

**Competition Law**

[Beatriz Cravo](#) | [Daniel Tobias Athias](#)

## What does CADE consider "simple" for the fast track?<sup>1</sup>

### I. CADE RESOLUTION NO. 02/2012 AND THE BACKGROUND HYPOTHESES FOR THE FAST TRACK PROCEDURE

Resolution 02/2012 of the Administrative Council of Economic Defense (CADE) establishes, in article 8,<sup>2</sup> the hypotheses for analysis of economic concentration acts ("AC" - the acronym in Portuguese) by the fast track procedure. This procedure is reserved for cases of less competitive complexity and for those whose advantages are a shorter period of analysis (that must be concluded within 30 days, according to Resolution No. 16/2016), and this must be done in the simplest form.

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<sup>1</sup> André Martines de Andrade and Giovanna Verginelli Mezher collaborated in the elaboration of this article.

<sup>2</sup> Art. 8 - The following operations are hypotheses that can be covered by the Fast Track Procedure:

I - Classic or Cooperative Joint-Ventures: cases of association of two or more separate companies for the formation of a new company under common control, which aims solely and exclusively at participation in a market whose products/services are not horizontally or vertically related;

II - Replacement of the economic agent: situations in which the acquiring company or its group did not participate in the market involved or the vertically related markets, before the act, , in addition to other markets, in which the acquired company or its group acted;

III - Low market share with horizontal overlap: situations in which the operation generates control of part of the relevant market, yet proven to be below 20%. This is at the General Superintendence's discretion, so as not to leave any doubts about the irrelevance of the operation from the competition viewpoint;

IV - Low market share with vertical integration: in the situation in which none of the applicants or their economic group has proven to control more than 30% of any of the vertically integrated relevant markets.

V - Absence of causal link: horizontal concentrations that result in a HHI variation of less than 200, as long as the operation does not generate control of a relevant market share greater than 50%.

VI - Other cases: cases, which, despite not being covered by the previous categories, are considered simple enough by the General Superintendence, to not need further analysis.

Among them, item VI (other cases) arouses interest by leaving open the possibility that cases considered *simple enough* that they do not fit into the other hypotheses can also be analyzed by this procedure. Therefore, it is important to understand how this has been applied by the authority when fitting cases into the fast track procedure.

Thus, all of the cases judged by Cade's General Superintendence (GS/CADE) between 2015 and 2020<sup>3</sup> that were included in item VI of the Resolution were lifted up for analysis. Each concentration act (AC) was then classified into a specific category by its operation type.

Naturally, classifications follow the preferences and choices of those who analyzed them, especially when cases border the chosen classifications and have blind spots in the analysis, due to relevant factors affecting the analysis by the GS/CADE.

Nevertheless, as Genaro Carrió points out, there is no true or false classification, nor any which is more useful or useless.<sup>4</sup> Therefore, the following analysis presents the types of cases being classified by the authority in the aforementioned item.

## II. CLASSIFICATION OF CASES DECIDED BY THE GS/CADE

In total, 367 opinions from the GS/CADE were analyzed. Some of the operations can be classified into more than one category, though it was decided to just classify them into the category that best represents them.

In several cases, the GS/CADE, highlighted factors that motivated the classification when applying item VI, such as the absence of horizontal overlapping, pre-existing relationships, and operations performed in natural monopoly markets. Despite the importance of these points, the objective was to systematize which types of operations are being classified as simple enough, since some of these points have their provisions in other items of art. 8.

The three main categories of types of operations found were: (1) acquisition or consolidation of control (2) acquisition of equity interest and (3) acquisition of assets. These three categories correspond to 278 opinions and 75% of the total number of cases analyzed.

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<sup>3</sup> The survey of cases was done as follows: (1) the "Free Search" of the expression - "other cases and" two filters having been applied in SEI; (2) Type of Document: "Opinion;" and (3) Type of Process: "Finalistic: Fast Track Merger. The analysis of cases was closed on July 22, 2020.

<sup>4</sup> "*Las clasificaciones no son ni verdaderas ni falsas, son serviciales o inútiles [o bien, pueden ser desorientadoras]; sus ventajas o desventajas están supeditadas al interés que guía a quien las formula, y a su fecundidad para presentar un campo de conocimiento de una manera más fácilmente comprensible o más rica en consecuencias prácticas deseables*", CARRIÓ, Genaro R. *Notas sobre Derecho y lenguaje*. Buenos Aires: Abeledo-Perrot, 1965, p. 99.

The majority of the operations included in item VI are concerning the acquisition or consolidation of control of a certain company, whether direct or indirect. This was the case of 151 of the opinions analyzed,<sup>5</sup> which corresponds to approximately 41% of the total number. If these cases are verified in a closer manner, different situations can be observed, both regarding the consolidation of control when the company already had relevant participation (60%, 75%, or 90%), as well as if there was an acquisition of a significant level of participation. In some cases, this could be of over 80% (and in others 100%), resulting in the acquisition of control. In other words, simplicity does not derive from the level of shareholding acquired in these cases.

The second largest category of cases regards the acquisition of equity interest. This category includes both an increase in the equity interest already held, as well as the acquisition of an

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<sup>5</sup> Mergers 08700.00032/2020-81, 08700.000136/2020-96, 08700.000439/2020-17, 08700.000441/2020-88, 08700.000653/2020-65, 08700.000673/2020-36, 08700.000907/2020-45, 08700.001372/2020-20, 08700.001427/2020-00, 08700.001620/2020-32, 08700.001726/2020-36, 08700.001770/2020-46, 08700.002058/2020-64, 08700.002544/2020-82, 08700.002762/2020-17, 08700.002787/2020-11, 08700.002911/2020-48, 08700.006216/2019-11, 08700.006197/2019-23, 08700.005123/2019-70, 08700.006136/2019-66, 08700.005815/2019-18, 08700.005709/2019-34, 08700.005306/2019-95, 08700.003364/2019-84, 08700.003290/2019-86, 08700.004758/2019-50, 08700.004847/2019-04, 08700.004532/2019-59, 08700.003267/2019-91, 08700.004264/2019-75, 08700.004175/2019-29, 08700.004094/2019-29, 08700.003920/2019-12, 08700.001600/2019-28, 08700.001267/2019-57, 08700.001228/2019-50, 08700.001143/2019-71, 08700.000945/2019-64, 08700.000935/2019-29, 08700.000748/2019-45, 08700.000708/2019-01, 08700.000542/2019-15, 08700.000395/2019-83, 08700.007402/2018-97, 08700.002837/2019-26, 08700.002564/2019-10, 08700.002300/2019-66, 08700.002165/2019-59, 08700.005808/2019-16, 08700.002295/2018-19, 08700.002492/2018-20, 08700.005597/2018-31, 08700.005793/2018-13, 08700.005992/2018-13, 08700.006572/2018-54, 08700.007027/2018-85, 08700.007226/2018-93, 08700.000228/2018-51, 08700.000349/2018-01, 08700.000390/2018-70, 08700.000391/2018-14, 08700.000419/2018-13, 08700.000634/2018-14, 08700.000644/2018-50, 08700.000744/2018-86, 08700.001278/2018-56, 08700.003707/2018-20, 08700.003765/2018-53, 08700.004243/2018-79, 08700.004290/2018-12, 08700.004327/2018-11, 08700.004388/2018-70, 08700.004415/2018-12, 08700.004437/2018-74, 08700.004455/2018-56, 08700.004520/2018-43, 08700.001409/2017-14, 08700.000710/2017-19, 08700.005039/2017-94, 08700.008115/2017-13, 08700.001952/2017-11, 08700.002198/2017-37, 08700.003083/2017-60, 08700.003771/2017-20, 08700.004197/2017-27, 08700.006901/2017-86, 08700.007010/2017-47, 08700.007756/2017-51, 08700.008708/2016-07, 08700.00549/2017-75, 08700.000654/2017-12, 08700.001313/2017-56, 08700.002854/2017-00, 08700.003025/2017-36, 08700.003927/2017-72, 08700.004092/2017-78, 08700.004011/2017-30, 08700.004675/2017-07, 08700.003956/2017-34, 08700.004694/2017-25, 08700.005178/2017-18, 08700.005315/2017-14, 08700.006373/2017-65, 08700.006869/2017-39, 08700.007052/2017-88, 08700.002794/2016-36, 08700.005246/2016-68, 08700.005982/2016-16, 08700.005015/2016-54, 08700.006646/2016-91, 08700.006647/2016-35, 08700.006725/2016-00, 08700.008420/2016-24, 08700.000950/2016-24, 08700.001301/2016-41, 08700.001413/2016-00, 08700.001828/2016-75, 08700.002223/2016-00, 08700.003489/2016-61, 08700.003560/2016-14, 08700.003595/2016-45, 08700.004506/2016-88, 08700.005410/2016-37, 08700.006008/2016-70, 08700.006171/2016-32, 08700.006658/2016-15, 08700.007552/2016-39, 08700.008060/2016-61, 08700.007735/2016-54, 08700.012588/2015-53, 08700.012653/2015-41, 08700.012655/2015-30, 08700.002117/2015-37, 08700.003153/2015-18, 08700.004046/2015-15, 08700.006789/2015-11, 08700.006999/2015-18, 08700.007998/2015-82, 08700.009117/2015-68, 08700.009122/2015-71, 08700.009475/2015-71, 08700.010032/2015-22, 08700.010317/2015-63, 08700.010875/2015-29, 08700.011981/2015-20, 08700.012059/2015-50, 08700.000439/2015-41, 08700.010767/2015-56, 08700.010791/2015-95, 08700.012065/2015-15 and 08700.012152/2015-64.

interest by a new economic agent, regardless of the structure adopted by the transaction. The difference between these cases and the previous category is that there is no acquisition of unitary control, although there are cases of shared control acquisition. As in the previous category, there are also minor increases in equity interest (e.g. 0.30%<sup>6</sup>), as relevant (e.g. 51%<sup>7</sup>). This type of operation corresponded to 96 cases,<sup>8</sup> totaling 26% of the opinions analyzed.

Operations of nature in both categories are of obligatory notification, as they can lead to reinforcements in pre-existing relationships, they are generally simple operations, whose specific hypotheses are not foreseen in CADE's Resolution No. 02/2012.

The third main category is the acquisition of either tangible or intangible assets, corresponding to a total of 31 cases (8%).<sup>9</sup> These cases are perhaps the most relevant, since the legislation in force is not extremely clear as what a notifiable acquisition is. For example, in a case judged in 2017, the parties highlighted that the assets would be inoperative, thereby, not representing an addition in production capacity. This argument was rejected, because, although they were not

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<sup>6</sup> Merger No. 08700.003546/2018-74.

<sup>7</sup> Merger No. 08700.004243/2018-79.

<sup>8</sup> Mergers 08700.000180/2020-04, 08700.000232/2020-34, 08700.000277/2020-17, 08700.000821/2020-12, 08700.000826/2020-45, 08700.001228/2020-93, 08700.001229/2020-38, 08700.002233/2020-13, 08700.002482/2020-17, 08700.002657/2020-88, 08700.004833/2019-82, 08700.006242/2019-40, 08700.005547/2019-34, 08700.005228/2019-29, 08700.006157/2019-81, 08700.005883/2019-87, 08700.005332/2019-13, 08700.004495/2019-89, 08700.003468/2019-99, 08700.003420/2019-81, 08700.000314/2019-45, 08700.001144/2019-16, 08700.001226/2019-61, 08700.001353/2019-60, 08700.001482/2019-58, 08700.002047/2019-41, 08700.002348/2019-74, 08700.002948/2019-32, 08700.002073/2018-98, 08700.005672/2018-63, 08700.006697/2018-84, 08700.006581/2018-45, 08700.006582/2018-90, 08700.007228/2018-82, 08700.003546/2018-74, 08700.004223/2018-06, 08700.004912/2018-11, 08700.000822/2017-61, 08700.004820/2017-41, 08700.001468/2017-92, 08700.001494/2017-11, 08700.001503/2017-73, 08700.001504/2017-18, 08700.005079/2017-36, 08700.006078/2017-17, 08700.006452/2017-76, 08700.006569/2017-50, 08700.007524/2017-01, 08700.007770/2017-54, 08700.001547/2016-12, 08700.002331/2016-74, 08700.003009/2016-62, 08700.004472/2016-21, 08700.007044/2016-51, 08700.001463/2016-89, 08700.003604/2016-06, 08700.003937/2016-27, 08700.004652/2016-11, 08700.004698/2016-22, 08700.005667/2016-99, 08700.005701/2016-25, 08700.005939/2016-51, 08700.007732/2016-11, 08700.008108/2016-31, 08700.012609/2015-31, 08700.012336/2015-24, 08700.012223/2015-29, 08700.011951/2015-13, 08700.011715/2015-05, 08700.011551/2014-27, 08700.009996/2015-28, 08700.009898/2015-91, 08700.009208/2015-01, 08700.009035/2015-13, 08700.008539/2015-16, 08700.007645/2015-82, 08700.005559/2015-35, 08700.004450/2015-81, 08700.004025/2015-91, 08700.003989/2015-12, 08700.003337/2015-88, 08700.001596/2015-74, 08700.001113/2015-31, 08700.000881/2015-78, 08700.003762/2015-77, 08700.004537/2015-58, 08700.000580/2015-44, 08700.000579/2015-10 and 08700.011623/2014-36.

<sup>9</sup> Mergers 08700.004281/2019-11, 08700.004970/2019-17, 08700.002510/2019-54, 08700.000180/2019-62, 08700.003211/2018-56, 08700.005894/2017-03, 08700.006425/2017-01, 08700.008064/2017-20, 08700.000941/2017-14, 08700.001169/2017-58, 08700.003024/2017-91, 08700.003055/2017-42, 08700.003216/2017-06, 08700.005589/2017-11, 08700.007662/2017-81, 08700.001107/2017-46, 08700.003926/2016-47, 08700.008315/2016-95, 08700.000611/2016-48, 08700.002554/2016-31, 08700.003742/2016-87, 08700.005474/2016-38, 08700.005603/2016-98, 08700.012338/2015-89, 08700.012337/2015-79, 08700.006278/2015-08, 08700.010994/2015-81, 08700.011570/2015-34, 08700.008524/2015-58 and 08700.009943/2015-15.

used after manufacturing, this *"does not imply that the asset is not productive or that it does not matter in terms of increased production capacity (...), since it is directly related to the economic activity for which it is intended."*<sup>10</sup> At this point, it is important to highlight that the authority has been considering the essentialness of the input for the activities involved as notification criteria.

Besides these three main categories of "simple enough" operations, at least 11 other categories were found, which, though they do not represent a significant part of the cases, are relevant to guide those who intend to use item VI:

- i) Creation of a joint venture or partnership (19 cases)<sup>11</sup> - covers both greenfield operations - to offer a product in which the parties alone would not have the capacity to manufacture in addition to others, in which the activity was already explored by the associated companies;
- ii) Assignment of exploration rights (16 cases)<sup>12</sup> - assignment of production rights related to contracts for oil exploration in specific fields;
- iii) Restructuring (14 cases)<sup>13</sup> - cases of corporate restructuring or restructuring of partnership, joint venture, consortium, or economic group (e.g. reallocation of equity interest);
- iv) Discontinuation of joint venture or partnership (11 cases)<sup>14</sup> - deals with the mere termination of joint ventures entered into between certain companies. In some cases, this may involve the disposal of equity interest and the termination of lease agreements. A distinction was made between cases where there was acquisition of control in a joint venture (included in the category of acquisition of control) and when there was an explicit indication of dissolution (computed in this category);

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<sup>10</sup> Merger No. 08700.008315/2016-95.

<sup>11</sup> Mergers 08700.004051/2019-43, 08700.001979/2019-76, 08700.002407/2019-12, 08700.007314/2018-95, 08700.001321/2018-83, 08700.003866/2018-24, 08700.006955/2017-41, 08700.000899/2017-31, 08700.006826/2017-53, 08700.002083/2016-61, 08700.012450/2015-54, 08700.012662/2015-31, 08700.000287/2015-87, 08700.000540/2015-01, 08700.002585/2015-10, 08700.006529/2015-46, 08700.001226/2015-37, 08700.010002/2015-16, 08700.002975/2014-09, 08700.007242/2015-33, 08700.011554/2014-60 and 08700.011597/2014-46

<sup>12</sup> Mergers 08700.001835/2020-53, 08700.001842/2020-55, 08700.002030/2020-27, 08700.002033/2020-61, 08700.002048/2020-29, 08700.002048/2019-95, 08700.002817/2019-55, 08700.002349/2017-57, 08700.008043/2017-12, 08700.008056/2016-01, 08700.000290/2015-09, 08700.007815/2015-29 and 08700.008664/2015-26.

<sup>13</sup> Mergers 08700.000136/2020-96, 08700.001760/2020-19, 08700.006178/2018-16, 08700.006321/2018-14, 08700.006323/2018-69, 08700.007028/2018-20, 08700.004415/2018-12, 08700.008654/2016-71, 08700.000662/2017-51, 08700.003971/2017-82, 08700.000839/2016-38, 08700.001182/2016-26, 08700.006657/2016-71 and 08700.004537/2015-58.

<sup>14</sup> Mergers 08700.003418/2019-10, 08700.001259/2019-19, 08700.002536/2017-31, 08700.004162/2017-98, 08700.005839/2017-13, 08700.000424/2016-64, 08700.005765/2016-26, 08700.007271/2016-86, 08700.005672/2015-11, 08700.007739/2015-51 and 08700.009751/2015-09.

- v) Absence of effects in Brazil (10 cases)<sup>15</sup> - covers cases in which a specific joint venture is focused on a geographic market other than Brazil. This would be cases in which the country is only affected indirectly (no notification in the country of origin). There is no prospect of sales or even modest imports to the country, and there is no time perspective for a certain type of technology to reach that country;
- vi) Associative contracts (6 cases)<sup>16</sup> - referring to exclusive contracts (e.g. distribution);
- vii) Acquisition of franchisee by the franchisor (5 cases)<sup>17</sup> - The GS/CADE highlights that there is already "*some power of interference of the franchisor over the decisions of the franchisee, resulting in some degree of coordination,*" so that the change in the governing structure does not modify competitive-commercial conditions (e.g. price);
- viii) Constitution of non-profit associations (3 cases)<sup>18</sup> - constitution of an association for the purpose of implementing the National Policy on Solid Waste;
- ix) Codeshare (2 cases)<sup>19</sup> - flight sharing contracts - no longer notifiable after the edition of CADE's Resolution No. 17/2016;
- x) Lease or lending of assets (2 cases)<sup>20</sup> - for example, the leasing of company assets under Judicial Reorganization for a period of one year (renewable); and
- xi) Replacement of economic agent (1 case)<sup>21</sup> - related to the assignment of a contractual position.

### III. ADDITIONAL RELEVANT CRITERIA FOR ITEM VI

Among the criteria adopted by the GS/CADE for acceptance of the fast track procedure are: (i) characteristics of the relevant affected markets; (ii) presence of relevant competitors; (iii) reduced change in market structure; and (iv) maintenance of economic incentives.<sup>22</sup> In general, what has been concluded is that the cases notified and classified as simple enough include those that do not aim to promote relevant changes in the market structure.

An excellent example of this are the three main categories, since there would first be the acquisition or consolidation of unitary control by companies that generally already held equity interest, although in some cases, this acquisition would have been new. Next, there would be the

<sup>15</sup> Mergers 08700.000485/2018-93, 08700.002970/2018-00, 08700.003901/2018-13, 08700.000899/2017-31, 08700.001932/2017-41, 08700.002630/2017-90, 08700.006425/2017-01, 08700.006313/2017-42, 08700.000357/2016-88 and 08700.009207/2015-59.

<sup>16</sup> Mergers 08700.003743/2019-74, 08700.006667/2018-78, 08700.005953/2018-16, 08700.000128/2017-44 and 08700.006640/2017-02.

<sup>17</sup> Mergers 08700.000234/2018-17; 08700.000074/2017-17, 08700.004965/2017-42, 08700.007469/2017-41 and 08700.000606/2015-54.

<sup>18</sup> Mergers 08700.005384/2014-85, 08700.009764/2015-70 and 08700.012602/2015-19.

<sup>19</sup> Mergers 08700.001862/2015-69 and 08700.011932/2014-06.

<sup>20</sup> Mergers 08700.003664/2015-30 and 08700.003056/2016-14.

<sup>21</sup> Merger No. 08700.000780/2018-40.

<sup>22</sup> Mergers 08700.004520/2018-43 and 08700.004455/2018-56.

cases in which there was already equity participation, yet there was no significant increase. Then finally, there would be the mere acquisition of assets.

#### IV. CONCLUSION

This quantitative and semi-qualitative analysis has mapped and classified the cases as understood by the authority as *simple enough* to be analyzed under the fast track procedure. Although the analysis of concentration acts is conducted on a case-by-case basis because of the numerous factors considered, this mapping is useful to present how the authority has been using item VI of Resolution No. 02/2012. To some extent, this serves as a guide to the administrators in the submission of economic concentration acts.