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EX ANTE MERGER CONTROL OF CROSS-BORDER M&AS IN BRAZIL: CASE STUDIES OF CADE'S ENFORCEMENT OF GUN JUMPING

Fabiana Pereira Velloso (USP, São Paulo)

Study and Objective: This paper aims to discuss the effectiveness of the Brazilian *ex ante* merger control system based on a case study of gun jumping investigations recently analyzed by the Administrative Council of Economic Defense (CADE), which resulted in the payment of the largest gun jumping fines in CADE's story.

Method: Firstly, we present the debate on the impacts of antitrust regulation on cross-border M&A transactions, which involves the costs of notifying in several jurisdictions that adopt *ex ante* merger control but brings relevant benefits. After, we introduce some of the main characteristics of the Brazilian *ex ante* merger control regime and analyze CADE's decisions in the IBM/Red Hat and Veolia/Engie/Suez cases.

Results: In IBM/Red Hat and Veolia/Engie/Suez cases, the threat of conviction for gun jumping did not effectively protect the Brazilian *ex ante* notification regime. The transactions, which were cleared by other national antitrust authorities (pending only CADE's approval), proceeded without major obstacles.

Conclusions: We argue that the Brazilian enforcement of the pre-merger control has limited effectiveness, for the following reasons: (i) the punishments for the gun jumping infringement seem to be too lenient; and (ii) the role of CADE as a "peripheral" antitrust authority. In this sense, the gun jumping punishment brings limited costs to the parties compared to their possible private gains in speeding or not notifying the transaction.

Keywords: Administrative Council of Economic Defense; merger control; gun jumping; cross-border M&As; standstill obligation; suspensory effects; competition policy.

Summary: 1. Introduction; 2. Costs, benefits and enforcement of *ex ante* merger control in cross-border M&As; 3. Gun jumping in cross-border M&As analyzed by CADE; 4. Is the Brazilian pre-merger notification system effective?; 5. Conclusion.

CONTROLE PRÉVIO DE ATOS DE CONCENTRAÇÃO TRANSNACIONAIS NO BRASIL: ESTUDOS DE CASO DO *ENFORCEMENT* DO CADE DO ILÍCITO DE *GUN JUMPING*

Estudo e Objetivo: Este artigo visa discutir a eficácia do sistema brasileiro de controle *ex ante* de atos de concentração, com base em um estudo de caso de investigações de gun jumping recentemente analisadas pelo Conselho Administrativo de Defesa Econômica (CADE), que resultaram no pagamento das maiores multas à autoridade pela prática de *gun jumping*.

Método: Em primeiro lugar, apresentamos o debate sobre os impactos da regulamentação antitruste nas operações de fusões e aquisições transnacionais, que envolve os custos de notificação em diversas jurisdições que adotam o controle *ex ante* de concentrações, mas traz benefícios relevantes. Posteriormente, introduzimos algumas das principais características do regime brasileiro de controle de fusões *ex ante* e analisamos as decisões do Cade nos casos IBM/Red Hat e Veolia/Engie/Suez.

Resultados: Nos casos IBM/Red Hat e Veolia/Engie/Suez, a ameaça de condenação por *gun jumping* não protegeu efetivamente o regime brasileiro de notificação prévia. As operações, que foram autorizadas por outras autoridades antitruste nacionais (aguardando apenas a aprovação do Cade), prosseguiram sem maiores obstáculos.

Conclusões: Argumentamos que a aplicação brasileira do controle prévio de atos de concentração tem eficácia limitada, pelas seguintes razões: (i) as punições pela infração de *gun jumping* parecem ser muito brandas; e (ii) o papel do CADE como uma autoridade antitruste "periférica". Neste sentido, a punição por *gun jumping* traz

custos limitados para as partes em comparação com seus possíveis ganhos privados em acelerar ou não notificar a transação.

Palavras-chave: Conselho Administrativo de Defesa Econômica; controle de estruturas; *gun jumping*; atos de concentração transnacionais; obrigação *standstill*; efeitos suspensivos; política de defesa da concorrência.

Resumo: 1. Introdução; 2. Custos, benefícios e enforcement do controle prévio de concentrações em operações transnacionais; 3. Gun jumping em fusões e aquisições transnacionais analisadas pelo CADE; 4. O sistema brasileiro de pré-notificação de atos de concentração é efetivo?; 5. Conclusão

1. INTRODUCTION

Recently, two cross-border M&As[143] investigated by the Brazilian antitrust authority, the Administrative Council for Economic Defense (CADE) drew attention for resulting in payment of the highest contributions associated with the gun jumping infringement: IBM/Red Hat (2019) and Veolia/Engie/Suez (2022).

The term "gun jumping" refers to the offense of the obligation to notify a transaction *ex ante* or failure to comply with a standstill obligation to maintain the competitive market conditions before the antitrust approval of the transaction. (OECD, 2018, p. 10) Both the transactions investigated by CADE had high values (billions of dollars or euros), involved companies with relevant international activities, and were filed in several jurisdictions.

These cases are set in a particular context. Nowadays, many countries adopt a mandatory pre-merger control system for transactions that meet certain thresholds. This system delays the implementation of the merger until the authority grants its approval,

143 We refer to "cross-border M&As" generally as merger transactions which parties come from distinct countries and/or have assets and activities in many jurisdictions. In this essay, we emphasize transactions that must be notified to more than one antitrust authority.

since it is usually coupled with a standstill obligation, and brings costs to parties. Nevertheless, the *ex ante* merger control is relevant to avoid irreversible damage to competition in the affected markets in each jurisdiction.

In this sense, the study of the two cross-border M&As recently investigated by CADE may indicate the effectiveness of this authority's enforcement of pre-merger control, considering the international context. Our hypothesis is that the cases provide evidence that the Brazilian punishment for the gun jumping infringement is not working, since it brings limited costs to the parties compared to the possible private gains obtained by them in speeding or not notifying the transaction.

This paper has three parts. In the first chapter, we will present the debate on the impacts of antitrust regulation on cross-border M&A transactions, which involves the costs of notifying in several jurisdictions that adopt *ex ante* merger control but brings relevant benefits. In the second chapter, we will introduce some of the main characteristics of the Brazilian pre-merger control to analyze the IBM/Red Hat and Veolia/Engie/Suez cases. Finally, we will discuss the effectiveness of the Brazilian enforcement of the *ex ante* merger regime, considering the case studies.

2. COSTS, BENEFITS AND ENFORCEMENT OF *EX ANTE* MERGER CONTROL IN CROSS-BORDER M&AS

In this chapter, we will present the debate on the impacts of antitrust regulation on cross-border M&A transactions, among which is the cost of coordinating several notifications submitted to antitrust authorities whose jurisdictions adopt an *ex ante* merger control. The benefits of pre-merger control, however, outweigh this cost.

2.1. ANTITRUST AND CROSS-BORDER M&AS

Aspects related to antitrust or competition authorities can be understood as a regulatory issue of the countries affected by the M&A. Accordingly, the parties involved in the transaction consider, to a lesser or greater extent, antitrust-related aspects that may impact their deal.

Recently, there have been more concerns with evaluating potential antitrust liabilities of the target company by its buyer since those liabilities could have a material effect on the company's value. (ORBACH, 2020, p. 529-532) For example, recently, the Department of Justice Antitrust Division released guidance on assessing compliance programs in antitrust enforcement. (US DEPARTMENT OF JUSTICE ANTITRUST DIVISION, 2019)

Another example is that the national antitrust authority's approach in the relevant markets affected by the transaction may affect how the company operates, even before there is any definitive decision by the agency. An example is the opening of investigations related to a given company's unilateral conduct, which may signal possible concerns about its practices.

Nevertheless, a concern regarding competition law aspects that stands out in cross-border M&As is coordinating the notification of the transaction to more than one competition authority.

For the parties, this process involves (i) analyzing in which jurisdictions the transaction should be notified (*i.e.*, where the transaction meets local mandatory merger thresholds); (ii) conducting a competitive assessment in all countries of mandatory notification, in which the parties can have different market shares (and, therefore, the transaction can be seen as more or less complex by the national competition authority); (iii) coordinating simultaneous notifications in several countries (usually with many local legal teams); and (iv) awaiting the authorities' final decision on the matter.

For competition authorities, notification of a cross-border M&A can open opportunities for collaboration among the agencies but

simultaneously brings challenges (such as the enforcement of specific issues to certain jurisdictions, as will be seen throughout this paper).

2.2. *EX ANTE* MERGER CONTROL, STANDSTILL OBLIGATION AND THE GUN JUMPING INFRINGEMENT

Most jurisdictions require *ex ante* merger control, which is generally coupled with a standstill obligation – *i.e.*, "an obligation not to put a merger into effect until it is cleared." (OECD, 2018, p. 5) The standstill obligation guarantees that the transaction will not be closed before the competition authority's analysis, aiming to avoid irreversible and undesired effects on competition (*e.g.*, difficulties in untangling assets and exchange of competitively sensitive information). (OECD, 2018, p. 5)

As noted above, gun jumping is the offense of the obligation to notify a transaction *ex ante* or failure to comply with a standstill obligation to maintain the competitive market conditions before the antitrust approval of the transaction. In many jurisdictions, gun jumping is generally subject to fines, and the transaction can also be invalid or subject to other measures by the antitrust authority (such as remedies). (OECD, 2018, p. 10)

These obligations are based on the idea that the parties involved in an M&A should remain independent players in the market until the authority's final decision, which can approve the transaction without restrictions but can also impose remedies or block the deal. (OECD, 2018, p. 5) The most evident criticism of the *ex ante* regime is that it delays the closing of M&As, which could jeopardize transaction efficiencies that could benefit society in general. (OECD, 2018, p. 9)

There are some additional costs regarding the uncertainty about determining whether a transaction is notifiable in a given jurisdiction, which can affect both the parties (that expend resources on this analysis) and the authority (that could have to perform a mere formal analysis of the merger). Generally, competition authorities demand

the notification of merger transactions that meet certain notification criteria. The definition of "merger transaction" could vary depending on the country, as well as the thresholds that identify the weight and nexus of an M&A transaction to a given country's merger control. (OECD, 2018, p. 6)

In addition, the parties can be uncertain about what is considered "gun jumping" in a particular country. For example, companies can have doubts regarding the amount and type of information that can be shared without incurring in exchange of competitively sensitive information. (OECD, 2018, p. 10)

Most jurisdictions consider a few exceptions to the standstill obligation, allowing the parties to implement parts of the transaction before the final approval without being held liable for gun jumping. The most common situations are when the target is nearly insolvent or its assets threaten to deteriorate. (OECD, 2018, p. 23) Other hypotheses allow the previous implementation of a merger in certain circumstances – such as article 7.2 of the EC Merger Regulation and article 108 of CADE's Internal Regulation, which we will discuss in item 3.3 below.

Despite these costs to society in general (that may take longer to benefit from the merger) and to the parties, the *ex ante* merger regime is highly beneficial, avoiding irreparable damage caused by premature closing of mergers with anticompetitive effects.[144] Furthermore, there are benefits to using a similar merger control system in several

144 Regarding this topic, the OECD points out that: "The evidence on the actual cost of a deferred implementation of mergers is sparse and patchy at best. A review of business consulting literature submitted at a 2002 FTC-DOJ workshop (Pautler, 2003) concluded that the majority of mergers are not successful. The review also showed a broad consensus that early planning and fast-paced integration would improve merger outcomes (Blumenthal, 2005, pp. 4-5[14]) with success factors being frequent and tailored communication and use of transition teams (ibid., p. 6). At the same time, the studies referenced in the review list a multitude of factors that are not timing related and contribute to success or failure, such as wrong assessment of the strategic fit, cultural clashes, lack of an integration strategy, lack of designated planning and transition teams, and lack of communication. While limitations through regulatory review are mentioned, they are nowhere identified as a primary source of concern." OCDE, 2018, 36-37.

countries, which reduces legal and economic uncertainty and makes the process clearer to buyers. (HAN, 2020, p. 9; p. 15-16)

Therefore, the gun jumping provision is an essential tool to guarantee the good functioning of the *ex ante* merger control regime, since it works as a strong incentive for companies to notify operations and not close them before the final approval of the antitrust authority or authorities involved.

In this sense, we understand that in transactions that involve notification to more than one antitrust authority, the gun jumping analysis by a particular agency may be of interest to give some clues about the effectiveness of the enforcement of *ex ante* merger control of a national competition authority.

3. GUN JUMPING IN CROSS-BORDER M&AS ANALYZED BY CADE

In this chapter, firstly, we will present some characteristics of current Brazilian merger control, which will allow us to proceed with a study of two recent cases of cross-border M&As investigated by CADE (IBM/Red Hat and Veolia/Engie/Suez).

In both these cases, CADE's General Superintendence gave an opinion to convict merging parties on gun jumping. As a result, they entered into agreements with CADE's Tribunal, which led to the payment of the highest monetary contributions to the authority in gun jumping investigations.

3.1 THE *EX ANTE* BRAZILIAN MERGER CONTROL SYSTEM

The previous Brazilian antitrust law (Law n. 8,884/1994) adopted a post-merger notification regime, since it established that mergers were to be submitted to the authority in advance or no later than fifteen business days after its "occurrence." In 2011, Brazil's current antitrust law (Law n. 12,529/2011 or Brazilian Antitrust Law) was

enacted, establishing an *ex ante* merger control regime coupled with a standstill obligation, in article 88.[145]

This legislative change was seen in a positive light and regarded to be in line with the best international practices, since it was considered that the acts during a merger negotiation process in Brazil were a breeding ground for exchanging of competitively sensitive information among competitors. (ATHAYDE, 2012, p. 59-60) Naturally, this change has had significant implications for CADE and merger parties.[146]

Regarding the legislative framework, currently a transaction deemed a "concentration" (according to article 90 of Law 12,529[147]) should be filed if it has effects in Brazil and meets the jurisdictional thresholds. The thresholds are based on the revenues of the economic groups involved in the merger[148].

The possible punishments for gun jumping were established in paragraph 3 of article 88 of the new law: (i) nullity of the merger;

145 According to article 88 of Law n. 12,529/2011: "§2 The control of the concentration acts referred to in the caput of this Article will occur prior to the transaction and shall be performed within, at the latest, two hundred and forty (240) days, as of the application protocol or amendment thereto. (...)
§4 Until the final decision on the transaction, the conditions of competition shall be preserved between the companies involved, under penalty of incurring the sanctions provided for in § 3 of this article."

146 On the advantages and main impacts on the change of Brazilian merger notification regime, from a lawyers' point of view, see: ROSENBERG, BERARDO and BECKER, 2016, p. 159-180.

147 "Art. 90. For the purposes of Article 88 of this Law, a concentration act shall be carried out when:
I - two (2) or more previously independent companies merge;
II - one (1) or more companies acquire, directly or indirectly, by purchase or exchange of stocks, shares, bonds or securities convertible into stocks or assets, whether tangible or intangible, by contract or by any other means or way, the control or parts of one or more companies;
III – one (1) or more companies incorporate one or more companies, or
IV - two (2) or more companies enter into an associative contract, consortium or joint venture.
Sole paragraph. What is described in item IV of the caput, when used for bids promoted by direct and indirect public administration and for contracts arising there from, shall not be considered concentration acts, for the purposes of Article 88 of this Law."

148 As per the Article 88, §1 of Law n. 12,529/2011 and the Portaria Interministerial n. 994, of 30 May 2012.

(ii) pecuniary fine ranging from 60,000 Brazilian Reais to 60,000,000 Brazilian Reais; and (iii) opening of an administrative proceeding.

Moreover, CADE's Internal Regulation reaffirms the *ex ante* merger control regime in article 108. It provides that the notification must be done preferably after the signing and before the transaction closing (paragraph 1) and that "[t]he parties must keep their physical structure and competitive conditions unmodified until CADE's final assessment" (paragraph 2). The Internal Regulation also provides some exceptions to the standstill obligation on articles 109 and 110 (*i.e.*, transactions involving public offering, stock exchange transactions, and over-the-counter trades), as discussed in item 3.3 below.

CADE also published, in 2015, a non-binding guide to assist merging parties on best practices regarding the *ex ante* notification system. According to the document, the opening of an administrative proceeding considers possible infringing conducts after the merger, especially in cases where there is vertical integration or horizontal overlap between the original parties.

The 2015 guidelines also explain that activities that cause concerns regarding gun jumping belong to three major groups: "(i) exchanges of information between the economic agents involved in a given merger; (ii) definition of contractual clauses that govern the relationship between economic agents; and (iii) activities of the parties before and during the implementation of the merger." (BRAZIL (CADE), 2016, p. 7)

In 2019, CADE established new rules regarding the Administrative Proceedings for Merger Assessment, procedure which investigates gun jumping offenses. Among other topics, CADE's Resolution n. 24/2019 defined hypotheses for increasing the fine (*i.e.*, delay in the notification deadline, seriousness of the conduct, and intentionality) and reducing it (according to the transaction's notification moment).

Below, we will discuss the two cases that have been prominent on the topic of transnational mergers in the *ex ante* merger control system – which, as already mentioned, have resulted in the payment of the largest gun jumping fines in CADE's story.

3.2. IBM/RED HAT: VIOLATION OF THE STANDSTILL OBLIGATION

In October 2018, the IT company IBM announced its acquisition of Red Hat, an open-source cloud software provider, for approximately USD 34 billion. (IBM, 2018) The transaction was formally filed to CADE only on April 9, 2019[149], under the non-fast track procedure – which guarantees CADE a 240-day analysis period that can be extended for another 90 days.

In this case, and according to Brazilian Antitrust Law, the initial day of the deadline counted from the date the parties filed additional information (April 29) since the notification form initially sent was not deemed complete by the authority.

Nutanix, a company that also has cloud software operations and claimed to compete with IBM and Red Hat in several markets, had its request to be an interested third party in the case granted by CADE on May 17, 2019.

Under Brazilian Antitrust Law, interested third parties have the function of collaborating with the case instruction and enjoy a relevant prerogative: to appeal a decision of approval without restrictions, necessarily taking the merger analyzed by the General Superintendence to the Tribunal. Since the Commissioners thoroughly re-examine the transaction (including the complaints brought by the interested third party), an appeal can have a practical effect of delaying the clearing (and therefore closing) of a transaction by months.

After questioning the Parties' main competitors and clients in Brazil, GS-CADE issued its approval opinion in a relatively short timeframe: on June 29, 2019. Only a couple of days after the General Superintendence's decision, the President of CADE's Tribunal called the case for review, anticipating an appeal by the interested third party, which was filed on July 10, 2019.

149 Merger Filing n. 08700.001908/2019-73. Applicants: International Business Machines Corporation and Red Hat, Inc.

The above could be a common narrative of a merger review under the non-fast-track procedure in CADE, were it not for one exceptional circumstance: the Tribunal's imminent lack of quorum.

During the first half of July, the four-year term of three commissioners of CADE's Tribunal ended – which meant that as of July 17, 2019, the Tribunal no longer had a quorum to operate and therefore judge its cases[150]. Due to political circumstances[151], it was uncertain when the quorum would be restored.

On July 9, 2019, only one day after last CADE's trial session with enough quorum, IBM and Red Hat announced the global closing of the transaction. (IBM, 2019) (RED HAT, 2019) According to the Parties, the transaction had already been cleared by several antitrust authorities other than CADE – European Commission, US Department of Justice, Korea Fair Trade Commission, South African Competition Commission, and the Chilean Fiscalía Nacional Económica.[152]

Following that announcement, CADE started an investigation on the case.[153] According to CADE's General Superintendence, the Parties argued that, considering the decision to close the transaction abroad, they had established a separate structure for their operations in Brazil ("hold separate business"). Such a structure would be able to preserve the competitive conditions until CADE's final analysis of the merger

150 According to Article 9, § 1, of Law n. 12,529/2011, CADE's Tribunal decisions shall be made by at least 4 Commissioners. The Tribunal cases are suspended until the quorum reestablishment (as per Article 6, § 5, of Law n. 12,529/2011).

151 In Brazil, CADE's Commissioners are appointed by the President and approved by the Senate, as per article 6 of Law n. 12,529/2011. In May 2019, President Jair Bolsonaro had appointed two candidates for CADE's Tribunal, but they were not well received by the Brazilian Congress. In August, the President withdrew these two names and indicated four new candidates, which started working only in October. As a result, CADE's Tribunal did not have quorum between July 17 and October, 8 2019.
For more on this subject, see: (i) BASILE; LIMA, 2019; (ii) MANFRINI; RODRIGUES, 2019; (iii) ROUBICEK, 2019; and (iv) LIS; GARCIA, 2019.

152 Document SEI n. 0654584 at Administrative Proceeding for Merger Assessment n. 08700.003660/2019-85.

153 Administrative Proceeding for Merger Assessment n. 08700.003660/2019-85. Complaint: CADE *ex-officio*. Defendants: International Business Machines Corporation (IBM) and Red Hat, Inc.

since Red Hat's business in Brazil would remain as a completely separate unit from IBM and run by an independent manager.[154]

These arguments did not convince CADE's General Superintendence, which understood, in October 2019, that the parties closed the transaction intending to complete it as soon as possible and should be fined the maximum possible amount (BRL 60 million).[155]

Also in October 2019, CADE's Tribunal quorum was restored. It cleared the IBM/Red Hat merger without restrictions on November 13, 2019, months after the global closing of the transaction, and still within the legal deadline for the analysis (less than 200 days out of 240, which could be extended for another 90 days).

After that, the parties entered into an agreement with CADE's Tribunal, paying a contribution close to the maximum amount (BRL 57 million[156] – the BRL 3 million discount was due to the signing of the agreement).

In her vote for the approval of the agreement, Reporting Commissioner Paula Azevedo understood that the gun jumping had occurred due to an infringement of the standstill obligation, which violated the efficacy of the pre-merger review system. In addition to the General Superintendence's arguments, she considered that the timing challenges of notifying a transaction in multiple jurisdictions were already known to the involved parties when negotiating the deal.[157]

Moreover, Commissioner Paula Azevedo did not consider the lack of Tribunal's quorum as a reasonable justification for the deal closing. She affirmed that the involved parties notified the Brazilian authority months after filing the transaction to the US Department of

154 Document SEI n. 0657172 at Administrative Proceeding for Merger Assessment n. 08700.003660/2019-85.

155 Document SEI n. 0657172 at Administrative Proceeding for Merger Assessment n. 08700.003660/2019-85.

156 According to Central Bank of Brazil's exchange rate (available at https://www.bcb.gov.br/conversao) on December 11, 2019 (date of the trial session in which the agreement was approved), such amount corresponds to approximately USD 13,850,752.

157 Document SEI n. 0697183 at Administrative Proceeding for Merger Assessment n. 08700.003660/2019-85.

Justice. Furthermore, CADE still had 255 days to analyze the merger on the closing date. Finally, she considered that transaction clearance in other jurisdictions would not be a valid argument either since the effects of a transaction in each market may vary due to the jurisdiction and the methods of analysis adopted by the antitrust authority.[158]

In addition, in her speech at the trial session, in December 2019, Commissioner Paula Azevedo pointed out the need to review the low limit for fines in gun jumping cases.[159]

3.3. VEOLIA/ENGIE/SUEZ: FAILURE TO NOTIFY

In October 2020, Veolia announced that it acquired 29.9% of Suez's capital from Engie. (VEOLIA, 2020) Veolia and Suez were both French companies that operated mainly in the water and waste management sectors in many countries, while Engie is a French company with activities in the energy sector that divested its entire stake in Suez to Veolia.

The press release from October 9, 2020, affirms Veolia's "intention to file a voluntary public takeover bid on the remaining Suez share capital in order to complete the merger of the two companies", which would create "a world super champion of the ecological transformation". (VEOLIA, 2020)

The same document also discusses authorizations relating to merger control. It claims that Veolia had identified targeted competition issues of the merger and anticipated remedies. In addition, it informs that "Notifications will be required in a number of jurisdictions, including the European Union, United States of America, United Kingdom, Australia, China, Morocco. Pending authorization from the European Commission, Veolia will not exercise the voting rights attached to its stake, except for decisions likely to protect the

158 Document SEI n. 0697183 at Administrative Proceeding for Merger Assessment n. 08700.003660/2019-85.

159 As per the video of the 151st Ordinary Judgment Session (December 11, 2019), available at https://www.youtube.com/watch?v=J7F_RceXUw0.

property value of this stake with the authorization of the Commission." (VEOLIA, 2020)

The excerpt refers to the EC Merger Regulation (Council Regulation n. 139/2004), which allows the implementation of a public bid or a series of transactions in securities, provided that the merger is notified to the Commission without delay and the acquirer does not exercise the voting rights attached to the securities in question or does so only to maintain the full value of its investments.

On November 9, 2020, Suez presented a gun jumping complaint against Veolia and Engie in CADE, claiming that both parties had activities in Brazil and that the transfer of shares had already occurred without proper notification to the Brazilian antitrust agency and its authorization. According to the company, the total value of the non-notified transaction was EUR 3,4 billion.[160] CADE then started an investigation on the matter.

The Suez complaint was part of initiatives to try to block Veolia's acquisition of control. These also included transferring assets related to Suez's water treatment activities in France to a Dutch foundation to obstruct one of Veolia's anticipated merger remedies. (KEOHANE, 2020)

Veolia and Engie basically defended themselves to CADE by claiming that the acquisition of shares was only one step in Veolia's acquisition of control of Suez. As part of a public offering, the acquisition would fall within the provisions of article 107 (now art. 108) of CADE's Internal Regulation. Such article authorizes acquisitions through public offerings before final approval by CADE, as long as the party does not exercise the political rights attached to the acquired stake.[161]

Veolia and Engie also mentioned the European Commission's decision to analyze the acquisition of 29.9% of the shares as part of

160 Administrative Proceeding for Merger Assessment nº 08700.005713/2020-36. Complaint: Suez S.A. Defendants: Veolia Environment S.A. and Engie S.A.

161 See Documents SEI n. 0892106 and Document SEI n. 0892128 at Administrative Proceeding for Merger Assessment nº 08700.005713/2020-36.

a single operation to acquire control and the notification exemption provided for in article 7.2 of EC Merger Regulation. Veolia reinforced that had it not exercised any political rights in connection with the transaction. [162]

Such arguments did not convince CADE. A few months later, in December 2021, the General Superintendence understood that the private contract between Engie and Veolia, resulting in the 29.9% share transference, was not equivalent to a public offering. As per Brazilian Antitrust Law, the transfer of ownership of Suez shares was enough to consummate the transaction, regardless of Veolia's exercise of political rights.[163]

In May 2022, CADE's Tribunal signed an agreement with the parties that included the payment of a contribution in the maximum amount provided for a gun jumping fine (60 million Brazilian Reais[164]). This was the largest contribution of its kind ever paid to CADE.[165]

In the meantime, Veolia and Suez eventually reached an agreement on the transaction, as announced in April 2021. (VEOLIA, 2020) In May, Suez informed CADE to have given up on its injunction request to prohibit Veolia from exercising any voting rights or influence over Suez.[166] Moreover, Veolia notified CADE of the acquisition of Suez's control, including the already consummated share acquisition step, under the non fast-track procedure.[167]

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162 See Documents SEI n. 0892106 and Document SEI n. 0892128 at Administrative Proceeding for Merger Assessment nº 08700.005713/2020-36.

163 Document SEI n. 0989910 at Administrative Proceeding for Merger Assessment nº 08700.005713/2020-36.

164 According to Central Bank of Brazil's exchange rate (available at https://www.bcb.gov.br/conversao) on May 25, 2019 (date of the trial session in which the agreement was approved), such amount corresponds to approximately USD 12,407,204.

165 Document SEI n. 1068766 and Document SEI n. 1068276 at Administrative Proceeding for Merger Assessment nº 08700.005713/2020-36.

166 Document SEI n. 0906685 at Administrative Proceeding for Merger Assessment nº 08700.005713/2020-36.

167 Merger Filing n. 08700.002455/2021-17. Applicants: Veolia Environment S.A. and Suez S.A.

The acquisition of Suez's control by Veolia was cleared without restrictions by the General Superintendence in November 2021. The interested third party, Suzano (current and potential parties' customer), and CADE's Tribunal did not appeal the decision.

4. IS THE BRAZILIAN PRE-MERGER NOTIFICATION SYSTEM EFFECTIVE?

We argued that the pre-merger notification system, coupled with a standstill obligation, imposes costs to parties involved in cross-border M&As, but has a crucial aim: to avoid irreparable harm to competition. Considering the role of gun jumping enforcement in the *ex ante* merger control regime, we studied two recent investigations of cross-border M&As at CADE in which the parties entered into agreements and paid the higher pecuniary contributions regarding gun jumping.

As we saw, the IBM/Red Hat and Veolia/Engie/Suez mergers had high values, drew attention worldwide (including from the media), and encountered no relevant obstacles to closing from other antitrust authorities – notably in the European Union and the United States. They show that despite the opening of investigations by CADE and the payment of the highest monetary contributions for gun jumping to the authority, the enforcement of the *ex ante* merger control regime in Brazil was not effective.

In both cases, the threat of conviction for gun jumping in these cross-border M&As did not effectively protect the Brazilian *ex ante* notification regime. Despite the ongoing investigations at CADE, the transactions seem to have proceeded without major obstacles.

In the IBM/Red Hat case, the parties only followed the regular merger review process at CADE while the Brazilian authority was adopting the same timing as other antitrust jurisdictions. In the Engie/Veolia case, although it is unclear why the merging parties did not

notify the initial share acquisition to CADE[168], the transaction does not seem to have been affected by the authority's investigation. Afterwards, CADE cleared without restrictions the untimely notification filed by Veolia, soon after it reached an agreement with Suez.

One can argue that the punishments for gun jumping in Brazil are too lenient and, therefore, not very efficient. In effect, the threat of fines of up to 60 million Brazilian Reais in billion-dollar or billion-euro transactions, such as IBM/Red Hat and Veolia/Engie/Suez, seems to be ineffective. Furthermore, CADE has not opened investigations that could lead to greater accountability of the companies involved (and even of individuals related to them) for conducts such as exchanging competitively sensitive information in the premature closing of transactions.

In this sense, it is possible to suggest that the protection of the *ex ante* merger control regime would be more efficient if individuals were held accountable for making decisions regarding gun jumping infringement. Studies recognize the importance of holding individuals responsible for better enforcement of cartels and other anticompetitive conduct, for instance. (OECD, 2005) (ORBACH, 2020, p. 558-559)

Further discussion on whether it is desirable to extend such liability in gun jumping cases can be relevant. Perhaps the choice of IBM and Red Hat to close the deal, despite the pending CADE judgment, would be different if there were a possibility of effective liability of the companies' executives that made the final decision.

Moreover, Law n. 12,529/2011 also provides another possible punishment for gun jumping: nullity of the transaction. One could

168 The reasons for the failure to notify might be: (i) "A mandatory notification is simply overlooked or forgotten, *e.g.* as a result of negligence on the part of the merging parties and omission of any analysis of the competition law implications of a concentration"; (ii) "Failures to identify a duty to notify. This may result from mistakes in the calculation of threshold values or the identification of what transactions constitute a notifiable concentration;" and (iii) "Intentional lack of notification, in order to speed up the merger process or avoid competition scrutiny. This will usually only occur when it is expected that a competition agency will never find out and/or bother to impose sanctions, or when the merger control agency is seen as lacking effective enforcement powers". OCDE, 2018, p. 10-11.

question the impact and effectiveness of such a penalty applied by CADE in cross-border M&As. Would it be possible that a billion-dollar operation, approved and at least partially closed in several other countries around the world, be reversed due to a decision from the Brazilian antitrust authority?

This discussion thus brings us to CADE's role as a competition authority of a developing country that operates in a globalized world, although it is recognized as a mature authority with a relevant role in the international antitrust community.[169]

The two case studies seem to show that an isolated decision by CADE, considering circumstances specific to the Brazilian jurisdiction and not applicable to other authorities, has limited reach in cross-border M&As.

The situation seems to be different in authorities in "non-peripheral" jurisdictions of the antitrust system, such as the USA and Europe. In merger control in general, as an example, there is a case of a global billionaire transaction, General Electric/Honeywell, that did not go ahead only because it was not approved by the European Commission, although the US Department of Justice cleared it.[170] However, an analogous situation seems unlikely at Brazilian CADE.

5. CONCLUSION

In this paper, we aimed to discuss the effectiveness of the Brazilian *ex ante* merger control in cross-border M&As, through a study of recent gun jumping investigations that could represent an example of fruitful enforcement by CADE – since they found that

169 Vinicius Marques de Carvalho rightly recognized, in 2015, that "All these advances reveal the institutional consolidation of the PDC (Competition Defense Policy) and have made it possible for CADE no longer to be seen as an inexperienced agency, but rather as a mature body in the promotion of its objectives. The international recognition that CADE has obtained is a clear indicator in this direction." CARVALHO, 2015, p. 28. Our translation.

170 Regarding the so-called "Brussels Effect" (*i.e.*, "the EU's unilateral power to regulate global markets") in competition law, see: BRADFORD, 2020, p. 99-130.

there was a gun jumping infringement and resulted in the payment of contributions close to or equal to the legal maximum.

In order to do this, we first introduced the costs and benefits associated with the *ex ante* merger control system for cross-border M&As in general and then discussed the concrete cases in the Brazilian jurisdiction and analyzed their implications.

The IBM/Red Hat and Veolia/Engie/Suez cases suggest that the risk of conviction did not offer sufficient disincentives to prevent gun jumping, as the parties only had to pay low amounts relative to the total value of the transactions and were able to proceed with the transactions under investigation.

These situations show that, in both cases, the parties' benefits associated with closing the transaction before CADE's approval were possibly superior to the costs of complying with the pre-notification system. This is especially clear in the IBM/Red Hat case, where the costs of delaying the global transaction for an unpredictable period were probably higher than the costs of complying with Brazilian competition law.

Therefore, we noted that the enforcement of *ex ante* merger control in Brazil through gun jumping investigations might be limited by two aspects: (i) the prospect of a low fine for the involved companies and the absence of individual liability for their executives; and (ii) the cross-border nature of these transactions, which makes it difficult for CADE to act separately and independently from other influent competition authorities.

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