above 20%, the company must use the ‘complete’ form (besides particular exceptions), in which is

⁶ Art. 54 of Law No. 8.884/1994

⁷ Approximately US\$ 123 million, as of December 31st 2016.

⁸ Approximately, respectively, to US\$ 230 million and US\$ 23 million, as of December 31st 2016.

⁹ Market share must be proved by the company with estimates from reliable data; if the company is not able to present the estimates or CADE does not agree with the methodology used, the notification must be complemented with the fulfilment of the complete form, besides particular exceptions.

necessary to present detailed information related to entry stages and rivalry in the relevant markets affected by the operation, in addition to other information on competition matters.

9. However, experience under the validity of the former Brazilian Competition Law shows that a detailed analysis of all operations with a market concentration above 20% requires enormous analytical efforts on evidentiary and judgment phases. This occurs mainly with sectors in which the relevant market definition is local, delimited by radius (in kilometres or minutes) or limited to a neighbourhood or a municipality, for example. Operations that involve medium or big companies can entail the analysis of dozens or even hundreds of relevant markets and, in many of those, there are no reliable market share estimates¹⁰. Thereby, the case study can become not only complex but also laborious in terms of information search, even when the companies involved in a merger provide all the necessary information for the case analysis. In other words, data gathering from third parties becomes costly for the competition authority and for the parties involved in a merger operation, resulting in an unnecessary burden that should be avoided considering that the State should not obstruct the proper functioning of its economy.

10. Notwithstanding, the New Brazilian Competition Law allows CADE to modify, for certain economic sectors, the market share threshold that sets up a dominance situation as stated below:

*Art. 36. § 2º A dominance position is presumed when a company or a group is able to change, unilaterally or coordinately, the market conditions or when it detains 20% or more of a relevant market share, a threshold that CADE can change for specific economic sectors.*¹¹

11. In recent years, given the growing merger trend in sectors where the relevant market definition is local, as retail, education, and health, for example, and that Brazil has more than 5.5 thousand municipalities, the more complex analysis scenarios showed it off increasingly often. Meanwhile, safe harbours of higher market share threshold have been increasingly used in CADE's decisions during this period. This is to proceed for the next stages of analysis, applying, even without mentioning, the possibility opened by article 36 of the New Brazilian Competition Law. Questions coming from this scenario are hereafter discussed.

2. Risks and benefits of *safe harbours*

12. The definition of higher *safe harbours* in the stage of market share assessment aims to focus the analysis of entry and rivalry in the cases that have more probability to exhibit anti-competitive issues. Thereby, the analysis tends to be faster because it allows deepening the examination in the cases that can, indeed, create competition issues. This occurs because, with the reduction in the number of markets that entices binding analysis prior to the next evaluation stages, there is a necessity of a lower data set, usually hard to

¹⁰ In the education sector this is especially critical, because CADE states that each course is a product for the relevant market and each education unit acquired is defined as a geographic market. Thus, an operation that involves, for example, the acquisition of 5 colleges, each one with 30 courses, results in 150 different relevant markets.

¹¹ Law 12.529/11. The former Brazilian Competition Law had the same legal rule, on its art. 20, §3º

obtain (especially from third parties) and to deal with (notably when econometric techniques are used). Another benefit of the use of higher *safe harbours* is to provide more predictability to the market because it indicates which concentration levels raise concerns to the competition authority.

13. The benefits stated above must be weighted with the concerns due to the use of this strategy. The first of them is the delimitation of *safe harbours* based on the cases in which there were no in-depth market analysis, like in those cases that, however not fast-track eligible, still do not raise major competition concerns for several reasons. These operations result in a joint market share that can be considered intermediate, that is, operations that are not eligible for fast track, but the concentration level allows the participation of other big economic agents that can challenge the dominant position of the parties involved in the operation. Thereby, these concentration acts are usually approved in Brazil without deepening the analysis on market conditions, especially in the markets in which CADE has a more solid jurisprudence, or a previous knowledge on how those markets operate. These approvals are based on some market indicators, like the evolution of market share, the existence of spare capacity, customers and competitors' opinion. However the undertaken analysis can fit the specific situation, this might not occur in future cases. It is possible to evaluate only by means of a dynamic competition analysis of the affected market.

14. The second issue is due to the possible lost capacity of seeing the operation as a whole, resulting in specific remedies when the competition issue is in the entire operation. The establishment of higher *safe harbours* can lead the authority to a detailed analysis of a small number of markets and, thereby, to evaluate specific remedies for these markets. The issue would, actually, be diverse if there had been a joint analysis of several markets with smaller market share levels compared to those established by *safe harbour*. For example, markets in which economies of scale play a major role or in which purchase power is feasible can exhibit those issues.

15. Regarding the first example, companies involved in a merger can have economies of scale that unbalance the market dynamic competition as a whole¹², which is not perceived if a *safe harbour* is established and the competition issues seem to be limited to local markets or few products. Thereby, a competition analysis of the impact of the whole operation would be necessary, not confining to the relevant markets that have high concentration levels. In the second example, the analysis of the potential effect of the purchase power due to the merger or acquisition can be harmed with the establishment of higher *safe harbours*, because the capacity of the company to practice it can be underestimated when the markets which evaluation were not deepened are not taken into account.

16. A third issue arises from the establishment of high *safe harbours* in sectors in which there is no precise definition of relevant markets or that possess different market share means of calculation¹³. As a result, the market shares might not be an adequate indicator of the competitive dynamics of that market, leading to under or overestimation

¹² This does not mean that huge differences between competitors is an issue by itself, because companies can act in different markets and show off different sizes in each of them

¹³ OECD stands out that difficulties in defining the relevant market can harm the settlement of market shares that reflect the actual market power of a given company. In that case, the use of other criteria is recommended for not biasing the analysis. (OECD. Market Definition. Policy Roundtables. 2012).

of the market shares of the economic agents involved. This might occur due to the unavailability of reliable data (a common issue in Brazil), to the existence of product differentiation of difficult market segmentation, different market share means of calculation that exhibits diverse outcomes in terms of concentration levels, the presence of mavericks, among others. Therefore, the adoption of higher *safe harbours* can lead the authority to clear some operations that are actually more likely to generate abuse of market power. In other words, too high *safe harbours*, not gauged for certain operations, can engender the occurrence of false-negatives. A mean to minimize this risk is to establish more conservative relevant market definitions, be product or geographic, and consider those competition issues when evaluating the effectiveness of the rivalry in the affected relevant markets, as CADE is doing. Thus, the risk of not analysing the anticompetitive potential of the agents with dominant position is mitigated.

17. Thereby, considering that the New Brazilian Competition Law determines 20% as the threshold for dominant position, this percentage has been used as basis for filtering the cases considered of low potential damage from those that must go through a deepened analysis. Next, there will be some considerations regarding the use of this percentage and other *safe harbours* in specific cases in Brazil.

3. Appliance of safe harbours by CADE

3.1. Fast tracks and non-fast track proceedings

18. Merger acts must be submitted to CADE if they meet some revenue criteria, as stated in the last topic. Meeting those criteria, the parties involved must notify the operation by filling the form provided on CADE's website. There are two forms: a more simple one, for the operations with less risk of exhibiting competitions issues, and another more complete, for the operations that do not meet the criteria to be framed in the first case. The first situation cases are called "fast tracks" and the second situation cases are called "non-fast tracks".

19. The operation eligible to be fast tracks are those that meet at least one of the following requirements:

- Classic joint-venture or cooperatives;
- Economic agent substitution;
- Horizontal overlapping below or equal 20%;
- Vertical integration with market share below 30% in both of the vertically involved markets;
- An absence of causality nexus, understood as horizontal merger with HHI of less than 200 points, provided that market share is below 50%.

20. These requirements are not binding to the authority and CADE can analyse as fast tracks other cases that, in spite of not matching these criteria, are considered simple enough so as to not require the filling of the complete form. On the other hand, even meeting those criteria, the authority might opt for a more detailed analysis, depending on the specific situation. For example, operations involving markets under cartel investigation (or even with recent convictions) or Mavericks' acquisitions.

21. It is worth highlighting that, without consulting CADE, the companies are responsible for the initial indication of the category in which its cases' fall. After the

notification, the General Superintendence, CADE's unit responsible for the initial phase of merger acts, can change the category from fast track to non-fast track, if it concludes that the operation does not meet the above-listed requirements or it raises issues that lead to a more thorough analysis.

22. The benefit of having an operation qualified as fast track is big. In this case, besides from the necessity of filling an extremely simple form, with few market information, the timeline for a final decision is 30 calendar days, with no possibility of suspension. In the first semester of 2017, the average length of a fast track analysis was 16 calendar days, compared to 80 calendar days of the non-fast track ones. About 85% of cases have been analysed under the fast track model, that is, observing this average term. A significant part of the cases fall under fast track due to market share below or equal 20%, when there is horizontal overlapping, or 30%, when there are vertical integrations. These thresholds are used as a "first safe harbour" given the number of cases which analysis are not deepened.

23. On the other hand, qualifying a merger as non-fast track does not necessarily means that it is complex. In this situation, sectorial units will evaluate the operation complexity and may do a more simple evidentiary stage, in the situations of low probability of competition issues, or a more complex one if it identifies elements that indicate, during the initial or evidentiary stages, that the operation arouses competition issues. In the first cases, statistic or econometric tests are rarely used. In the later, those tests are largely used.

24. Considering that the 20% threshold divides the fast track cases from the non-fast track ones, in other markets CADE has been adopting other safe harbours to focus its analysis on the cases that are more likely to negatively affect the market. Hard goods retail¹⁴ and education are the two markets where higher safe harbours are used. This, however, has been used in other retail markets, such as gas, medicines, and toys, besides of healthcare plans.

3.2. Hard goods retail

25. Table 1 below sums up the safe harbours used in four recent operations that involved the hard goods retail sector. In all of the cases, thresholds different than the 20% stated by the New Brazilian Competition Law were used as indicators of the companies' dominance position. After a detailed analysis of the operation of the hard goods retail sector, CADE concluded that it would be possible to use less strict criteria when analyzing the market share. The main noted benefit was efficiency improvements when focusing the evaluations only in those relevant markets more likely to harm competition.

Table 1. Safe harbours hard goods retail sector

Merger	Market	Thresholds
08012.004857/2009-18 e 08012.010473/2009-34: Companhia Brasileira de Distribuição e Globex Utilidades S.A; Companhia Brasileira de Distribuição e Casa Bahia Comercial Ltda.	Hard goods retail	Uses 40% of market share in each relevant market as a threshold for the result of the operation.

¹⁴ CADE includes in the market of hard goods retail all the companies that supply a given set of products, such as television, furniture, washing machine, etc. Thus, even supermarkets can be included in this market, as long as they offer the established set of products.

08012.006107/2011-03: Magazine Luiza S.A., BF PAR Utilidades Domésticas Ltda. e BF Utilidades Domésticas (Lojas Baú da Felicidade)	Hard goods retail	Uses 40% of market share in each relevant market as a threshold for the result of the operation.
08012.004168/2010-47Lojas Insinuante Ltda. e Ricardo Eletro Divinópolis Ltda.	Hard goods retail	Adopted for physical shops. A situation where two big competitors have more than 20% of market share puts aside the need to deepen the analysis
08700.009587/2012-89: Cybelar Comércio e Indústria Ltda. Requerente B: Lojas Colombo S.A.	Hard goods retail	Adopted for physical shops. A situation where two big competitors have more than 20% of market share puts aside the need to deepen the analysis

Source: Own elaboration

26. Even considering that some of these thresholds are different, they indicate that CADE is willing to use less strict safe harbours aiming to turn the cases' evidentiary stages less costly. The mergers 08012.004857/2009-18 (Companhia Brasileira de Distribuição e Globex Utilidades S.A) e 08012.010473/2009-34 (Companhia Brasileira de Distribuição e Casa Bahia Comercial Ltda) were analyzed together and the use of a higher threshold for market share evaluation made unnecessary a deepen analysis in 49 out of the 166 under investigation.

3.3. Education

27. Table 2 below sums up the filter used in four operations related to the education market, being two in the market of higher education (colleges), one in language and technical schools market and another in preparatory schools for public tenders. In three of them, a threshold higher than 20% was used while in one of the situations, the market share filter was used in the rivalry stage.

28. The filters used varied from 30% to 50% of market share. In some cases, the settled filter allowed a substantial reduction in the number of relevant markets to be analyzed. In the operation in the language schools market, for example, a threshold of 50% was used, which reduced the need for investigation from 101 to just 23 municipalities.

Table 2. Threshold in the education sector

Companies	Relevant markets with the use of thresholds	Thresholds
08012.008694/2011-67. Anhanguera Educacional Ltda. e UNIFEC - União para a Formação e Cultura do ABC Ltda. (Universidade do Grande ABC - UNIABC)	Classroom Undergraduate programs	Adopts a filter of 30% and other competitors with high market share.
08012.001613/2012-89. Sociedade Educacional Amazônia (atual Estácio) e Associação Educacional da Amazônia	Classroom Undergraduate programs	The need to deepen the analysis dispels when there is at least one competitor bigger than the applicants.
08012.006400/2011-62. Anhanguera Educacional Ltda., Sociedade Educacional de Belo Horizonte Ltda. e Praetorium Instituto de Ensino, Pesquisa e Atividade de Extensão em Direito Ltda.	Preparatory schools for public tenders	Uses 50% of market share in each relevant market as a threshold for the result of the operation.
08012.006927/2010-14: Multi Brasil Franqueadora e Participações Ltda., CPM Distribuidora e Editora Ltda., Anhanguera Educação Profissional Ltda. e José Carlos Semenzato (Wizard, Skill, Yázigi, etc)	Technical schools with emphasis on languages	Uses 50% of market share in each relevant market as a threshold for the result of the operation.

Source: Own elaboration

3.4. Comments on the use of safe harbours in education and hard goods retail merger cases

29. The merger cases' description in the previous topics shows that safe harbours are being used in education and hard goods retail markets from different perspectives. Generally, it may find that, in the cases related to hard goods retail, the safe harbours are being settled after a detailed analysis of the state of markets competitiveness. Meanwhile, in the cases related to the education sector, the safe harbours are based on previous CADE decisions regarding the sector. The consolidated jurisprudence points out that even in high market share situations, close to 50%, operations with this concentration level generally do not raise major competition concerns, due to the effectiveness of the rivalry of the competing companies.

30. However, the use of recent jurisprudence as a foundation to the settlement of higher thresholds in the education market raises the previously discussed concern related to the use of safe harbours: the risk of losing the overview of the operation as a whole. This does not mean, on the other hand, that the filters used were not adequate, but that the use of such high levels (50% in two cases) in markets not enough studied can cover-up competition issues not faced in previous decisions.

31. With this in mind, the issue has been tackled in more recent cases by the authority, like the merger involving Kroton and Estácio (merger 08700.006185/2016-56) in the higher education market. Although the performed analysis has used safe harbours in the exam of the municipal (local) relevant market, with many municipalities below the settled level, CADE concluded that the operation exhibited broader competition issues. Hence, the theory of potential competition and conglomerate analysis were used, putting aside the safe harbours used in previous cases. As a result, the authority disapproved the operation in 2017.

4. Concluding remarks

32. CADE has been using thresholds to separate the simple cases, fast tracks, from those non-eligible for fast track, that demand a more deeper analysis. Even in those cases, CADE has been using complimentary safe harbours in some markets to make all the analysis process more efficient. Examples of this situation are the cases of the markets of education and hard goods retail, in which the definition of the geographic relevant market as municipal (local) makes the evidentiary stage extremely laborious in a country like Brazil, which has more than 5.5 thousand municipalities.

33. While CADE makes use of complimentary safe harbours, it is aware of the risks involved, since the overview of each case, as a whole, can be lost. The case of Kroton-Estácio is an example of this concern, which more detailed analysis led the Tribunal to disapprove the operation. This concern of not losing the overview of the operations' effects as a whole (not only for each specific relevant market by itself) might continue, given the increase of the concentration level in many markets for which higher safe harbours are used.

34. It is probable that this cost-benefit analysis for the use of safe harbours in mergers remains over the next years and is extended to other markets, notably due to CADE's growing experience in merger analysis after the validity of the New Brazilian Competition Law, in 2012, that changed the analysis method from ex-post to ex-ante, in harmony with international best practice. In these first five years of the New Brazilian Competition Law, wherein about two thousand operations were analyzed, the adoption of safe harbours appears to be efficient, avoiding false-positive events that generate excessive burden to the economy as a whole. On the other hand, even facing a higher risk derivative from the adoption of safe harbours in higher levels than the threshold stated for dominance position in Brazilian Law (20%), some really high as previously exemplified in this article – especially in the higher education market – the monitoring of these markets after CADE's decisions has apparently exhibited that there have not been false-negative events. However, a more detailed ex-post evaluation of CADE's decisions is necessary in order to reach a safer conclusion regarding these results.