MERGER REVIEW IN BRAZIL: A STATUS REPORT

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Executive Summary

Since the enactment of Law No. 12,529/2011, Brazil's Administrative Council for Economic Defense (CADE) has significantly enhanced its merger review system, aligning its procedures with international best practices to improve efficiency and predictability. The most transformative change was the shift from an *ex-post* to an *ex-ante* review system, ensuring that transactions are assessed before their completion.

Over the years, CADE expanded the fast-track procedure to expedite clearance of straightforward transactions, with around 90% of merger filings now reviewed within 30 days. In 2024, the introduction of *e-Notifica* further streamlined the process, enabling the General Superintendence to clear a merger in less than 24 hours for the first time. This efficiency is critical, given the surge in merger notifications, which reached a record 712 filings in 2024 - an increase of nearly 20% from the previous year (contrasting with 392 notified cases in 2024 before the European Commission, for example).

As the volume of filings grows, CADE faces ongoing discussions about refining filing thresholds to determine when a transaction is subject to mandatory review. For example, the 2024 Tribunal's ruling in the gun jumping probe Digesto/Jusbrasil revisited long-standing debates regarding Resolution No. 33/2022, particularly concerning the "economic group" definition and revenue calculation criteria. Other discussions focus on associate agreements and whether acquisitions of non-operational assets should trigger mandatory filing requirements.

CADE has also strengthened its ability to assess complex mergers, relying increasingly on economic analysis and market studies. However, challenges remain in reducing the review timeline for such cases, which sometimes exceed the 330-day statutory limit. To enhance predictability, CADE has issued several guidelines, most recently the 2024 Non-Horizontal Merger Guidelines. Notably, merger prohibitions remain rare - of approximately 7,000 transactions reviewed since 2012, only 14 were blocked, a rate consistent with international standards.

Statutory provisions allow CADE to review transactions that fall below the filing thresholds within one year from closing. Since 2012, CADE has resorted to this provision in only 15 cases, which shows its selective and cautious approach. Gun-jumping enforcement has been an area of focus, with 47 cases reviewed since 2012, leading to fines ranging from BRL 60,000 to BRL 60 million (e.g., Veolia Environnement/Engie, 2022), which is the statutory limit.

CADE has also refined its merger remedies framework, shifting from a preference for behavioural remedies (80% in 2016–2017) to favouring structural remedies such as divestitures, particularly in horizontal cases. Additionally, external monitoring trustees have been introduced to ensure compliance with imposed remedies.

Finally, while CADE has considered non-price competition factors - such as quality, innovation and data protection and privacy - in some cases, it has yet to conduct in-depth assessments or issue clear guidelines on their role in merger reviews.

Key Words: antitrust, merger, suspensory system, remedies, gun jumping, joint venture, filing thresholds, non-price parameters, CADE, Law No. 12,529/2011, Brazil.

I. Introduction

In October 2011, Brazil approved Law No. 12,529, its current antitrust law, effective May 29, 2012. This law consolidated the functions of Brazilian competition authorities into one autonomous agency, CADE. CADE now includes an administrative tribunal with six Commissioners and a President, a General Superintendence for Competition (GS), and an Economics Department. The GS reviews and clears simple transactions, while complex cases are investigated by the GS and decided by CADE's Tribunal. The Tribunal can reexamine, *ex officio*, any decision made by the GS through an "*avocation*" process or when prompted by third parties to do so.

The law includes a mandatory pre-merger notification system, meaning transactions that meet the Brazilian merger filing thresholds must receive CADE's clearance before completion. Penalties for "gun jumping" include fines ranging from BRL 60,000 to BRL 60 million, and the authority may also declare the transaction null and void. The law states that "*[the] parties should maintain their physical structures and competitive conditions unaltered until CADE's final approval, being prohibited any transfer of shares or any influence of one party over another' business, as well as the exchange of competitively sensitive information outside of what is strictly necessary for the execution of the relevant binding agreement by the parties*." Violations can occur even if parties do not compete in the same markets. The coordination of activities among competitors or the exchange of detailed information can also lead to cartel violations, resulting in fines from 0.1% to 20% of their gross revenue in the affected sector. In 2015, CADE issued guidelines on gun jumping outlining procedures to mitigate risks and specify applicable fines.

The maximum statutory merger review period is 240 calendar days from the submission of a complete filing, extendable by 90 days under certain conditions. Requests for information do not halt the review timeline. In complex cases, the Reporting Commissioner may allow the transaction to close before CADE's final clearance decision, subject to conditions such as limitations on the acquirer's ability to undertake certain actions such as liquidating assets, integrating activities, dismissing workers, closing locations, terminating brands or product lines, and altering marketing plans.

This paper reviews key merger developments since the Brazilian antitrust law took effect in May 2012. Section II outlines CADE's merger filing thresholds and review criteria. Section III covers significant developments and precedents over the past thirteen years. Section IV explores recent discussions on non-price factors in merger reviews. Section V concludes with final remarks.

II. Statutory Filing Thresholds & Relevant Regulations

II.1 Overview

Under the Brazilian antitrust law, transactions will require antitrust clearance in Brazil when the following criteria is met: (i) it consists of a "concentration act"; (ii) the parties meet turnover thresholds; (iii) it produces effects in Brazil. The law allows CADE to review transactions that do not meet the turnover threshold within one year of closing. Complaints from consumer associations, clients, suppliers, and competitors can prompt CADE to do so, besides being able to act *ex officio*.

The following constitute a "*concentration act*" under Brazilian antitrust law and CADE's Resolution No. 33/2022 ("Resolution 33"): (i) a merger of two or more companies; (ii) one company acquiring control or shares of another, directly or indirectly; (iii) incorporation of one

company by another; or (iv) formation of a joint venture, association, or consortium. The formation of consortia for public bids does not require previous approval from CADE.

Turnover thresholds consider the Brazilian gross turnover generated in the last fiscal year by the *economic group* to which the parties belong. Filing is mandatory when one party's economic group has Brazilian revenues in the last fiscal year of at least BRL 750 million (roughly USD 130 million as of February 24, 2025) and a party's economic group in the opposite side of the transaction has Brazilian revenues in the last fiscal year of at least BRL 75 million (roughly USD 13 million as of February 24, 2025).

Under CADE's definition, the following entities should be considered as part of the same "*economic group*" for the purposes of calculating the group's revenues (i) entities subject to common control; and (ii) all the companies in which any of the entities subject to common control holds, directly or indirectly, at least 20% of the total or voting shares. CADE has specific rules regarding the calculation of the turnover threshold for groups involving private equity firms. In relation to investment funds, the following are considered part of the fund's "*economic group*" for the purposes of calculating the group's revenues: (i) the economic group of each entity that holds 50% more of the fund; and (ii) the portfolio companies controlled by the fund or in which the fund holds 20% or more of the total or voting shares.

There is no clear rule or precedent to determine when a transaction is deemed to have effects in Brazil. Decisions issued by the GS on the scope of the effects test have been issued on a case-by-case basis[3] and CADE's Tribunal has not yet ruled on this matter[4]. However, CADE has frequently adopted an expansive interpretation of the effects test and has reviewed mergers because they involved global markets or led to only indirect effects in Brazil.

In any case, the Anglo-American concept of binding judicial precedent, i.e*., stare decisis*, is virtually non-existent, meaning that CADE's Tribunal is under no obligation to follow past decisions in future cases, which adds legal uncertainty to the jurisdictional assessment. Under CADE's internal regulations, legal certainty is only achieved if CADE rules in the same way at least ten times, after which they codify a given statement via the issuance of a binding statement. To date, CADE has issued nine binding statements, all under the old 1994 law and mostly related to merger review.

Third parties, including customers and competitors, may seek to participate in the merger review process by submitting a request within 15 days of the publication of the transaction summary in the Official Journal. According to Article 118, §1º, of CADE's Internal Rules, "*the request must include, at the time of submission, all documents and opinions necessary to substantiate its claims, under penalty of being rejected*." Third parties admitted to participate in the review have the right to appeal a clearance decision by the GS to CADE's Tribunal, which prevents the merger parties from closing until the Tribunal issues a ruling.

CADE continues to engage in close cooperation with its counterparts in other jurisdictions regarding transnational cases. It is a common practice for the authority to request or for the parties to voluntarily offer a waiver to facilitate such cooperation.

[3] CADE's DG has been considering the following to assess whether a given transaction fulfills the effects' test: (i) whether the target has or is expected to have [following the transaction] activities in Brazil or generate revenues in the country (please note that there is no de minimis exception); and/or (ii) whether the parties have horizontal or vertical relationships that could affect Brazil; and/or (iii) whether the geographic scope of the relevant market includes a region encompassing Brazil.

[4] In 2019, in a joint venture between Volkswagen Ag and Ford Motor Company (Merger Case No. 08700.005324/2019-77), CADE dismissed the case based on the effects test because the JV planned to operate in a market that was not yet active in Brazil and was unlikely to affect Brazil in the coming years, so CADE found that there was no current or potential effects on competition in Brazil.

II.2 Substantive Review Standard

Brazil's antitrust law does not clearly define the substantive standard for mergers. However, CADE applies a combined test of "*dominant position*" and "*lessening or restriction of competition*". In July 2016, CADE updated its 2001 Horizontal Merger Guidelines ("Horizontal Guidelines") to reflect current practices. [5] More recently, in 2024, CADE issued the Guidelines for the Analysis of Non-Horizontal Mergers ("V+ Guidelines")[6].

The Horizontal Guidelines state that CADE will follow the standard five-step merger analysis, and may also resort to other "alternative" criteria.

According to the Horizontal Guidelines, market share is not the only element in the assessment of the market conditions post-merger and CADE may consider counterfactuals and simulations in the process as well. The role of potential mavericks, two-sided markets, portfolio effects, potential competition, and coordinated effects may also carry weight in CADE's merger assessment.

The V+ Guidelines applies to transactions involving non-horizontal (vertical and conglomerate) mergers and aim to enhance transparency and to set forth best practices regarding these cases[7]. It generally adopts the same five-step process to analyze transactions provided under the Horizontal Guidelines, with some caveats. CADE has typically assumed that a non-horizontal transaction does not raise competition concerns if the parties' market shares are below 30%. The V+ Guidelines highlight, on the other hand, that a downstream player's market power is more closely tied to its purchasing power in relation to the relevant input than to its market share in downstream product sales. The Guidelines also indicate that market foreclosure concerns will be assessed considering the economic incentives of the parties to do so, which may vary based on the ownership percentage of the target.

Finally, CADE may adopt any measures to prevent negative effects to consumer welfare arising from a transaction. CADE's internal rules state that the parties can negotiate undertakings with CADE to remedy perceived competition issues, which can be offered from the day of filing up to 30 days following the challenge of the transaction before the Tribunal by the GS.

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[5] CADE's Horizontal Guidelines set forth the following five-step process: **Step 1**: Defining the relevant product and geographic markets; **Step 2**: Determining whether the market share of the merged entity is sufficiently large to permit the exercise of market power. The law sets forth a presumption of if parties jointly hold a share of at least 20% of the market; **Step 3**: Assessing the probability that market power will be exercised post-merger. CADE will consider market conditions relating to the likely exercise of market power, taking into account both unilateral and coordinated effects. If CADE concludes there is a likelihood of market power exercise following the completion of transaction, CADE proceeds to Step 4. In most of the cases, the authority's analysis ends at Step 3; **Step 4**: Examining the efficiencies generated by the transaction. The authorities will consider whether cognizable efficiencies resulting from the merger are likely to reduce or reverse adverse effects; **Step 5**: Evaluating the net effect of the transaction on economic welfare. Historically, whenever CADE reaches Step 5, the transaction is either blocked or subject to substantial remedies. Furthermore, no case has been approved based solely on efficiencies arguments. See Horizontal Merger Guidelines, available at https://cdn.cade.gov.br/Portal/centrais-de-conteudo/publicacoes/guias-do-cade/guia-para-analise-de-atos-de-concentracao-horizontal.pdf (Portuguese version) and https://cdn.cade.gov.br/Portal/centrais-de-conteudo/publicacoes/guias-do-cade/Guide-for-Horizontal-Merger-Review.pdf (English version).

[6] See V+ Guidelines, available at https://cdn.cade.gov.br/Portal/centrais-de-conteudo/publicacoes/Guia%20V+/Guia-V+2024.pdf (Portuguese version) and https://cdn.cade.gov.br/portal-ingles/Publica%C3%A7%C3%B5es%20instituiconais/Guias/V+%20Guide%20in%20English.pdf (English version).

[7] See Guidelines for the Analysis of Non-Horizontal Mergers, available at https://cdn.cade.gov.br/Portal/centrais-de-conteudo/publicacoes/Guia%20V+/Guia-V+2024.pdf (Portuguese version) and https://cdn.cade.gov.br/Portal/centrais-de-conteudo/publicacoes/guias-do-cade/V+%20Guide%20in%20English%20-%20Final%20version%202.pdf (English version).

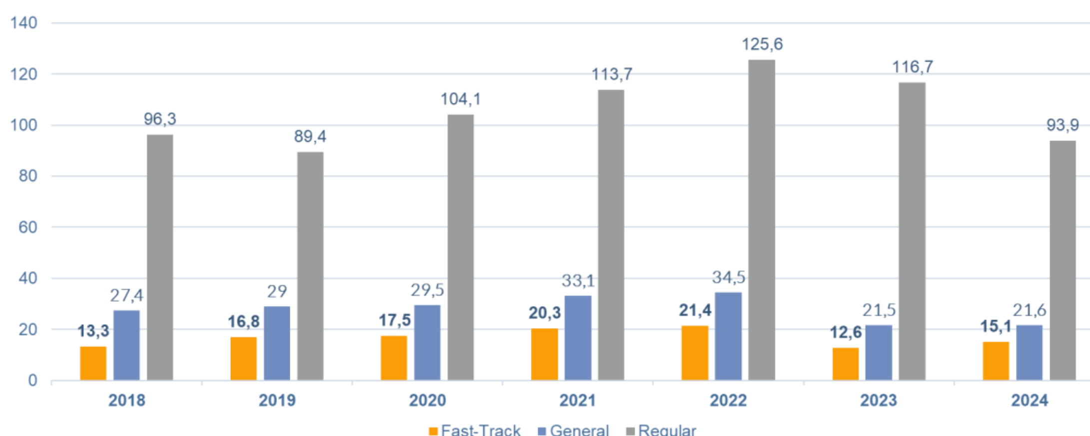
III. Key Developments

III.1. Number of Filings & Average Review Period

In 2024, the number of merger filings reached a record high, with a total of 712 notifications submitted, representing a nearly 20% increase compared to the previous year (see chart below). The total value of transactions reviewed by CADE reached BRL 1.1 trillion and the sectors with the highest number of filings were electricity generation, oil and natural gas extraction, real estate development, and wholesale and retail trade.

CADE has focused on reducing the average review period over the years (see chart below). In 2024, the average review period for fast-track cases was 15.1 days, and 93.9 days for cases reviewed under the regular proceedings. In 2023, the average review period was, respectively, 12.6 days for fast-track and 117 days for cases reviewed under the regular proceeding. This does not consider pre-filing discussions in complex cases, which typically last between 30 to 60 days.

Chart 1: Average Review Period (2018 – 2024)



Source: CADE's Annual Reports for 2018, 2019, 2020, 2021, 2022, 2023 and 2024, available at www.cade.gov.br. Access on February 28, 2025.

CADE's statistics do not differentiate between standard cases reviewed regularly and complex cases, including those that are blocked or require remedies. The timeline for merger investigations reviewed by CADE's Tribunal often reaches or exceeds the statutory limit, which may be a result of a waiver given by the merging parties.

In 2024, CADE launched a new online merger filing system to simplify notification procedures for fast-track cases reviews. The *e-Notifica* automates the applicants' collection and submission of information. The first transaction submitted through the new channel was cleared in 18 hours. The GS expects to incorporate, in the near future, artificial intelligence tools to improve the review process.

The GS often forwards case files to the Tribunal if a common understanding with the filing parties regarding the necessary remedies for addressing competition concerns is not reached within approximately three months post-filing. This practice also ensures that the Tribunal has an equal amount of review time as the GS.

III.2. Blocked Transactions

Since 2012, out of roughly 7,000 transactions, CADE blocked 14 cases, 9 of which between 2012 and 2018, and only 5 since 2019. While this seems low, it is aligned with international best practices. For example "*from 2005 through November 2023, the European Commission has cleared the vast majority of mergers, with 99.3% of the 6462 merger cases allowed in some form. Of the mere 0.7% of prevented cases, only 0.2% were a result of the Commission's explicit prohibitions*"[8].

The following three cases were the most recent ones blocked by CADE.

- **Catena-X (2023)[9].** In 2023 CADE's Tribunal blocked the formation of the Catena-X platform. Volkswagen, BMW, Mercedes-Benz, BASF, Henkel, SAP, Schaeffler, Siemens, T-Systems, and ZF formed a joint venture for technological and innovation cooperation. The case had already been approved in Chile, South Korea, Poland, Ukraine, Germany, and by the European Commission, with only the Brazilian approval pending. The case was cleared in 2022 by the GS, but was reviewed by the Tribunal at the request of a Commissioner, who required remedies to clear the transaction, including to prevent the exchange of commercially-sensitive information among participants. The parties did not reach an agreement with CADE regarding remedies and CADE's Tribunal issued a unilateral decision conditionally clearing the case. The parties did not accept the conditions and, early in 2023, filed a submission to pull the filing. A few days later, they announced what was viewed by CADE as being a very similar transaction with a carve-out to exclude Brazil. In response, CADE's Tribunal blocked the transaction as the parties failed to implement the requested remedies and determined that the GS open a gun-jumping probe against the parties. This investigation was ongoing as of February 2025;
- **Smile/Hapvida (2023)[10].** The transaction was blocked due to concerns related to the transfer of assets in the medical-hospital services market. The analysis pointed to issues mainly in the segments of individual, family, membership-based, and corporate health plans. The transaction would result in high market concentration in the Northeast region of Brazil, where Hapvida, Smile, and Unimed collectively control nearly 90% of the market according to CADE. The absence of effective remedies to address these concerns led the agency to prohibit the transaction; and
- **Trevo/Knauf (2024)[11].** In 2024, CADE's Tribunal blocked the acquisition of Trevo Industrial de Acartonados' drywall plasterboard manufacturing plant by Knauf do Brasil due to there being no equivalent substitutes for the product, reducing the number of suppliers from four to three. Furthermore, despite the market growing more than eight times between 2006 and 2022, no new competitors have entered in recent years. The proposed behavioral remedies, such as production plans and price

[8] See Brianna Rock, *Merger intervention rates in the EU*, Hertie School (2024), available at https://www.hertie-school.org/fileadmin/2_Research/2_Research_directory/Research_Centres/Centre_for_Digital_Governance/5_Papers/Student_publications/Student_working_paper_series/2024_Rock_Merger_intervention_rates_in_the_EU__final_.pdf. Access on February 27, 2025.

[9] Merger Case No. 08700.004293/2022-32.

[10] Merger Case No. 08700.004046/2022-36.

[11] Merger Case No. 08700.003198/2023-01.

controls, were deemed insufficient and difficult to monitor, leading to the prohibition of the transaction.

III.3. Associative Agreements

For at least two years after Law No. 12,529/2011 entered into force, there was ambiguity regarding which types of associative contracts met the mandatory filing thresholds in Brazil. During this period, limited guidance was provided through case law. However, in October 2014, CADE took a significant step towards providing legal clarity by issuing Resolution No. 10/2014, which listed the types of associative contracts subject to the mandatory filing.

Resolution No. 10/2014 had broader language than previous GS and Tribunal cases under the current statute and CADE soon found that many agreements that did not raise competition issues and did not require filing in other jurisdictions had to be filed in Brazil. To address this, CADE then enacted Resolution No. 17/2016, which determined that an agreement is a reportable associative agreement if the following requirements are cumulatively met: (i) the parties' economic groups meet the yearly turnover thresholds (BRL 750 million on one side and BRL 75 million on the other, the year prior to the transaction); (ii) the agreement has effects in Brazil (even if only indirect, through exports to Brazil of goods with the products affected by the agreement); (iii) parties are competitors in the markets affected by the agreement; (iv) the agreement has a duration of two years or more; (v) the agreement entails a "*joint enterprise to explore an economic activity*"; and (vi) the agreement provides for the "*sharing of profit and risk*" between the parties. Under these new rules, simple distribution, supply, manufacturing contracts, and other strictly vertical associations no longer require clearance from CADE.

Case law is not clear on what constitutes a "*joint enterprise to exploit an economic activity*", but precedents suggest that the following are common elements in a joint enterprise: (i) "*sharing of structure, personnel, or joint coordination or governance bodies*" (Saipem/Technip[12]); (ii) "*sharing of corporate structures or coordination of activities performed by each party*" (Hyundai/Caoa[13]); (iii) access to sensitive information from one party by the other (Warner Bros/Metro-Goldwyn-Mayer Studios[14]); and (iv) "*creation of a governance structure to regulate joint decisions between the contracting parties*" (Ford/Volkswagen[15]).

CADE has already recognized that there is no "*joint enterprise to exploit an economic activity*" in cases where: (i) there was no interdependence between the applicants, so that neither party could control the other's supply; (ii) the products of one party continued to compete with those of the other; (iii) there was no interference by one party in the other's economic activities, but only the establishment of limited distribution criteria; (iv) there was no access to sensitive information from one party by the other; and (v) there was no sharing of corporate structures or coordination of activities performed by each party (Warner Bros/Metro-Goldwyn-Mayer Studios[16]). In another case, CADE determined that this element was absent because the execution of the partnership's objectives had an individual nature. Each party managed its own staff independently, without interference from the other (Saipem/Technip[17]).

Precedents suggest that the finding of the *joint enterprise* element in a specific case is more likely if the contract includes exclusivity or non-compete clauses, as these imply one party's interference over the other. CADE has identified exclusivity clauses as key to defining a joint enterprise.

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[12] Merger Case No. 08700.002526/2022-62.

[13] Merger Case No. 08700.008926/2023-62.

[14] Merger Case No. 08700.007868/2022-79.

[15] Merger Case No. 08700.004247/2021-52.

[16] Merger Case No. 08700.007868/2022-79.

[17] Merger Case No. 08700.002526/2022-62.

III.4. Review of Non-Reportable Mergers

Brazil's Antitrust Law allows CADE to review transactions that do not meet the turnover threshold within one year of closing. Since 2012, CADE has resorted to this provision in around 15 cases (either directly or indirectly). The limited number suggests that CADE primarily relies on its standard pre-merger review process to address competitive concerns, rather than frequently looking into smaller or less obvious transactions post-closing, showing its commitment to legal certainty.

A review of case law indicates three main applications of this provision: (i) reviewing transactions voluntarily submitted by the parties that did not meet the legal notification criteria; (ii) requiring notification of transactions that did not meet the legal threshold; and (iii) citing the provision as a measure for protecting competition when approving a transaction.

The enforcement of this rule is shaped by factors such as significant market share and dominance, potential anticompetitive effects, successive acquisitions increasing market concentration, and limited industry rivalry.

The most recent case concerns the 123 Milhas' acquisition of MaxMilhas.[18] Even though the parties did not meet the turnover thresholds, CADE determined the filing of the transaction under the provision that allows the review of non-reportable mergers due to concerns about market power in mileage sales (the combined market share of the merging parties was in the 30-40% range). The transaction was ultimately unconditionally cleared in October 2024.

III.5. Gun Jumping

In May 2015, CADE released the Gun Jumping Guidelines, which outline (i) the definition of gun jumping and the activities that may cause it, (ii) measures to mitigate associated risks, and (iii) the applicable fines.[19].

The Gun Jumping Guidelines establishes that some information exchange in transactions is expected and provide examples of where CADE may view such exchange as a violation (e.g., when involving segregated/specific information directly addressing the core-business performance of the companies, including costs, capacity and expansion plans, marketing strategies, pricing, clients and suppliers). Moreover, the Gun Jumping Guidelines prohibit any acts of partial or full completion before closing, which includes transferring assets, exercising voting rights, influencing commercial decisions, receiving performance-based payments, joint product development, and halting investment.

Creating independent committees (clean teams), aggregating/anonymizing data, and using historical data are effective measures to reduce violation risks. CADE also suggests the parties adopt "Antitrust Protocols" with clean team procedures to prevent the exchange of sensitive information during complex transactions until closing.

The Gun Jumping Guidelines determine that contract provisions must establish that there will be no integration or influence of one party over the other until a final decision is issued. Non-compete clauses and non-refundable payments can trigger scrutiny. However, anticipated payments are allowed if they serve as advance payments, go through an escrow account, or serve as break-up fees.

CADE has been particularly active in bringing gun-jumping cases. Since May 2012, CADE has reviewed just under 7,000 transactions and issued a gun jumping finding in 47 cases. Fines imposed ranged from BRL 60,000 (roughly USD 10,000) to BRL 60 million (roughly USD

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[18] Gun jumping probe No. 08700.004240/2023-01. Merger Case No. 08700.008693/2023-06.

[19] See Guidelines for the Analysis of Gun Jumping available at http://www.cade.gov.br/acesso-a-informacao/publicacoes-institucionais/guias_do_Cade/guideline-gun-jumping-september.pdf (English version).

10 million), with the cases spanning a wide range of sectors.[20,21] Most cases were settled by the parties and the maximum fine/settlement sum in connection with a gun-jumping investigation in Brazil amounted to BRL 60 million (Veolia Environnement/Engie, 2022), which is the statutory maximum.[22]

A recent ruling by CADE's Tribunal in the Digesto/Jusbrasil[23] gun jumping probe has drawn attention to the interpretation of Resolution 33/2022. This ruling particularly affects the definition of "economic group" for the purposes of calculating the group revenue in the context of a jurisdictional assessment. CADE conducted a step-by-step analysis to determine the structure of an economic group in accordance with Resolution 33. The analysis began by identifying companies under common control, followed by entities in which these companies held at least 20% ownership. For transactions involving investment funds, CADE interpreted that companies in which the fund held 20% or more ownership were also part of the same economic group. Despite this conclusion, no gun jumping fine was imposed, as the Reporting Commissioner deemed a financial sanction unreasonable and disproportionate, given that the interpretation of Resolution 33 was not foreseeable at the time of the transaction.[24]

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[20] CADE's Gun Jumping Guidelines note that the fine in case of a violation should take into account: (i) whether the transaction was voluntarily filed and whether it had already been consummated at the time of the submission; (ii) the ultimate result of the antitrust review (i.e., whether the transaction was cleared, subject or not to remedies, or blocked); (iii) how much time had passed since the transaction had been completed; and (iv) the economic conditions of the parties. The Guidelines do not clarify how much weight that should be given to each of these factors, and in practice the Tribunal has considered the value of the transaction as a basis for calculation of the fine in merger and acquisitions cases.

[21] In 2024, CADE's Tribunal held that the imposition of gun jumping fines should adhere to the principle of proportionality, taking into account the value of the transaction. Therefore, in certain cases, the Tribunal may limit the fine to 20% of the transaction value, so long as: (i) the applicants did not act in bad faith, (ii) the value of the transaction is not merely symbolic, and (iii) the transaction does not cause significant harm to the market (Gun Jumping Probe Nos. 08700.005463/2019-09 and 8700.003705/2023-06.). CADE Resolution No. 24/2019 establishes objective criteria to calculate gun-jumping fines. Under this resolution, the fine should include up to 4 percent of the transaction's value depending on the seriousness of the companies' conduct and on CADE's final decision on the deal. It should also include (i) 0.01 percent of the transaction's value per day that the deal wasn't notified; and (ii) up to 0.4 percent of the companies' revenues the year before the deal was closed, depending on their intentions in skipping CADE's notification process. Fines will be doubled in case of recidivism. CADE's Tribunal has determined that the provisions of Resolution No. 24 cannot be applied retroactively in cases where the relevant facts occurred before the Resolution was enacted, and its criteria would have a negative impact on the parties involved. CADE's Tribunal has also held that gun-jumping is an ongoing offense while the merger is in effect and has not been notified to the antitrust authority. This means that the statute of limitations for administrative penalties does not begin until the merger ceases to produce effects or when it is approved by CADE.

[22] See more details at http://www.levysalomao.com.br/publications/LegalBulletin/gun-jumping-lessons-learnt-from-cade.

[23] Gun Jumping Probe No. 08700.000641/2023-83.

[24] In February 2025, CADE's Tribunal dismissed the Gun Jumping probe against Nexus and Servtec, concluding that the transaction did not require mandatory filing. The decision stated that acquisitions that do not alter pre-existing sole or shared control are not subject to a filing obligation, in accordance with CADE Resolution No. 33. Since there was no change in the decision-making structure or acquisition of sole control, it concluded that there was no premature consummation and dismissed the case. (Gun Jumping Probe No. 08700.008330/2022-81and CADE's Judgment Session No. 242).

III.6. Provisional Authorization

Under Article 115 of CADE's Internal Rules[25], merger parties can exceptionally request provisional authorization to close before CADE's final clearance decision, either with the initial notification or following a motion by the GS. This authorization is granted only if: i) there is no risk of irreparable harm to market competition; ii) the requested measures are fully reversible; and iii) the notifying party can demonstrate that substantial and irreversible financial damage to the acquired company would occur if the authorization is not granted.

CADE has applied this provision very rarely, having granted only one out of the six requests that are publicly known, to preserve the enforcement of its pre-merger system.

The authorization was granted in 2013 in the context of the merger involving Excelente B.V.'s acquisition of 60% of Odebrecht's shares in Rio de Janeiro Aeroportos S.A. In 2013, Rio de Janeiro Aeroportos S.A. was awarded the contract to operate Antônio Carlos Jobim International Airport (Galeão Airport). The Brazilian National Civil Aviation Agency (ANAC) set a deadline of December 20, 2017, for the first payment of the concession. Just twelve days after filing, the parties requested a provisional authorization, arguing that: i) there would be no potential harm as the filing merely consolidated control of a company that already held 40% of the target's shares; ii) the measure would be fully reversible, with Excelente B.V. transferring all acquired shares to a third-party entity until the clearance decision; and iii) without the authorization, the consequences for the concession would be so significant that the airport's operation might become unfeasible.

CADE granted the requested authorization five days after the filing and waived the need for the parties to wait for the 15-day deadline for a possible appeal from third parties or a request for further review by other Commissioners.

CADE has also been exceptionally authorizing buyers in transactions involving listed companies to exercise certain political rights to preserve their investment, while the merger review is still pending. In 2021, while analyzing the SAS/Log-In merger case[26], SAS was allowed, for example, to call extraordinary general meetings to elect members of Log-In's board of directors; and call and vote at general meetings to resolve matters that alter the standard course of business, such as share capital increases, subject to a number of safeguards and the filing of monthly reports before CADE till the issuance of a final clearance decision.

[25] See CADE's Internal Rules, available in Portuguese and in English at https://www.gov.br/cade/pt-br/centrais-de-conteudo/regimento-interno.

[26] Merger Review No. 08700.005700/2021-48.

III.7. Behavioral and Structural Remedies

The law allows CADE to take any necessary measures to prevent a merger from harming competition. If CADE determines that a transaction is anticompetitive, it can either block or approve it subject to remedies. Since May 2012, CADE's Tribunal has reviewed many complex mergers but blocked only 14 cases. In most conditional clearances, CADE and the parties negotiated undertakings, a tool introduced by the 2011 antitrust law (*Acordo em Atos de Concentração* in Portuguese). In 2018, CADE released a Guide for Antitrust Remedies[27] to ensure predictability and transparency in applying and monitoring these remedies. Remedies are generally categorized into structural (as asset divestiture) and behavioral (regulating activities without divestiture). Effective enforcement of mergers may require a combination of these remedies.

In a 2023 study entitled "Monitoring Antitrust Remedies: An Analysis of CADE's Case Law" (*Monitoramento de Remédios Antitruste: uma análise da jurisprudência do Cade*, in Portuguese), published by CADE's Department of Economic Studies (DEE), the implementation of remedies between 2016 and 2021 was closely examined. Initially, behavioral remedies were predominantly applied, with a ratio of 80% to 20% in 2016 and 2017. However, over time, this trend shifted, and by the end of the period, there was a notable balance between structural and behavioral remedies. There was a consistent increase in the simultaneous imposition of both types of remedies within the same transaction, which accounted for 66% of the conditional clearance decisions during the analyzed timeframe.

For instance, in 2022, following a review period of 320 days, CADE approved the acquisition of Grupo Big by Carrefour Brasil, the largest retailer in the country, subject to both structural and behavioral remedies. In the domain of structural remedies, in 2023, CADE's approval of the transaction between DPA Brasil and Lactalis was contingent upon licensing the Batavo and Batavinho brands in the fermented milk and *petit suisse* segments to Tirol, a significant player in the dairy sector, particularly in the southern region of Brazil.

A landmark merger case resolved only in 2023 shows how the previous post-merger review system was inefficient. After 18 years of litigation, the 2002 acquisition of Chocolates Garoto by Nestlé Brasil, originally blocked by CADE in 2004, was conditionally approved by CADE in 2023. This decision was contingent upon the execution of a Merger Control Agreement, where the merging parties agreed to several behavioral remedies. Nestlé was prohibited, for example, from acquiring assets representing a market share equal to or greater than 5% for a period of five years and was required to keep the Garoto factory in Vila Velha operational for at least seven years. Furthermore, this agreement served as a judicial settlement, bringing an end to the legal proceedings that had been ongoing since 2005, at a time when Brazil had a post-merger review system.

IV. Non-Price Parameters

CADE has considered non-price parameters in various cases but has yet to undertake an in-depth assessment or establish clear guidelines on the significance of quality, innovation, sustainability, privacy, and other factors in its assessment.

According to the Horizontal Guidelines, when analyzing coordinated effects, it is crucial for the authority to assess whether the transaction alters competitive elements beyond prices, including aspects such as innovation and quality. Similarly, the V+ Guidelines also mention non-price parameters. Although it is not comprehensive, whenever the V+ Guidelines mention the assessment of "effects", non-price effects are addressed alongside price effects. The

[27] See the Guideline for Antitrust Remedies, available at: https://cdn.cade.gov.br/Portal/centrais-de-conteudo/publicacoes/guias-do-cade/Guide-Antitrust-Remedies.pdf (English version).

changes in non-price competitive parameters are listed as one of the theories of harm in non-horizontal mergers. This suggests that there is increasing attention to these parameters in recent assessments.

In 2022, during its participation in the ICN's Merger Working Group, CADE published a report entitled "Control of Data Market Power, and Potential Competition in Merger Reviews"[28]. This document primarily addresses various other topics, but it briefly touches on the evaluation of non-price effects in merger reviews. Although limited in scope, the section on non-price parameters within the report reviews discussions led by authorities in other jurisdictions. It does not, however, provide extensive insights into CADE's specific methodologies or approaches.

CADE's most significant contribution on the topic was presented in the Note by Brazil on Non-Price Effects of Mergers, submitted to the OECD in June 2018. On that occasion, the authority stated that: "*CADE has never rejected or required remedies in a merger based exclusively on non-price effects. In recent merger cases, however, the Brazilian competition authority has been increasingly considering those effects. Variables such as quality and innovation have been important dimensions of remedies recently adopted.*"[29].

IV.1. Innovation

CADE's Horizontal Guidelines provides that a potential negative effect of a merger could be a slowdown in innovation compared to pre-transaction levels. However, in a horizontal merger, specific efficiencies may also arise through the introduction of innovative improvements to products or processes. The guidelines also note that a merger involving a maverick could reduce competition and hinder innovation, leading to a loss of economic welfare.

Similarly, the V+ Guidelines notes that in the analysis of non-horizontal mergers, several theories of harm can be identified, one of them being the potential and dynamic competitive risks if, as a result of the transaction, companies cease to launch competing products or if the transaction aims to eliminate a disruptive or innovative market player.

Both guidelines suggest that concerns about the impact on innovation are particularly relevant when a company acquires a potentially innovative target with the intent of halting its innovation and preventing future competition, a phenomenon known as "killer acquisition".

In 2017, while reviewing Dow/DuPont[30], CADE assessed potential negative effects on innovation. At the time, five major players dominated the sector and accounted for 40% of global R&D investments in the field. Since Dow and DuPont were major players, there were concerns that the merger could reduce incentives for innovation. To address these concerns, the companies proposed divesting part of Dow's assets, ensuring that the buyer would have the ability to compete in the long term.

Similarly, in Monsanto/Bayer[31], CADE considered innovation concerns as part of its broader competition analysis. The merger involved two of the largest players in the agrochemical and seed industries, raising concerns not only about market concentration but also about the potential impact on innovation in biotechnology, genetically modified seeds, and crop protection products. CADE examined whether the consolidation of R&D capabilities could reduce incentives for innovation, limit competition in new product development, or create barriers for

[28] See Report on Control of Data Market Power and Potential Competition in Merger Reviews, available at https://cdn.cade.gov.br/Portal/assuntos/noticias/2024/ICN%20MWG%20Report%20Control%20of%20Data%20Market%20Power%20and%20Potential%20Competition%20in%20Merger%20Review%20-%20CADE.pdf

[29] See Organization for Economic Co-operation and Development (OECD) Note by Brazil on Non-Price Effects of Mergers, available at https://one.oecd.org/document/DAF/COMP/WD(2018)23/en/pdf

[30] Merger Case No. 08700. 005937/2016-61.

[31] Merger Case No. 08700.001097/2017-49.

emerging competitors. CADE cleared the transaction subject to remedies, including divestitures of key assets, to preserve competition in innovation-driven markets.

IV.2. Quality and product differentiation

Both guidelines highlight that a merger could either negatively impact product or service quality and variety or, alternatively, it may lead to improvements in quality and greater product diversity. Quality concerns have been a relevant factor in several of CADE’s decisions.

For example, XP/Itaú[32] was conditionally cleared by CADE in 2017 based on quality and innovation concerns. As one of Brazil’s largest financial institutions, Itaú’s acquisition of a 49.9% stake in XP raised concerns that the bank could influence XP’s business strategy, potentially leading to a reduction in the quality and diversity of investment products available to consumers. CADE assessed whether Itaú’s control could result in preferential treatment for its own financial products or restrict access to competing investment platforms, ultimately harming competition and consumer choice. To address these risks, CADE conditionally approved the transaction, imposing behavioral remedies to ensure XP maintained operational independence and continued to offer a broad range of investment options. These measures included restrictions on Itaú’s voting rights and governance influence, as well as a ban on exclusive agreements that could hinder XP’s competitive neutrality. This decision reflected CADE’s growing concern over non-price competition factors, particularly the impact of mergers on service quality, market access, and innovation in financial services.

Quality concerns were also a relevant factor in CADE’s 2017 decision to block Kroton/Estácio[33]. While assessing the case, CADE raised significant concerns over the potential impact on the quality of education, in addition to other concerns. The transaction would have combined Brazil’s two largest private higher education groups, creating a dominant player in both in-person and distance learning (EAD) segments. CADE's analysis indicated that the merger could lead to reduced competitive pressure, allowing the newly formed entity to increase tuition fees while simultaneously lowering investment in academic quality, faculty, and student services. The agency also expressed concerns that the reduction in market competition could limit student choice and incentives for educational institutions to innovate and improve their offerings. Additionally, CADE found that proposed remedies, such as campus divestitures, were insufficient to mitigate these risks, as the remaining competitors lacked the scale and resources to maintain effective rivalry.

Similarly, in the 2017 AT&T/Time Warner[34], CADE conditionally approved the transaction, citing concerns over its potential impact on the quality and diversity of audiovisual content available to consumers. The merger combined one of the largest telecommunications providers (AT&T) with a major content producer (Time Warner), raising risks of vertical foreclosure in Brazil’s pay-TV market. CADE analyzed whether AT&T, through its ownership of SKY (one of Brazil’s largest pay-TV operators), could prioritize Time Warner content while restricting access to rival distributors, ultimately reducing consumer choice and content diversity. The agency was also concerned that anti-competitive bundling strategies could limit competition among independent content providers and streaming services. To address these risks, CADE imposed behavioral remedies, including non-discrimination commitments, ensuring that AT&T continued to license Time Warner content on fair, reasonable, and non-discriminatory (FRAND) terms to competing pay-TV operators. These conditions aimed to preserve competition in content distribution, prevent market distortions, and maintain high-quality, diverse programming options for Brazilian consumers.

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[32] Merger Case 08700.004431/2017-16.

[33] Merger Case No. 08700.006185/2016-56.

[34] Merger Case No. 08700.001390/2017-14.

IV.3. Data protection and privacy

According to the V+ Guidelines, the integration of production processes allows access to strategic information within the firm's supply chain. While this can enhance decision-making and efficiency, it may also raise competition concerns. For instance, an integrated firm supplying downstream competitors could access sensitive data like input costs and production volumes, creating a competitive disadvantage.

Precedents prior to the issuance of the Guidelines also discuss the potential relevance of data protection and privacy concerns in the antitrust review process. In Itaú/XP (2018) and AT&T/Time Warner (2017) for example, CADE considered potential competitive concerns arising from vertically-related markets and the sharing of sensitive data and information between the merged entities. While these concerns were not the primary focus of the analysis, they played a role in shaping the remedies imposed.

- In Itaú/XP[35], CADE considered whether Itaú could leverage its position to restrict competitors' access to XP's distribution channels or influence the flow of sensitive financial data. To address these concerns, behavioural remedies were imposed, ensuring that XP remained operationally independent and that competitive neutrality was maintained in the financial services market;
- Similarly, in AT&T/Time Warner, concerns were raised regarding data-sharing risks, particularly whether AT&T could use privileged information to disadvantage competing content distributors. As a result, remedies were designed to ensure that AT&T maintained fair access to content for its competitors and did not engage in discriminatory practices.

These cases reflect an increasing awareness of how data access, content distribution, and market interdependencies can shape competition in digital and traditional markets.

V. Concluding Remarks

Since the shift to an ex-ante merger review system in 2012, CADE has made significant strides in modernizing its processes and aligning with international best practices. The agency's emphasis on efficiency has resulted in the rapid approval of non-problematic transactions, with approximately 90% of filings reviewed within 30 days.

While the fast-track system has improved regulatory efficiency, the growing number of notifications also underscores the importance of refining filing thresholds to ensure that only relevant transactions are subject to mandatory filing.

CADE has also strengthened its ability to assess complex mergers through economic analysis and market studies, though challenges remain in reducing the review period for such cases, some of which exceed the statutory limit of 330 days. The Non-Horizontal Merger Guidelines (2024) are a welcome addition to CADE's growing body of guidance documents, providing more certainty to market participants. The agency's limited number of merger prohibitions indicates a careful, evidence-based approach, consistent with practices observed in leading competition authorities worldwide.

Despite all the progress, the transition of Brazil's merger review system into a mature and tested set of rules and practices is a process that we are seeing now – and as in any such transition, it will not be without some turbulence.

[35] Merger Case No. 08700.004431/2017-16.