

## The Brazilian Antitrust Commission's New Guideline on Gun-Jumping

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Until Federal Law 12,529 of 2011 came into force, the Brazilian Antitrust Commission (CADE), differently from its American and European counterparts, only reviewed M&A transactions upon the execution of a binding agreement, generally after the effective implementation of the deal. Back then gun-jumping was not a concern and the focus was mainly on whether a given transaction posed a material threat to competition.

Law 12,529/11 has changed this scenario. In accordance with the best international practices, it has imposed pre-merger antitrust control for deals that meet certain criteria<sup>1</sup>. Actions with potential to alter the parties' original competitive positions are now prohibited until the CADE's approval of the relevant transaction, which has raised doubts about how to proceed to avoid the risk of gun-jumping. A new guideline recently issued by the CADE provides important insights in this regard.

In addition to the obvious directive for businesses to be run independently, the new guideline identifies three main elements the CADE will weigh in evaluating whether the parties to an M&A transaction incurred in gun-jumping: (1) the extension of the exchange of business information during negotiations; (2) the contractual rules agreed on to govern the parties' relationship prior to CADE's approval of the transaction; and (3) the parties behavior before closing of the deal.

With regard to information exchange, the guideline, despite acknowledging such practice is inherent to the negotiation of any M&A transaction, especially through the due diligence process, points out that competitively-sensitive data related to the businesses of the companies should not be disclosed. Examples of such information are: (i) marketing and pricing strategies; (ii) main clients and suppliers, as well as the specific terms of the commercial relationships held with them; and (iii) employees' wages.

Where the analysis of the transaction's viability depends on the exchange of highly sensitive commercial information or otherwise relevant antitrust concerns are involved, the guideline recommends the adoption of precautionary steps to mitigate the risk of gun-jumping, including the execution of an antitrust protocol and the set up of clean teams and an executive committee.

The antitrust protocol will set out rules for the exchange of confidential information. Clean teams, in turn, are groups of parties' employees or independent consultants tasked with classifying and treating confidential data, so as to avoid one party having access to very specific details about the other party's business. The officers

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<sup>1</sup> Such criteria were described in Issue No 2 of our newsletter, which can be accessed here: [www.loboeibeas.com.br/publicacoes/ma-private-equity-newsletters](http://www.loboeibeas.com.br/publicacoes/ma-private-equity-newsletters).

responsible for negotiating the deal from the executive committee and cannot have access to confidential information not previously treated by the clean teams. All meetings of the executive committee should be held at a restricted “parlor room” and recorded.

As to contract provisions applicable to the period prior to the approval of the transaction, the guideline alerts that the following do not comply with gun-jumping regulations: (i) clauses providing for total or partial payment of the deal's consideration on a non-reversible basis (deposits in escrow accounts and payments of break-up fees are allowed); (ii) clauses conditioning the execution of one party's strategic, business decisions to the other's consent (warranties against actions outside of the regular course of business are accepted); and (iii) clauses anticipating integration, regulating competition or imposing irreversible measures

Although admitting that each case will be decided in view of its own particularities, the guideline also provides illustrations of actions that, if taken before the CADE's approval, are likely to raise red flags with respect to gun-jumping. Such actions include (i) the joint development of new products; (ii) the licensing of exclusive intellectual property; and (iii) the interruption of investments in strategic areas.

Given the harsh penalties applicable in gun-jumping situations – which may be as high as BRL 60 million –, it is advisable that dealmakers and their attorneys have the CADE's new guideline in mind when negotiating M&A transactions in Brazil.

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