



# Brazil

## Global merger control handbook – update

JUNE 2020

### Merger control legislation updates since 1 July 2018

There have been no changes in merger control legislation. However, CADE has recently changed its enforcement practice in relation to investment funds. In May, 2020, CADE decided the Case No. 08700.000180/2020-04 (Fundo de Investimento Multimercado Profit 1552/Kepler Weber S.A.) and changed its assessment on the possibility of considering the fund's manager as part of economic groups when:

- The fund's manager can effectively control the fund, without limits very well defined by the regulation, being able to freely decide on the fund's investment portfolio and exercise the right to vote on the assets that compose the fund's portfolio. The fund does not have an investment committee formed by the shareholders, which gives the manager even more autonomy and power.
- The manager prevails on the daily course of management (even to the detriment of the shareholders' will).

- The quota holders have no alternative to take control and decide on fund management other than to withdraw the manager from the fund's corporate structure.

CADE informed that the agency is also developing new Guidelines about the methodology for fines imposition in cases involving gun jumping (it is expected to have a preliminary version of the new Guidelines for public consultation in the second half of 2020).

### Landmark merger control cases since 1 July 2018

#### DISNEY/FOX

Fox's purchase of Disney was approved with restrictions by CADE in February 2019. During the analysis, CADE concluded the transaction raised competitive concerns in the sports pay TV channels in Brazil, due to:

- Existence of significant barriers to enter into the market.

- Absence of expected entry, in the short or medium term, of a new player that could represent effective competition in the market basic sports channels for pay TV.
- High concentration in the basic sports channels market.
- Possible stay of only 2 players relevant in this market (Globosat and Disney).
- Concerns of third parties interested parties.
- Risk that the transaction would result in a decrease in quality, diversity and level of investment in sports content available for pay-TV subscribers, as well as a significant increase in the number of concentrations, decreased competition, likely loss of diversity of content, and increased licensing costs for Disney and Fox's channels. Specifically, the main competitive problem identified was the creation of practically a duopoly in the closed TV sports channel market: with the transaction, Globo and Disney (Fox Sports and ESPN) would have approximately 95% of market share, leaving only approximately 5% for Band Sports.

Thus, the approval was conditioned to the sale of the Fox Sports channel, under the terms of Concentration Control Agreement (ACC) previously negotiated with the companies.

The Merger Control Agreement (ACC) is the instrument through which any problems identified in merger acts notified to CADE are remedied, in order to enable the approval of the transaction. This agreement, which must be homologated by the CADE Court, must contain proposed solutions (remedies) structural and/or behavioral problems capable of removing the identified concerns during the analysis of the Merger Review Procedure.

The transaction was notified in 25 jurisdictions and the decision was the result of an action coordinated by CADE with foreign antitrust authorities, such as the Department American Court of Justice, the European Commission and the agencies of Mexico and Chile (138th SOJ – February 27, 2019).

However, as the sale of Fox Sports channel – condition for the approval of the transaction by the CADE – did not occur within the stipulated period, CADE decided, during the Tribunal's Trial Session that took place on November 13, 2019, that the Merger Review Procedure should be reviewed.

During CADE's Tribunal Trial Session that took place on 6 May, 2020, the transaction was then approved after the parties had signed a Merger Control Agreement (ACC) through which Disney committed itself to maintain in the schedule for three years – or until the end of the already signed contracts – all sporting events now distributed in Brazil. The company is also expected to maintain Fox Sports' main channel, with the same quality

standard, including the broadcast of the Copa Libertadores de América games, until January 1, 2022. After that date, the events of such games must be broadcast by any of its affiliated channels, until the end of the current contract with Conmebol.

In addition, the agreement provides that Disney must return the Fox Sports brand in advance if it chooses to end the transmission of this channel, leaving it free to be used by any other group that is interested, by means of a commercial arrangement with its owner.

#### IBM/RED HAT

In the middle of 2019, IBM acquired Red Hat – the leading hybrid cloud provider – in a USD34 billion deal. Even though the merger was unconditionally cleared by CADE's Tribunal in November 2019, the companies faced a gun jumping investigation that ended in a RUSD 57 million settlement fine.

In accordance with CADE, the gun jumping fine was imposed because (a) IBM/Red Hat deliberately chose to delay submitting the transaction to CADE in comparison to other jurisdictions (in the USA, for instance, notification took place in December, 2018) and (b) the companies ignored the possibility of requesting a provisional clearance, which is the appropriate legal instrument to address urgency matters.

CADE sees gun jumping as a serious offense and will not tolerate deliberate attempts to mitigate the efficacy of the pre-merger control system itself. Regardless of being set in an agreement, the RUSD 57 million settlement fine is the highest ever imposed by CADE and creates an important precedent for gun jumping enforcement in Brazil.

Moreover, this case shows that the present legal limit for gun jumping fines may not be best to address the reality of global and high value deals. As well stated by Commissioner Paula Farani during IBM/Red Hat trial session, the real fine according to the new methodology adopted by CADE this year (Resolution n. 24/2019) would be of approximately RUSD 1.3 billion – more appropriate to the R\$ 140 billion (USD 34 billion) transaction – but it was cut off by the legal limit of RUSD 60 million. Under similar circumstances, major global companies could be encouraged to cross the limits established by the Brazilian Antitrust Law, potentially jeopardizing competition in national markets before any remedies could be imposed by CADE.

#### RAIA DROGASIL/ONOFRE

The acquisition, by Raia Drogasil, of the entire share capital of Drogaria Onofre, then held by the CVS Group, was submitted to CADE on March 25, 2019 and approved without restrictions directly by SG on May 17, 2019, that is, in less than two months.

According to Technical Opinion 15/2019, the transaction generated concentration in the retail market for drugs, medicines, perfumery products and personal hygiene in several locations in Brazil.

When analyzing the case, CADE understood that the barriers to entry for the opening of new physical drugstore stores are not high and that the large chains operating in the country have, in fact, expanded their presence. Additionally, he considered that geographic markets affected by the transaction are marked by strong rivalry, which indicates that the transaction would have a low probability of generating competitive impacts negative.

#### NATURA/AVON

The Merger Review Procedure between the two giants in the cosmetics sector was submitted to CADE on August 9, 2019 and approved without restrictions by SG almost three months later, on November 6, 2019.

The transaction did not generate vertical integrations, but implied horizontal overlap between the parties' activities in several national markets: deodorants, total fragrances, mass fragrances, total skin care, face care, body care, total hair care, shampoos, 2-in-1 products and conditioners, stylers, color cosmetics, sun care, hair care products full bath, bar soap, liquid soap, body wash / shower gel, specific products for children and babies, total male care, beard and pre-beard.

CADE's analysis considered the existence of sufficient rivalry to keep the risk of exercise of market power by the parties in the markets affected by the transaction. According to Technical Opinion No. 32/2019, this rivalry is evidenced by the following factors:

- substitutability between the products of different suppliers active in the above market;
- the capacity of competitors to absorb any deviation in demand resulting from an eventual price increase – mainly due to the expressive rates of idle capacity of the players consulted during the market test;
- the presence of players with relevant market share that can cope with any attempt to exercise post-transaction market power.

The conclusion of the purchase of Avon by Natura formed a company with sales estimated at USD8.79 billion<sup>11</sup> and transformed the Brazilian cosmetics manufacturer in the largest direct sales company in the world.

The acquisition of Avon is in line with the series of acquisitions planned by Natura to become one of the largest cosmetics manufacturers in the world

#### Web link to the national competition authority

Competition Authority: <http://www.cade.gov.br>

### Your merger contacts in Brazil

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