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Brazil: Common ownership by institutional investors and its impact on competition

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ABSTRACT

Brazilian capital markets have experienced a significant increase in the engagement of institutional investor, despite the fact intertwined companies or those with family control are still dominant in the country. In this sense, one must question whether institutional investors are promoting a procompetitive environment when applying funds in Brazilian companies. Additionally, one may raise the following competitive concern: are institutional investors in Brazil making systematic minority stock purchases in competitors? Are those situations in the radar of the Brazilian watchdog? From the empirical research carried out by these authors, it was possible to assess that the concern with minority interests in competitors has already been addressed by CADE in at least two cases. The concern with common ownership by institutional investors, however, has not yet been analyzed by the Brazilian antitrust authority, although it has been in one case.

Les marchés boursiers brésiliens ont vu une croissance significative de l'engagement des investisseurs institutionnel, bien que dans le pays des sociétés étroitement imbriquées où contrôlées par des familles soient encore dominantes. On doit donc se demander si les investisseurs institutionnels encouragent un environnement favorable à la concurrence lorsqu'ils sollicitent des fonds dans des entreprises brésiliennes. De plus, on peut s'inquiéter d'investisseurs institutionnels qui achèteraient systématiquement de petites parts d'entreprises concurrentes. Est-ce que ces situations sont surveillées par les autorités de contrôle brésiliennes? La recherche empirique menée pas les auteurs a permis d'établir que l'inquiétude relative à des intérêts minoritaires chez les compétiteurs a déjà été abordée au moins deux fois par le CADE, conseil administratif de conscience économique. L'inquiétante possibilité d'une propriété commune n'a toutefois été analysée que dans un seul cas par l'autorité antitrust brésilienne.

Brazil: Common ownership by institutional investors and its impact on competition

I. CADE'S merger review of transactions regarding institutional investors

1. Brazilian capital markets have experienced a significant increase in the engagement of institutional investors (including investment funds), despite the fact that intertwined companies or those with family control are still dominant in the country.¹ Institutional investors have an important role in Brazilian companies because they finance economic activity, provide the necessary liquidity to the investees, pulverize the stockholders' equity and dilute ownership—although still not very significant. In this sense, one must question whether institutional investors are promoting a procompetitive environment when applying funding in Brazilian companies.

2. The Administrative Council for Economic Defense (CADE in its acronym in Portuguese) is the Brazilian competition authority responsible for maintaining healthy competition conditions in the markets. Considering that, one can question if CADE is concerned with the impact of the large amount of funds that those institutional investors deal with and with the manner they can then modify the competitive dynamics of a given market. In that context, one may raise the following competitive concern: are institutional investors in Brazil making systematic minority stock purchases in competitors? Are those situations on the radar of the Brazilian watchdog?

1. CADE's filing thresholds of mergers regarding institutional investors

3. Under Article 88 of Law No. 12.529/2011 (the Brazilian competition law), a merger, acquisition of shares or other kinds of transactions must be submitted for CADE's review if it meets the mandatory legal filing thresholds of the economic

¹ E. Gorga, Changing the Paradigm of Stock Ownership: From Concentrated Towards Dispersed Ownership? Evidence from Brazil and Consequences for Emerging Countries, *Northwestern Journal of International Law & Business*, Vol. 29, Issue 2, 2009, p. 469.

group of companies involved in the transaction, based on the group's total gross revenues (one above 750 million Brazilian reais and the other above 75 million Brazilian reais).

4. The filing thresholds of the economic group of companies regarding transactions engaged by investment funds—one of the categories of institutional investors—have a specific normative framework. CADE's first non-statutory rule on the topic (Resolution No. 2/2012,² Article 4, paragraph 2) considered part of the economic group of the investment funds, cumulatively:

I. Investment funds under the same management;

II. The manager;

III. The quota holders who directly or indirectly held more than 20% of the quotas of at least one of the funds of item I; and

IV. The companies that form part of the portfolio of funds in which the direct or indirect holding held by the fund is equal to or greater than 20% of the capital or voting capital.

5. In October 2014, however, Resolution No. 9/2014 updated the Resolution No. 2/2012, which restricted the standards for considering what belonged to the economic group of the investment funds. Under the new criteria provided by Article 4, paragraph 2 of the new Resolution, the following are considered part of the economic group of the investment funds, cumulatively:

"I. The economic group of each investor holding, directly or indirectly, 50% or more of the fund directly involved in the transaction, either individually or by means of an agreement with other investors; and

II. The portfolio companies that are controlled by the fund directly involved in the transaction, as well as the portfolio companies in which such fund holds, directly or indirectly, an interest of 20% or more."

6. This modification limited the number of transactions to be cleared by CADE. The funds under the same management (former criteria I) and the manager itself (former criteria II) were withdrawn from the economic group. The former criteria III ("*The quota holders who directly or indirectly held more than 20% of the quotas of at least one of the funds of item I*") was replaced by more restricted criteria (new criteria I), namely: "*The economic group of each investor holding, directly or indirectly, 50% or more of the fund directly involved in the transaction, either individually or by means of an agreement with other investors.*" And the former criteria IV ("*The companies that form part of the portfolio of funds in which the direct or indirect holding held by the fund is equal to or greater than 20% of the capital or voting capital*") was replaced

by more restricted criteria (new criteria II), namely: "*The portfolio companies that are controlled by the fund directly involved in the transaction, as well as the portfolio companies in which such fund holds, directly or indirectly, an interest of 20% or more.*"

7. It is important to note that the above-mentioned criteria are standards to determine whether a transaction should or should not be filed for CADE's clearance, and can serve to restrict the transactions to be examined by the authority. It should be noticed that the criteria are quite different when it comes to investment funds, and that finally transactions involving equity stakes revolving around 20–50% are not considered.

8. Having fulfilled these requirements, the investment fund that is a part of the transaction—whether it is a fast-track or a non fast-track case—must submit a series of information, as identified in II.5. of Annexes I and II of CADE's Resolution No. 2/2012. Among the information to be provided in the filing form, the investment fund should indicate the economic groups to which the parties directly involved in the transaction belong. In addition, they should provide a list of all individuals or legal entities governed by public or private law belonging to economic groups. That information must include the activities in the national territory and the following information: (a) organization chart with the corporate structure of the parties directly involved in the transaction; and (b) organization chart with the corporate structure of the group to which such parties belong. Despite the requirement to present the corporate structure of the group, the requirements for inclusion of companies in the same group, basically, remain on the analysis of the controlling shareholders, as shown below:

"(a) investment funds involved in the transaction;

(b) investment funds under the same management as the funds involved in the transaction;

(c) the fund's manager;

(d) economic groups of the investors holding [as provided on item II.5.1.³], directly or indirectly, over 20% of the quotas of funds involved in the transaction;

(e) companies controlled by the funds involved in the transaction and the companies in which such funds hold, directly or indirectly, participation of at least 20%; and

(f) companies controlled by the investment funds under the same management of the funds involved in the transaction and the companies in which these funds under the same management hold, directly or indirectly, participations of at least 20%."

² Resolution No. 2/2012 was one of the first infra-legal rules framed by CADE after Law No. 12.529/2011 has taken effect. That law regulated the *ex ante* merger review performed by CADE nowadays and established the fast-track procedure.

³ Annex II from CADE's Resolution No. 2/2012: "*II.5.1. On this filing form, it is considerate part of the economic group the following agents, cumulatively: I. Companies under common control; and II. Any companies in which the companies under common control hold a shareholding higher than 20%.*"

9. Therefore, it is possible to observe that the filing form identified in II.5. of Annexes I and II of CADE's Resolution No. 2/2012 maintained the criteria applied prior to Resolution No. 9/2014, and that the non-statutory modifications were focused on the threshold used to indicate whether a transaction should be submitted for CADE's clearance. Despite that broader standard of analysis of the economic group of the investment funds to be included in the filing form, it is possible that CADE will not examine acquisitions of minority holdings in competitors below the 20% limitation. In addition, although Article 10 of CADE's Resolution No. 2/2012 addresses the problem of direct acquisitions in competitors by establishing a 5% minimum requirement for filing transactions in which a competitor acquires shares of another, it does not specifically consider the acquisition of shares in competitors made by a common shareholder, as can be seen below:

"II - In horizontal or vertical mergers:

a) Acquisition that directly or indirectly provides the buyer with 5% or more of the total capital stock or voting capital stock of the target; or

b) Latest acquisition that individually or added to other acquisitions entails an increase in interest of 5% or more, where the investor already holds 5% or more of the total capital stock or voting capital stock of the target."

10. CADE applies different standards to institutional investors as to filing the transaction and to analyzing minority acquisitions submitted, differentiating, therefore, the cases that are submitted to CADE's clearance depending on the parties in the transaction. Moreover, in both cases, when the acquisitions do not reach the 20% requirement, CADE typically does not investigate the presence of a common institutional investor in competing companies. According to Article 10 of CADE's Resolution No. 2/2012, only direct acquisitions held among competitors fall under its scrutiny.

11. Thus, some crucial questions remain: are the economic group thresholds and the minimum requirement of 20% share acquisition enough to address the concerns regards possible anticompetitive effects resulting from transactions performed by institutional investors? That's because the criteria established for the analysis of transactions involving investment funds within CADE are mainly focused on the concept of control provided for in Brazilian Corporate Law (Law No. 6404/76⁴) or require a shareholding of at least 20% of the capital stock or with voting rights—characterized under the terms of Law No. 6404/76 as "*significant influence*."⁵ If a minimum of 20% is considered insufficient to analyze the possible anticompetitive effects produced by institutional investors, should the withholding of 5% of

shares between competitors be analyzed in cases in which there is a common investor? Should that raise concerns to CADE, on the existence of institutional investors that are a common shareholder in competing companies?

2. CADE's merger review on cases filed by institutional investors

12. In view of the above, it is necessary to study the main characteristics of the transactions filed by investment funds to CADE's review. From the empirical research carried out by these authors, between June 2012⁶ and September 2014⁷ (twenty-eight months under CADE's Resolution No. 2/2012 old text), it was possible to observe that investment funds⁸ presented at least 84 transactions to CADE. Among these, 14 were related to acquisition/consolidation of control (16.6%), 61 dealt with acquisition of equity engagement without acquisition/consolidation of control (62.6%) and 9 reflected another sort of transaction (10.7%). From the 14 transactions related to the acquisition/consolidation of control, 5 were related to the real estate development market and the other 9 to other markets. On the other hand, from the 61 transactions that did not result in the acquisition/consolidation of control, 13 were also related to the real estate development market, 5 to electric power, 3 to hotels, 2 to health and 39 to other markets.

13. In turn, between October 2014⁹ and September 2017¹⁰ (that is, in the twenty-four months of the new wording of CADE's Resolution No. 2/2012), investment funds¹¹ filed at least 78 transactions. Of these, 23 consisted of acquisition/consolidation of control (29.4%), 46 dealt with acquisition of shareholding without acquisition/consolidation of control (58.9%) and 9 reflected another type of transaction (11.5%). Of the 23 transactions related to the acquisition/consolidation of control, 6 were related to the real estate development market, 3 to electric power and 14 to various markets. On the other hand, of the 46 transactions that dealt with the acquisition of shareholding without acquisition/consolidation of control, 5 dealt with the real estate development market, 5 with electric power and 35 were related to other markets.

14. In view of a global context, according to Law No. 12.529/2011, considering the 162 transactions filed before CADE, it is possible to reach the following preliminary conclusions regarding investment funds:

6 Since Law No. 12.529/2011 came into effect as of May 29, 2012, the sample considers the cases reviewed from June 2012.

7 Since CADE's Resolution No. 2/2012 new wording has been in force since October 1, 2014, the sample considers the cases reviewed until September 2014.

8 The cases were collected using the keywords "fundos," "fund," "FIP," "FII" and "equity" at CADE's General Superintendence database.

9 Since CADE's Resolution No. 2/2012 new wording has been in force since October 1, 2014, the sample considers the cases reviewed from October 2014.

10 The sample considers the cases reviewed at the time of this writing, September 2017.

11 The cases were collected using the keywords "fundos," "fund," "FIP," "FII" and "equity" at CADE's General Superintendence database.

4 Article 116 of Law No. 6404/76.

5 Article 243 of Law No. 6404/76.

- The majority (107 transactions, 66%) deals with the acquisition of equity interest without acquisition/consolidation of control, and only a small portion (37 transactions, 22.8%) consisted of acquisition/consolidation of control;
- Even though there is no economic sector in which there is a more intense investment activity regarding investment funds, it is possible to acknowledge a slight difference on transactions related to real estate development (29 transactions, 17.9%) and electric power (13 transactions, 8%);
- Despite the change on the extension of the economic group thresholds concerning investment funds for filing the merger to CADE's clearance, there was just a small reduction in the number of the transactions filed (84 transactions were reduced to 78).

15. It is clear, however, that these conclusions do not necessarily represent the complete reality of investments made by investment funds in Brazil, since only a portion of these transactions are filed for CADE's clearance, in accordance with the threshold bottleneck.

II. Institutional investors as minority shareholders, common ownership and possible antitrust concerns

16. The doctrine of competition law and corporate law abroad and in Brazil have been discussing over the last few years the possible competitive impacts of transactions involving the acquisition and holding of minority direct interests in the capital stock of competitors.¹² The current discussion of common ownership by institutional investors and its competitive impacts are, though, still incipient in Brazil. How to evaluate the possible competitive impacts of a strategy of acquisition of passive investments in several competitors of the same market? Is there an antitrust risk to be considered? As will be detailed below, recent studies are leading to the belief that the simple engagement of these investors in competing companies may lead to higher prices, tacit collusion, express collusion, and other effects that may be harmful to the competitive landscape.

12 Please refer to: OECD Minority Shareholdings 2008. Available at: <https://www.oecd.org/competition/mergers/41774055.pdf>.

1. Minority shareholders between competitors and possible antitrust concerns in Brazil

17. The potential of minority shareholdings producing anticompetitive effects has gained significant attention in recent years. In 2008, the OECD¹³ discussed the topic of minority interests and the phenomenon of interlocking directorates.¹⁴ The discussion addressed the concerns regarding the existence of structural links among competing companies and the anticompetitive effects that may arise due to the possibility of influence on the decision-making process of competitors, which could be triggered by increased transparency and the change in the incentives for companies to compete.

18. Concerning the possible coordinated effects of minority interests, the OECD pointed out that since the minority shareholder may be granted access to sensitive information of the target; it has been observed that structural links among competitors may facilitate tacit or express collusion. In addition, when holding minority shares, an investor may also modify the company's incentives to default on an anticompetitive agreement or to enter into a price war to punish companies that break an anticompetitive agreement. As for the unilateral effects, the OECD pointed out that in certain circumstances partially holding of minority shares in companies with structural connections with competitors could lead to the definition of policies to reduce production in the market, as well as the creation of incentives for the company to adopt favorable positions to increase the joint profit margin. According to the report, the reason is simple: if a company acquires shares of a competitor and aggressively competes against it, financial losses will affect the investment made.

19. However, as discussed by the OECD, the evaluation of these anticompetitive effects depends on several factors that significantly affect the incentives of the company to compete; for example, structural characteristics of the market and the specificities of the parties involved in the transaction. Although there is evidence of anticompetitive effects, the major problem of reviewing merger filings involving minority interests would be that the analysis typically falls within the concept of control or relevant influence to determine whether the transaction should be filed. Therefore, it is possible that the anticompetitive effects caused by these transactions will not be detected because, as they do not imply a transfer or change of control, they will not be filed.

13 Ibid.

14 Interlocking directorates occurs when one or more competitors (or vertically related companies) have one or more members in common or with family ties in their boards of directors. Such a situation may raise competitive concerns as the connection between firms can result in exchange of information, parallel behavior, obstruction of competitors, and other activities that may adversely affect market competitiveness (op. cit. pp. 24 and 25).

20. In Brazil, the discussion regarding holders of minority shares on competitors can be seen, for example, in the case No. 535500.021373/2010. In this case, Telefônica submitted to CADE's review the acquisition of 50% of Brasilcel shares held by Portugal Telecom and PT Móveis. Back then, Brasilcel was a majority shareholder of Vivo and Telefônica, and already owned a minority stake of Tim. That fact raised competitive concerns since Telefônica would control Vivo and at the same time would have minority shares in Tim, which was Vivo's competitor. At the end, the CADE's Administrative Tribunal decided to approve the transaction with restrictions. CADE's final decision was to impose to Telefônica the obligation of not maintaining any direct or indirect financial position at Tim. In addition, alternatively, the transaction could be approved by the joint of a new member at Vivo's board of director that had experience in the sector and was not a part of another telephone company in Brazil. That way, Vivo's control would be shared and the possibility of coordination could be avoided through the independent co-controller.¹⁵

21. In addition, there was another discussion in this regard on case No. 08012.009198/2011-21 that involved companies that competed in the flat steel production market, CSN and Usiminas. In this case, CSN announced the acquisition of 4.99% of common shares and 4.99% of preferred shares of Usiminas and, later, CSN released another 4 notices to the market reporting additional acquisitions in the said company, which totaled 14.13% of participation in common shares and 20.69% in preferred shares. The former Secretariat of Economic Law (SDE-MJ) became aware of CSN's purchase of shares, as well as its intention to form part of the controlling block of the investee, requesting that the companies submitted the transactions to CADE's analysis.¹⁶ CADE then established a Performance Commitment Agreement (TCD) with the parties, in which it was imposed, among other measures, restrictions on CSN's political rights in Usiminas. That measure was taken in view of competitive concerns towards the scenario in which CSN could vote in the election of the board of directors and the fiscal council of Usiminas. In 2016, however, CADE's Tribunal, by a majority,¹⁷ eased the TCD, allowing CSN to nominate members to Usiminas' fiscal and administration councils, because "*the financial and corporate situation of Usiminas is extremely delicate.*"¹⁸ In 2017, once more, there was a new request for softening by the parties. However, at this time, the tribunal was unanimous ruling not to allow reappointing independent directors nominated by CSN in 2016.¹⁹

15 Please refer to Tim's Market announcement published on December 5, 2013. Available at: <http://ri.tim.com.br/Show/Apresentacao-de-nota-do-Conselho-Administrativo-de-Defesa-Economica--CADE?=-BaAABRz6qV22RCxHHEquEg==>.

16 Please refer to Commissioner's Eduardo Pontual vote. Available at: https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_documento_consulta_externa.php?xgSJDH-3T17Rh0CrGYtJb0A1Onc6JnUmZgGFw0zP7uM_xaqhshSa8qYtqSBnA5amzT-dq0EK-4bllqyL98fy5wJcPd8EzT1VsfpAKd1wZc8FrGym3Y1nY69sGTVhgz_d3

17 The Commissioners João Paulo Resende and Cristiane Alkimin voted against the measure.

18 PARECER No. 77/2016/UCD/PFE-CADE-CADE/PGF/AGU

19 Published on the *Official Gazette* on April 4, 2017.

22. In either case reported in CADE's jurisprudence, it is possible to observe, therefore, that corporations may exercise influence through minority shares, without constituting control under the terms of the Brazilian Corporate Law (Law No. 6404/76). Therefore, a question remains: what if this influence is exercised by an institutional investor, which acquires minority shares, in competing companies? Will there be anticompetitive effects?

2. Common ownership by institutional investors and possible antitrust concerns in Brazil

23. Azar, Tecu and Schmalz²⁰ were pioneers on conducting empirical research associating the price increase in product markets and the existence of common investors. Therefore, a statistical correlation between common ownership and price increases was documented. After this first work, other studies²¹ were produced with the purpose of discussing competitive problems engaged by institutional investors. For Azar, Schmalz and Tecu,²² the price increase is related to the common minority shares held by institutional investors in competing companies, which may result from both active and passive performance. Thus, an active role of the institutional investor in competing firms may arise, for example, from incentivizing companies to compete less aggressively or to encourage collusion.

24. Azar, Schmalz and Tecu²³ pointed out that the three main strategies investors apply are: (i) voice; (ii) incentives and (iii) voting. The voice is exercised by passive and active investors through private meetings with corporate CEOs, which sometimes require board seats to ensure that a strategy is implemented. Incentives, in turn, are related to investor pressures on selling their shares if the director does not follow the market strategy suggested by the investor. As a result, implementing the strategy could lead to a fall on stock prices and would have a direct impact on management incentives. Finally, in relation to the vote, according to the authors, it is the last instance, when it was not possible to use private mechanisms of influence or voice. According to the authors, "*engagement is the carrot, voting is the stick.*"²⁴ Therefore, despite the

20 J. Azar, M. Schmalz, and I. Tecu, Anti-Competitive Effects of Common Ownership, (March 15, 2017), *Journal of Finance*, Forthcoming. Available at SSRN: <https://ssrn.com/abstract=2427345> or <http://dx.doi.org/10.2139/ssrn.2427345>.

21 J. Azar, S. Raina, and M. Schmalz, Ultimate Ownership and Bank Competition, 2016. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2710252; J. Azar and M. Schmalz, Common Ownership of Competitors Raises Antitrust Concerns, *Journal of European Competition Law & Practice*, Vol. 8, Issue 5, May 2017, pp. 329–332. Available at: <https://doi.org/10.1093/jeclap/lpx032>; J. Azar, M. Schmalz, and I. Tecu, Why Common Ownership Causes Antitrust Risks, *CPI Antitrust Chronicle* June 2017. Available at SSRN: <https://ssrn.com/abstract=2988778>.

22 J. Azar, M. Schmalz, and I. Tecu, Anti-Competitive Effects of Common Ownership, op. cit.

23 Op. cit.

24 Op. cit. p. 36.

impossibility of using the vote to influence competitive strategies, this voting power can be used to choose the board of directors, which will represent their interests in commercial decisions. In addition, after the election of the board of directors, it is also possible to exert such pressure on the managers using the vote relative to the remuneration of directors as a bargaining chip.

25. Posner, Morton and Weyl,²⁵ for that matter, pointed out other aspects as main mechanisms of institutional investors' exercise of influence. Firstly, institutional investors can recommend strategies to CEOs in order to increase profits by raising prices. As the company's CEOs aware of the possibility of communication between the institutional investor and the CEO of the competing company, there is greater certainty about approving a price increase. On the occasion that one of the CEOs does not follow the policy suggested by the institutional investor, the common investor may use opposing votes and its influence on votes of other board members. Secondly, the institutional investor can propose incentive packages for the CEO to reduce his incentives to compete against rivals. This precise point appears to be especially relevant in oligopolistic markets. In those markets, instead of competing to gain market share of the competitor, the company may choose to increase the total level of profit. As a result, this compensation mechanism reduces competition. Thirdly, the authors point out that the investor may block bids from active investors interested in establishing aggressive competition through his vote.

26. Azar, Schmalz and Tecu²⁶ point out, however, that in addition to active engagement, a mere minority passive engagement of institutional investors in competitors may result in anticompetitive effects. This is due to the possibility that the investor's passivity will result in not encouraging investments in R&D, market research, price wars against market entrants, and expansion of productive capacity is harmful to the industry and may cause price increases.

27. Considering the anticompetitive concerns in terms of the active and passive engagement of institutional investors in competitors, it is necessary to analyze whether CADE has ever faced this type of situation or not. Under the jurisprudential research carried out by these authors, it was not possible to identify any transaction in which there was a sign of this discussion. This fact possibly derives from the fact that the filing requirements regarding investment funds given by Resolution No. 2/2012 are quite restricted (see Section I.1. above). Furthermore, it also must be considered that the analysis carried out by CADE does not cover engagements under the 20% threshold. In addition, to consider only direct acquisitions among competitors and exclude those carried out by a common investor may also downsize the

number of cases involving institutional investors with minority investments in competitors.

28. Despite this fact, even though this concern was not pointed out by CADE itself in its analysis, there was a correlated discussion in a merger that was analyzed by CADE.²⁷ The case involved a transaction filed by the companies Kroton and Estácio, both active in the market of on-campus and distance-learning education in Brazil. The transaction was rejected by CADE's Tribunal in June 2017, due to the competitive risks of the merger, which would result in competitive problems in the on-campus modality.²⁸

29. Despite the ruling of the case in itself, it is interesting to note that, it turned out that both parties of the transaction—competitors—had a common investor, the Coronation Fund Managers, which held 10.3% of shares at Estácio and 4.5% of shares at Kroton.²⁹ Prior to the submission of the transaction for CADE's review, that institutional investor Coronation Fund Managers voted in favor of the merger at the general assembly of shareholders of both competitors,³⁰ having even expressed publicly its opinion on the value of the offer: "*Kroton's offer represents the preferable option to Estácio's shareholders in the long run,*" adding, "*I would like to warn [Estácio's] management not to demand an unjustified price that would put the proposed transaction at risk.*" Coronation Fund Managers had a clear interest in the merger, as it was an institutional investor in both merging companies.

30. In terms of the Brazilian Corporate Law, it would be possible to question if this institutional investor abused of its right to vote and voted in a conflict of interests situation (Article 115, Law No. 6404/76), since it had an interest in both companies involved in the transaction. On the other hand, in competitive terms, it would be possible to question if the decision to support the transaction by the institutional investor were motivated by the efficiency it would have brought to the market or by the profits that the investor itself would have obtained individually in each company invested. Could the merger decision, from the very beginning, have been influenced precisely by these minority holdings of the institutional investor, which could already be reducing competition between the competitors Estácio and Kroton, whether through active or passive action? Although the analysis of that institutional investor participation has not been the subject of further discussions by CADE, the case is an important indication of how it is possible for an institutional investor to exercise significant influence in decision-making processes involving competitive matters, which may have the potential to have anticompetitive

25 E. A. Posner, F. M. Scott Morton, and E. G. Weyl, A Proposal to Limit the Anti-Competitive Power of Institutional Investors. *Antitrust Law Journal* (Forthcoming), 2017. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2872754.

26 J. Azar, M. Schmalz, and I. Tecu, Anti-Competitive Effects of Common Ownership, op. cit.

27 Please refer to CADE's Press Release available at: <http://www.cade.gov.br/noticias/aquisicao-da-estacio-pela-kroton-e-vetada-pelo-cade>

28 Op. cit.

29 Please refer to the article published by Exame, on July 7, 2016. Available at: <https://exame.abril.com.br/negocios/quem-e-o-coronation-fundo-com-acoes-da-estacio-e-da-kroton>.

30 Op. cit.

effects. In view of the increase in capital market activities in Brazil, it is our understanding that new cases submitted to CADE's review in the future may face this discussion.

III. Final remarks

31. In view of the above, and under the Brazilian legal framework, it is possible to conclude that an institutional investor, even if it is a minority shareholder with passive participation, can affect the competitive dynamics of the market. That is because there are nuances regarding the exercise of power on companies, not related necessarily to the concept of control, such as significant influence, relevant influence, financial interests and interpersonal contacts, that can result in commercial strategies with potential anticompetitive effects.

32. The concern with minority interests in competitors has already been addressed by CADE in at least two cases (see Section II.1.). The concern with common ownership by institutional investors, however, has not yet been analyzed by the Brazilian antitrust authority, although it has been discussed in the background of one case (see Section II.2.).

33. As academic research and jurisprudential analysis involve recognizing that there may be a competitive problem caused by the influence of non-controlling institutional investors in competing companies, it will be necessary to assess the extent to which this concern is applicable in Brazil, in view of our corporate ownership structure that is concentrated, family owned and intertwined. This is because CADE's jurisprudence and the current Brazilian antitrust legal framework do not address the issue of institutional investors in depth. It is necessary to expand the discussion and evaluate whether major rigidity in the filing thresholds has a perverse effect on Brazilian capital markets, which do not have a dispersed ownership structure yet, in comparison with other jurisdictions where the discussion on minority interests of institutional investors is in a more advanced stage. Thus, although there is still a long path ahead, there is an important indication that the discussion is necessary and that it is possible that the anticompetitive effects of the minority interests of these agents are not sufficiently addressed.

34. This work could be a starting point for the discussion of common ownership by institutional investors and its impact on competition, which is still incipient in Brazil. ■

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