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JURISDICTIONAL NEXUS IN MERGER CONTROL REGIMES

-- Note by Brazil --

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*More documents related to this discussion can be found at
www.oecd.org/daf/competition/jurisdictional-nexus-in-merger-control-regimes.htm*

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BRAZIL¹

1. Introduction

1. The new Brazilian competition law², introduced in 2011 (entered into force on May 2012), not only reformed the merger control system to allow *ex ante* analyses, but also set forth a clearer definition of what is a merger for the purpose of merger review, and listed more objective thresholds to the notification of a merger. While the old competition law³ determined that "any acts that may limit or otherwise restrain open competition or that result in the control of relevant markets for certain products or services"⁴ had to be submitted to CADE⁵ for review, the new competition law established specific kinds of operations⁶, which have to be submitted to CADE for approval⁷. While the old law's thresholds were either a resulting market share of 20% or a local gross turnover of BRL 400,000,000.00 by any of the groups involved⁸, the new law focused on the local revenues of the economic groups involved in the merger and made it possible for the turnover threshold to be modified by a specific executive act, with no need of previous discussion by the Congress⁹. The general rule of competence of the competition authority, however, remains the same – the competition law is applied whenever an act may produce effects in the national territory.

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² Law n° 12.529 of November 30, 2011. English version available at [http://en.cade.gov.br/topics/legislation/laws/law-no-12529-2011-english-version-from-18-05-2012.pdf/@download/file/LAW%20N%C2%BA%2012529%202011%20\(English%20version%20from%2018%2005%202012\).pdf](http://en.cade.gov.br/topics/legislation/laws/law-no-12529-2011-english-version-from-18-05-2012.pdf/@download/file/LAW%20N%C2%BA%2012529%202011%20(English%20version%20from%2018%2005%202012).pdf).

³ Law n° 8.884 of June 6, 1994. English version available at [http://en.cade.gov.br/topics/legislation/laws/law-no-12529-2011-english-version-from-18-05-2012.pdf/@download/file/LAW%20N%C2%BA%2012529%202011%20\(English%20version%20from%2018%2005%202012\).pdf](http://en.cade.gov.br/topics/legislation/laws/law-no-12529-2011-english-version-from-18-05-2012.pdf/@download/file/LAW%20N%C2%BA%2012529%202011%20(English%20version%20from%2018%2005%202012).pdf).

⁴ Article 54 of the old competition law.

⁵ In Portuguese, *Conselho Administrativo de Defesa Econômica* (Administrative Council for Economic Defense), the Brazilian competition authority.

⁶ See article 90 of the law. Doubts related to the definition of an "associative contract", as set out by the law, were only resolved in 2014 by CADE's Resolution n° 10, available in Portuguese at [http://en.cade.gov.br/topics/legislation/laws/law-no-12529-2011-english-version-from-18-05-2012.pdf/@download/file/LAW%20N%C2%BA%2012529%202011%20\(English%20version%20from%2018%2005%202012\).pdf](http://en.cade.gov.br/topics/legislation/laws/law-no-12529-2011-english-version-from-18-05-2012.pdf/@download/file/LAW%20N%C2%BA%2012529%202011%20(English%20version%20from%2018%2005%202012).pdf).

⁷ The only exemption is the association of companies under an associative contract, a consortium or a joint venture for taking part in public biddings, as for article 90's sole paragraph.

⁸ The law did not make it clear if the turnover was local and if it was as wide as to involve all the companies in the economic group. All this was clarified by CADE's *Súmula* (precedent) n° 1, published in the Official Gazette in October 18, 2005.

⁹ The current revenue thresholds, as defined by the Ministry of Finance and Ministry of Justice's Joint Ordinance 994 of May 30, 2012, are BRL 750,000,000.00 in annual gross sales and local turnover in Brazil by one of the economic groups involved and BRL 75,000,000.00 in annual gross sales and local turnover in Brazil by any other of the groups involved.

2. As the local nexus of a merger is assessed by the law when setting the production of effects of a merger, and defining the turnover thresholds of the economic groups involved, this contribution will present CADE's most important existing orientations for the annual turnover to be "local" and a business to produce effects in the country.

3. It is relevant to notice that, independently of the turnover of the companies involved in an operation, CADE has residual jurisdiction to require the submission of mergers until one year after they are consummated¹⁰.

2. Local turnover

4. According to article 88 of the Brazilian competition law:

Art. 88. The following shall be submitted to CADE by the parties involved in the operation of acts of economic concentration in which, cumulatively:

I - at least one of the groups involved in the transaction has registered, in the last balance sheet, annual gross sales or total turnover in the country, in the year preceding the transaction, equivalent or superior to four hundred million reais (R\$ 400,000,000.00); and

II - at least one other group involved in the transaction has registered, in the last balance sheet, gross annual sales or total turnover in the country, in the year preceding the transaction, equivalent to or greater than thirty million reais (R\$ 30,000,000.00).

5. Both the BRL 400,000,000.00 and BRL 30,000,000.00 values were updated by the Ministry of Finance and the Ministry of Justice's Joint Order No. 994 of May 30, 2012 to BRL 750,000,000.00 and BRL 75,000,000.00, respectively.

6. The thresholds based on the parties' total turnover have been only recently established as a single criterion by the law that restructured the Brazilian System for Competition Defense. Prior to it, parties market share were also considered for notification purposes. Such change is in accordance with international recommendations, that state that notification thresholds should be based exclusively on objectively quantifiable criteria. In this sense, the International Competition Network's ("ICN") Recommended Practices for Merger Notification Procedures provides that "examples of objectively quantifiable criteria are assets and sales (or turnover), [whereas] examples of criteria that are not objectively quantifiable are market share and potential transaction-related effects."

7. As for the concepts foreseen in the law, although there is no explicit provision determining the meaning of "gross sales"¹¹ and total turnover, CADE's case law has traced basic criteria for the definition of such terms¹².

2.1 Merger File No. 08700.011002/2013-71 – CCB / Bicbanco

8. In this case, the seller's group (Group CCB) did not include any company that operated in Brazil or that invested in a company that operated in the country. The turnover presented as reason for the submission of the transaction included operations made abroad by the China Construction Bank (CCB) with Brazilian clients. Although CADE made no specific considerations as to the definition of "volume of business" or "total turnover", the agency accepted the argument that transactions made

¹⁰ See article 88, § 7, of the law.

¹¹ In the original composition, the law talks about a total "volume of businesses", in a literal translation.

¹² All the decisions and the case filings can be accessed in CADE's website. Instructions for case search are available in English at http://en.cade.gov.br/case_search.

with Brazilians abroad by the CCB should not be taken into account for notification purposes. CADE decided not to analyze the case because it did not meet the turnover threshold requirements.

2.2 Merger File No.08700.004156/2015-79 – IEP Ferrous / FRL

9. In this merger proceeding CADE decided that both the legal reference to turnover "in the year preceding the transaction" as well as internal regulations required the utilization of the exchange rate of the period assessed by the balance sheet in question, either be it the average exchange rate of the year in reference, or the exchange rate of the last day of that year. In this case, the turnover requirements would only be met if the exchange rate used in the conversion of the values registered in the companies' balance sheet were that of the date of submission of the operation to CADE. Once the turnover requirements would not be met had the right exchange rate been used, CADE decided not to analyze the case.

2.3 Merger File No. 08700.000478/2016-20 – HNA / Azul

10. The turnover requirements in this case would only be met if CADE considered an acquisition HNA's group had started the year before the submission of the transaction (purchase of Swissport). However, CADE concluded that it was still possible that such acquisition be blocked by other competition authorities, so there would not be a reason for Swissport's turnover to be considered in HNA's group total balance sheet. Therefore, CADE decided not to analyze the case.

3. Residual jurisdiction

11. CADE's procedure for requesting the submission of a transaction was specified in the Resolution n° 13, of June 23, 2015¹³. There is no specific criteria for a transaction to be requested by CADE for analysis independently of the notification thresholds. Even though the request of a transaction was only made once, CADE's case law provides an assessment of the market effects of various transactions reviewed by the authority, gives guidance as to what mergers may present competitive concerns and, thus, orient the parties as to which transactions may be requested by the agency. Moreover, the General-Superintendence already issued reports on some cases that were unnecessarily submitted to CADE and explicitly referred to the reasons why there was a lack of need for requesting the submission of the cases in question.

12. Such analysis was made in the cases 08700.004156/2015-79 (IEP Ferrous / FRL) and 08700.000478/2016-20 (HNA / Azul) referenced above. In both, CADE's General-Superintendence concluded that, even if the transactions fulfilled the thresholds for their obligatory submission to CADE, they would be approved under the fast-track procedure, reserved for cases with little chances of posing serious competitive damages to the markets involved. The same was done in the Administrative Proceeding No. 08700.000258/2015-15, destined to investigate the existence of a transaction that should have been notified to CADE.

3.1 Merger File No. 08700.006497/2014-06 – Greca Distribuidora / Betunel / Centro Oeste Asfaltos

13. CADE recognized that the parties involved in the submitted transaction did not reach the turnover requirements, but taking in account their high market shares it decided to analyze the case based in its power to review mergers that do not meet merger control thresholds. The case was approved without restrictions due to the rivalry capacity of competitors.

¹³ Available in Portuguese at <http://www.cade.gov.br/assuntos/normas-e-legislacao/resolucao/resolucao-ndeg-13-2015.pdf/@download/file/Resolu%C3%A7%C3%A3o%20n%C2%B02013-2015.pdf>.

4. Production of effects in the national territory

14. CADE's competence goes as far as the possibility of an act being able to produce competitive effects in the national territory. This has already been evaluated by a number of cases, such as the ones described below.

4.1 Merger File No. 08700.001204/2013-13 – Bosch / ZF / Knorr

15. The three companies intended to create a greenfield joint venture that would operate in the automotive aftermarket outside Brazil. Taking into account that the services that would be offered by the joint venture company were limited, in Brazil, to a national relevant market and that there was no possibility of the company to operate in the national territory, CADE concluded for the absence of effects in the national territory by this specific transaction, due to the absence of horizontal or vertical effects in the country.

4.2 Merger File No. 08700.008819/2014-43 – Bosch / Siemens

16. Bosch und Siemens Hausgeräte GmbH (“BSH”) was a 50/50 joint venture controlled by Bosch and Siemens. Bosch intended to acquire Siemens’ share, which would make BSH its whole subsidiary. BSH did not have any operation in Brazil, nor turnover originated from Brazilian clients. Once more, the market was geographically limited to the national territory and there would not be horizontal or vertical effects in the country, what made CADE decide not to assess the case.

4.3 Merger File No. 08700.004891/2015-82 – Bosch / Midea

17. Bosch and Midea intended to make a joint venture to produce specific A/C equipments in China. The parties said that there would not be horizontal effects in Brazil because Bosch did not produce and sell or had plans to produce and sell the specific A/C equipments in Brazil or elsewhere. In fact, the equipments that would be produced would function in a different energy frequency, incompatible with the Brazilian market. Because of this, the joint venture’s products would be sold only in Europe and Asia and could not be easily adapted to work in the Brazilian market, what made it impossible to consider the existence of a horizontal relation between the new equipments to be produced and Midea’s operation in Brazil. In the filing, the parties also stated that there would be no serious vertical relations in Brazil between them and the joint venture. CADE concluded the transaction could not affect Brazil and the case could not be analyzed by the authority.

4.4 Merger File No. 08700.006511/2015-44 – PANSTEEL / ThyssenKrupp / TAGAL

18. After this operation, a subsidiary of PANSTEEL (from Ansteel Group) called Angang would be shared with ThyssenKrupp and TAGAL (a 50/50 joint venture between TKSE and Ansteel Group), and would start to produce galvanized steel and related products to the Chinese market. Even though the joint venture would not sell to Brazil and the relevant market was considered national in its geographical scope, CADE concluded that the transaction could affect the national territory. The reason for this is that Angang Group and ThyssenKrupp sold galvanized steel to Brazil and could stop doing that separately in the country to start doing it together through the joint venture, which could export from China to Brazil (although that was not the reported intention from the parties). The transaction was approved without restrictions due to low joint market shares from the parties in the national market of galvanized steel.

4.5 Merger File No. 08700.009274/2015-73 – Evonik / PeroxyChem

19. Evonik intended to acquire the totality of shares of PeroxyChem. Even though the economic groups from the parties had enough turnover in Brazil, the specific company that was being sold had no activities in the country in the previous five years and could not start to sell its products (assessed as part of a national relevant market) nationally, as there were high transportation costs. In the filing,

the parties also stated that no vertical effects would be produced in Brazil. Therefore, CADE decided not to analyze the case.

4.6 Merger File No. 08700.009898/2015-91 – Orion / Qingdao Evonik

20. Orion intended to acquire 67% of the shares of Qingdao Evonik, which did not sell its products to Brazil. However, CADE could not conclude if the market was restricted to the national territory and there were other companies from Orion's group that operated in the same market in Brazil. Considering the possibility of an international market and the existence of horizontal effects in Brazil, CADE concluded that a raise in prices outside the country could impact internal prices. The transaction was approved without restrictions due to low joint market share from the parties in an international market.

4.7 Merger File No. 08700.012536/2015-87 – Wells Fargo / GE Capital

21. Wells Fargo intended to acquire GE Capital worldwide commercial distribution finance ("CDF") platform. CADE analyzed what would be a factoring market for technology OEMs and could not conclude on a closed geographical definition. In a similar conclusion to the one on Orion / Qingdao Evonik case, CADE decided to assess the competitive effects of the transaction because of the possibility of the specific factoring market to be international. The transaction was approved without restrictions due to low joint market share from the parties in an international market.

5. Conclusion

22. CADE's consideration of jurisdictional nexus for merger control derives (1) from the competition law application only over transactions that can produce effects in Brazil; and (2) from local fulfillment of turnover thresholds for the submission of a merger to the authority's approval, *provided that* association of companies for taking part in public biddings is exempt of approval by the authority and *provided further that* CADE can request the submission of operations that do not comply with the turnover thresholds but raise competitive concerns (such as high market shares in the affected relevant markets).

23. For a transaction to produce effects in Brazil, the affected market must be either international or the economic groups of the companies involved must be effectively acting or capable of acting in the national relevant market.

24. Even though there is no explicit definition in the law or in regulations of "volume of business" or "total turnover", the decisions that broach the computation of local turnover demonstrate that the turnover thresholds are not a complex matter for the companies.

25. As the present contribution has demonstrated, there has been significant efforts to improve legal certainty of the parties in respect to the merger transactions that must be notified to the authority. The recent change of the Brazilian competition law eliminated parties' market share as a notification criterion and consolidated the i) "volume of business", ii) "total turnover" and iii) the production of effects in the national territory as the relevant thresholds for the submission of a transaction. Additionally, CADE's case law serves as a useful guidance to the parties as to what the agency recognizes as a jurisdictional nexus that justifies its competence to review the merger. The legal certainty that originates from that reduces the costs faced by the parties¹⁴ and makes the notification process and the merger review itself more efficient.

¹⁴ Currently, article 23 of the competition law establishes a fee of BRL 85.000,00 for the submission of a transaction for CADE's approval and BRL 15.000,00 for the start of a special procedure destined to require a binding interpretation of merger control law and regulation. It is up to the parties of a transaction to decide to pay the BRL 85.000,00 straightaway or to pay the BRL 15.000,00 and risk facing a decision for the submission of the proposed transaction as a merger (what would demand the payment of the BRL 85.000,00 fee).