Administrative Council for Economic Defense

Guide

Antitrust Remedies

CADE

Conselho Administrativo de Defesa Econômica

Ministry of Justice

Administrative Council for Economic Defense

Guide to Antitrust Remedies

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Presentation

This Guide for Antitrust Remedies presents the best practices and procedures usually adopted by the Administrative Council for Economic Defense (CADE) for determining, applying and monitoring antitrust remedies. The Guide aims to ensure predictability and transparency as to the activities of CADE.

According to Article 61 of Law 12529/2011, antitrust remedies are applied as conditions to eliminate potentially harmful effects of a merger or acquisition. The remedies aim at preventing that mergers result in diminishing competition in a significant part of the relevant market, in increasing the likelihood of coordination amongst competitors, in creating or strengthening a dominant position, or even in controlling a relevant market of goods or services, as per articles 36 and 88 of Law 12529/2011.

Thus, if a merger is not fully cleared, imposing remedies are necessary for its clearance. However, Article 88 provides that if applying remedies to a merger or acquisition that harms competition is unfeasible, the Tribunal of CADE must decide for blocking said transaction.

The antitrust remedies may be negotiated with applicants through a Merger Control Agreement (ACC in its acronym in Portuguese). The ACC is suggested by the Office of the Superintendent General of CADE (SG), when the SG challenges the case to the Tribunal, or is determined as a decision of the Tribunal, as per Articles 161, 165 and 168 of the Statutes of CADE.

Remedies can also be determined unilaterally by the Tribunal of CADE or be established through a Cease and Desist Agreement (TCC in its acronym in Portuguese) in cases of anticompetitive practices under the terms of articles 36 and 38 of Law 12529/2011. Considering the information below, the remedies here mentioned shall concern cases of merger and acquisitions only; although they can be applied to anticompetitive practices.

Against this backdrop, the Guide for Antitrust Remedies is developed as a guideline to civil servants, applicants, interested third parties and society regarding the design, adoption and monitoring of future remedies.

This Guide is disposed as follows: Section 1 presents the general aspects of antitrust remedies, such as their definition, type, legal basis and goals; Section 2 concerns the principles and general guidelines for effective remedies; Section 3 presents structural remedies, considering

asset package, buyer, and divestiture process; Section 4 introduces behavioural remedies along with best practices and due diligence for its appliance; Section 5 regards trustees and in which situations they provide assistance; Section 6 concerns the monitoring and review of Merger Control Agreements (ACC), as well as fines and penalties related to it; Section 7 regards applicants' compliance with the ACC; and, lastly, Section 8 provides additional information regarding regulated sectors and international cooperation on mergers that involve other authorities. At last, in the Annex Section, the Guide provides a Glossary, a trustee Term and a Waiver of Confidentiality.

This guide is non-binding and should not be considered as a rule; therefore, it does not change nor substitute provisions of the Statutes of CADE. The practices and procedures herein described can change at CADE's convenience and opportunity, depending on the circumstances of the concrete case.

1 Antitrust Remedies: basic notions

1.1 Definition

An antitrust remedy consist of a procedure, imposed by CADE or negotiated between CADE and the Applicants, as a condition for the clearance of a merger. Antitrust remedies include (i) determining which practices and obligations the parties involved in a merger should take, (ii) the manner the practices are applied, (iii) the monitoring and (iv) fulfilment of remedies. Establishing a remedy often regards only determining practices and obligations; however, this Guide highlights the need for effective remedies that comprise all mentioned aspects, which shall, in fact, mitigate competition concerns derived by the mergers submitted to CADE.

Remedies may comprise the sale of tangible and intangible assets and/or business units of the applicants, in addition to imposing behavioural obligations to their businesses. The remedies shall aim at eliminating the potential harmful effects of a transaction. Thus, the establishment of remedies is subject to the specificities of the concrete case and the circumstances of the transaction, and must consider the potential competitive harm observed on the review of the merger.

1.2 Legal basis

Article 9, Items 5 and 10, of Law 12529/2011, enforces that, amongst its attributions, the Tribunal shall ratify the terms of Cease and Desist Agreements (TCC) and Merger Control Agreements (ACC), ordering the Office of the Superintendent General to monitor applicants' compliance with such agreements, and shall determine merger control agreements whenever deemed timely and suitable.

According to article 61 of Law 12529/2011, in assessing the request for clearance of a merger or acquisition, the Tribunal may refuse to process the case, clear the transaction unconditionally, block it, or clear it subject to remedies, in which case the Tribunal must specify the remedies to be fulfilled as a condition to the enforceability and effectiveness of the transaction.

Additionally, Paragraph 2 of said Article defines that such remedies shall comprise:

1. the sale of assets or a set of assets that constitute a business activity;
2. business division
3. disposal of controlling interest;
4. legal or accounting division of activities
5. compulsory licensing of intellectual property rights; and
6. any other practice or measure required to end harmful economic effects.

As established by Article 165 of the Statutes of CADE, amongst other provisions, CADE may receive proposals of Merger Control Agreements (ACC) in which remedies are negotiated with the Applicants from the date of submission of the application for merger review up to 30 days after the case has been challenged by the Office of the Superintendent General to the Tribunal, without prejudice to the analysis on the merits of the transaction.

On the other hand, Article 168 of CADE's Statutes mentions that in case of mergers conditionally cleared, the Tribunal shall determine the remedies to be fulfilled as a mean to ensure the enforceability and effectiveness of the transaction, as per article 61 of Law 12529/2011.

Besides, under the terms of Articles 36 and 38 of Law 12529/2011, remedies can be applied in cases of economic crimes derived by anticompetitive practices.

1.3 Competition issues mitigated with antitrust remedies

This section briefly summarizes the main types of competitive issues derived by mergers and acquisitions.

Both horizontal or vertical mergers may be harmful to competition by changing incentives in specific markets and setting conditions to the applicants directly involved in the merger to exercise their market power (unilateral effect). Furthermore, mergers can change the operation of the relevant market by increasing the likelihood of tacit or explicit coordination amongst competitors (coordinated effect). Lastly, by creating or strengthening upstream or downstream market dominance, vertical mergers may harm competition by eliminating or excluding current or potential efficient competitors (market foreclosure).

In all cases, remedies must mitigate the potential harm to the competitive environment resulting from the transaction, restoring rivalry and entry conditions existing in the pre-merger scenario. However, remedies are not intended to solve existing competition issues that are not a consequence of a merger.

It is worth mentioning that a transaction's blockage is the most appropriate decision if a remedy cannot be applied to mitigate the potential harm to the competitive environment, as foreseen by Law 12529/2011. Hence, this Guide for Antitrust Remedies consolidates and describes CADE's precedent for cases in which competition concerns are found and can be solved within the context of a merger, and therefore the antitrust remedies applied may be effective.

1.4 Types of remedies

There are different types of antitrust remedies that can be applied. In general, they can be classified as structural or behavioural remedies. Structural remedies regard complete divestiture of assets, whereas behavioural remedies regard commercial activities without required divestiture of assets. Defining antitrust remedies that grant enforceability and effectiveness to a merger may include more than one remedy and more than one type of remedy[1].

To illustrate, based on both CADE's precedent (under the terms of Article 61, Paragraph 2 of Law 12529/2011) and international precedent, structural remedies imposed include:

1. The sale of assets or a set of assets that constitute a business activity;
2. Business division;
3. Disposal of controlling interest or non-controlling interest;
4. Complete divestiture of intellectual property rights, including patent, brands, amongst others.

Item 1 above comprises the sale of pre-existing business units operating solo and the divestiture of a set of assets that become feasible business units, which can be immediately managed by the buyer. Assets may have, in both cases, (a) proven capacity to operate in a competitive manner in the relevant market under the new management; and (b) ability to mitigate the harmful effects of the merger.

Consequently, the sale of assets usually must comprise tangible and intangible assets required to remain the effective performance of the business unit, such as: labour; production, distribution and sale of goods; intellectual property rights; supply and distribution contracts; information system; research and development activities and infrastructure; permit and authorisations from relevant government authorities; and any other essential requirements to ensure the above mentioned (a) and (b) items. Additional behavioural requirements may also be required, such as provisional agreements for the supply of certain inputs and technical support to the buyer, to ensure the divestiture effectiveness.

[1] There are cases in which behavioural measures have been adopted to complement a structural remedy. In the case involving firms Perdigão S/A and Sadia S/A (Merger No. 08012.004423/2009-18), the Tribunal of CADE decided for the disposal of an asset package (brands and intellectual property, rights and goods related to certain operating units and distribution centres). Besides, additional behavioural measures have been adopted, such as the determination to not sign exclusivity agreements with points of sale during the term of the agreement, suspension of use of the brands Perdigão and Batavo, amongst others. See the public version of the case files of the Proceeding (pp. 3881–3895) https://sei.cade.gov.br/sei/controlador.php?acao=documento_download_anexo&acao_origem=procedimento_visualizar&id_anexo=27291&infra_sistema=100000100&infra_unidade_atual=110000960&infra_hash=1bc 978da94be76ec6475cb1504dddbdeb584615446bbff47baa877a949e8a000 Access on 6 Feb 2018.

In a supplementary and alternative manner, in some cases that a structural remedy is ineffective or disproportionate, behavioural remedies may be defined. These remedies include commercial, financial or economic obligations from the parties involved in the merger, whether or not regarding assets directly impaired by them in the relevant markets related to the transaction. In short, obligations comprise:

1. legal or accounting division of activities;
2. business transparency obligations with and for third parties in supply and purchase of inputs and products;
3. non-discriminatory and/or competitively inappropriate behaviour to third parties in supply and purchase activities, regarding parties related within the merger;
4. suspension or withdrawal of exclusivity clauses in matters of fact and law, in business relation with parties related within the merger;
5. obligation to provide inputs or access to key assets to vertically related competitors;
6. obligation to report the merger, even if not reportable under the turnover criterion;
7. suspension of political or corporate law resulting from shares or competitive effects derived by financial instruments;
8. constraint to the access and disclosure of relevant competitive information amongst related parties of the applicants of the merger;
9. mandatory licensing of intellectual property, including brands.

1.5 Designing remedies under Merger Control Agreements

Under the terms of Article 165 of the Statutes of CADE, applicants may submit a remedy proposal from the date of submission of the application for merger review up to 30 days after the case has been challenged by the Office of the Superintendent General, under a Merger Control Agreement (ACC). The submission of remedies proposal does not impair applicants from making later adjustments to the initial proposal.

In particular, according to the Statutes of CADE: "Article 165. CADE may accept proposals of Merger Control Agreements from the date of submission of the application for merger review up to 30 days after the case has been challenged by the Office of the Superintendent General, without prejudice to the analysis on the merits of the transaction." Accordingly, "2. Proposals of Merger Control Agreements are to be submitted to the Tribunal for approval." and "3. Merger Control Agreements negotiated with the Office of the Superintendent General must be submitted to the Tribunal for approval along with the decision of the Office of the Superintendent General to direct the case to the Tribunal." The proposals must contain required information to be properly analysed, as foreseen in Paragraph 4, Article 165 of the Statutes of CADE.

Observing the principle of proportionality, before defining remedies, the authority shall present potential competition issues identified (even within a provisional context), both when the case is at the Office of the Superintendent General and in the discussion with the Rapporteur Commissioner, providing the parties opportunity to submit further clarifications. At the Tribunal, the remedies negotiation must start with the Rapporteur Commissioner, without prejudice to applicants submitting the transaction to the other Commissioners at any time.

The assembled grounds obtained at the end of the discovery phase or submitted for hearing regarding the extent and characteristics of the competitive harm of the transaction with a causal link may require different remedies or additional remedies to the ones proposed, even if the parties present a remedy applied before the opinion of the SG or the decision of the Tribunal.

The signing of a Merger Control Agreement favours the proper appliance of an antitrust remedy. The parties commitment to comply with the remedy reduces risks and allows better focusing the remedy for a particular purpose. In addition, parties commitment enables positive management of assets until divestiture, safeguarding the divestiture value to the firm. The Merger Control Agreement (ACC) mitigate risks of ineffectiveness and judicialization of the remedy for both the antitrust authority and the parties[2].

As to confidentiality, in cases of both ACC and remedies unilaterally imposed by CADE, some commercially sensitive aspects or aspects sensitive for the effectiveness of a remedy, may be considered as of restricted access to CADE and the applicants; thus, public and private versions of decisive documents are provided following the Statutes of CADE.

[2] Determinations to protect the asset package are common in CADE's decisions while the divestment process is in progress. See Merger Novartis AG/Alcon Inc. (Merger No. 08012.003521/2008-57) that established the transfer of rights, titles and assets of the medication Zaditen Eye Drops held by Novartis for an economic agent that already holds production units operating in the pharmaceutical industry or for a new entrant. In this case, the measures adopted in the agreement to protect assets and assure the effectiveness of the divestiture were held in secrecy. See the public version of the case files of the Proceeding (pp. 410–413) https://sei.cade.gov.br/sei/controlador.php?acao=documento_download_anexo&acao_origem=procedimento_visualizar&id_anexo=32357&infra_sistema=100000100&infra_unidade_atual=110000960&infra_hash=f3df ad0e64e98a0440cdc7ebbd216e966d6a71bbc68c097df156a637cf1089b6 Access: 07 Feb 2018.

2 Principles and general guidelines for effective remedies

Effective remedies are remedies that surely solve competitive issues resulting from a merger. This section describes the main principles that contribute for the effectiveness of antitrust remedies and that should be considered during negotiation of Merger Control Agreements, which are: proportionality, timeliness, feasibility and verifiability.

2.1 Principles

2.1.1 Proportionality

An antitrust remedy should be proportional by determining required, adequate and sufficient mitigating actions to revert competitive damages derived by a merger. The proportionality requires at first that the applied remedies should independently be able to mitigate the competition issues identified. On the other hand, it implies avoiding the adoption of remedies exceeding the necessary to restore market competition. Proportionality aims to maintain potential synergy amongst the applicants, as long as ensuring that the potential harm to competition derived by the transaction is eliminated.

2.1.2 Timeliness

On the principle of timeliness, a remedy that mitigates competition issues more quickly is preferable to a remedy whose effects takes longer. The longer the remedy's term, the greater are the monitoring costs and the more susceptible remedy effectiveness is to future events.

The definition of a reasonable term must take into account the characteristics of the specific case. Long term remedies enforcement regarding the sale of assets or businesses may impose burdens and costs to the applicants, considering, for instance, the consummation of the transaction conditioned to the fulfilment of the divestiture obligations. As to the antitrust authority, it results in higher monitoring costs, and it may affect society since the anticompetitive effects observed are not actually mitigated without the complete enforcement of the remedy. On the other hand, in cases of remedies regarding firms' behaviour, the extension of remedies must be sufficiently long to revert the negative effects of the transaction.

2.1.3 Feasibility

A remedy will only be effective if feasible in its different steps. The structural remedy, for instance, must be defined so that the assets to be sold change controllers without loss of competitive effect and can act as a real competitor in the relevant market(s) adversely affected by the transaction. The remedy shall be monitored, present actual means of resolution of incidents, and provide assurance on the mechanisms of compliance over time. Remedies that cannot be monitored during the regular course of the businesses or government activities, raise concerns that can be settled only at significant costs, raise doubts on responsibilities, or provide a great risk of not being fulfilled cannot be considered feasible.

The risks associated with the design, appliance and monitoring of remedies regard, for instance, the absence of buyers for assets or non-controlling interests, the insufficiency of assets effectively competing after disposal, the possibility of omission or circumvention of monitoring or distortion of the required terms for compliance with the restriction, and regulatory impediments to fully comply with the remedy.

2.1.4 Verifiability

The proposed remedies must be verifiable. The verifiability regards (i) means to ascertain obligations; (ii) feasibility of monitoring the actions taken by the applicants efficiently and effectively; (iii) check consequences, if necessary; and (iv) identifying the subjects of the actions necessary to achieve the agreed or imposed remedies. The design of a verifiable remedy reduces implementation risks and facilitates the pursuit of compliance through appropriate judicial means in the event of non-compliance.

2.2 General guidelines

CADE's experience and international best practices allow us to assess, at first, which remedies have greater or lesser adherence to the above principles, within the corresponding context. This section presents general guidelines for effective remedies that may guide and delineate Merger Control Agreements negotiations. We reinforce these are overall guidelines, and their suitability shall be estimated considering the specificities of the case under analysis.

2.2.1 Structural relief is preferred

Structural remedies must be prioritized, since the source of competition issues derive from the change in the structure of a relevant market,

in horizontal and vertical mergers. Thus, a structural remedy, such as divestiture, is usually more effective as it drives the cause of the competitive harm more directly. Besides, structural remedies provide less monitoring costs and fewer risks of market distortions due to the remedies imposed in the transaction.

The adoption of structural remedies regard the transfer of property rights. This transfer results in significant incentive change as to asset management since it implies a new owner. By segmenting the ownership into two shares, the incentives to coordinate decisions as to the use of these assets are substantially reduced, which increases competition in the market.

In contrast, since in behavioural remedies assets ownership does not change, initially there are no changes on the owner's incentives. The antitrust authority establishes economic measures to the asset owner, which possibly would not be adopted in the absence of such intervention. Consequently, moral hazard issues may arise, which may compromise the effectiveness of this type of remedy.

2.2.2 Monitoring trustees are preferred

Given that CADE is unable to be directly and continuously involved in the monitoring of the commitments execution regarded with the antitrust remedies, a monitoring trustee is desirable to assist the agency in monitoring and ensuring the fulfilment of the obligations established in the Merger Control Agreement.

Defining a monitoring trustee favours a timely identification of the applicants' potential non-compliance with the duties and obligations and the corresponding adoption of appropriate measures by the agency, increasing the likelihood of remedies effectiveness. The range of the monitoring trustee's operation relies on the obligations and measures defined in the Merger Control Agreement.

See further information on Section 5.1.1.

2.2.3 On the need for continuous monitoring

Remedies must be addressed at correcting anticompetitive effects of a given transaction and therefore must be subject to lasting changes in the market structure. However, at first, the market behaviour of applicants shall not be subject to extensive monitoring by CADE, taking into consideration the monitoring costs involved.

Concerning behavioural remedies specifically, the agency may impose obligations to applicants regarding how they conduct businesses. To prevent competition harms on a permanent basis, however, behaviours must have a lasting and sustainable impact on market conditions. These long-term effects must be a result of strict compliance with the behavioural requirements defined in the Merger Control Agreement.

Behavioural remedies can be aimed at the internal operation of a business and/or affect the relationship of the business with customers and competitors. In general, the behavioural remedies that aim at changing the incentive structure of market players in a pro-competitive way (by improving information exchange with customers, for instance) are more effective than results control, i.e., the control over prices, service level agreements and supply commitments. Hence, effective behavioural remedies imply on viable monitoring, supervision and enforcement. However, it is worth mentioning that besides the monitoring implying costs to CADE, it imposes costs to the applicants as to information gathering, processing and submission to the agency. Thus, amongst other reasons, remedies must be provisional but provide long-term effects.

2.2.4 Remedies to be approached with caution

Remedies that limit the autonomy of enterprises to lead their businesses decisions may result in the enterprises operating contrary to their incentives, which requires continuous monitoring of the established commitments by the antitrust authority. Therefore, if some remedies are applicable due to proportional and reasonable matters, they must be applied with great caution, such as market access and sales restrictions.

Similarly, remedies that concern organizational commitments must be assessed with caution, for instance: (i) legal separation within a business group; (ii) obligation whether to make or not certain investments; (iii) long-term supply obligation; (iv) obligations not to exercise certain shareholder rights. Such commitments may change the incentive mechanisms of an enterprise, competitively impairing the business. Although, they can be useful in specific cases, especially as additional remedies.

Moreover, price caps (the fixing of a maximum price for a given period) are not acceptable remedies because, in addition to requiring continuous monitoring, in practice, they do not represent effective measures aimed at negative impacts on market conditions in the context of a merger. As a consequence, price caps are measures likely to result in undesired distortions to economic incentives since limiting

prices can constrain the entry of new competitors in the market, which impairs the level of diversity and/or offered amount.

Concerning obligations to make investments, such measures aim to mitigate the risk of capacity reduction after the merger. Yet, by imposing a capacity increase, this type of remedy may act as a disincentive to efficient mergers once remedies that go beyond their purpose of fighting competition issues often take over part of the efficiencies resulting from a merger.

These measures can be defined, in most cases, as of broad scope, i.e., when they do not have a strict causal link with potential competitive harm deriving from the merger. An example would be the imposition of Research and Development (R&D) investments to overcome Brazilian deficiency in technological development, which surpass the foremost objectives of operation of an antitrust authority.

Conversely, obligations to not make investments, i.e., restrictive measures to increase capacity, can reduce the risk of predatory behaviour by the merged firm. However, it is likely to occur the limiting of the firm's development, in addition to supply reduction.

3 Structural Remedies

Designing a structural remedy firstly consists of delimiting the assets to be divested, which involves listing the assets and determining its capacity to generate businesses, such as the amount of income or other auditable indicators and considerations.

These assets must be able to exercise an effective competitive pressure to overturn the negative effects of the transaction in the relevant market(s) affected. The assets can be
(i) already operating individual business units or, if not possible, (ii) part of existing business units to be partitioned to form a valid and active business entity after the sale.

Technological, productive, commercial or financial matters specific for the case under review may justify that the scope of the assets to be divested includes business units outside the relevant market negatively affected by the transaction or assets not directly affected by the transaction. This may occur when the necessary assets to meet the needs of the negatively affected relevant market do not reach a minimum scale to an efficient remedy, which may occur when there is technological limitation to separate the production involved in a remedy and when there is a small impact on the transaction's efficiencies, amongst other possible cases.

Once defined the scope of the assets, they must be kept separate and operating in the best way possible until the complete divestiture, with the ability to add value and meet clients' needs fully. That comprises applicants efforts to keep labour and sales force mobilized, keep supply contracts and distribution channels active, etc. CADE may appoint a trustee (see Section 5) upon indication of the applicants, who shall manage the business until its sale, in cases the sale occurs after the Tribunal's hearing.

The showing of a buyer for the assets can occur at the submission of the case to CADE, during the discovery phase or after the hearing of the case. During the period established for divestiture, applicants must make the necessary efforts to sell the assets. This pre-defined term must be short so as not to degrade assets and mitigate the competition harm of the transaction.

The following sections present guidelines on asset package, selecting a buyer and the divestiture process itself. The subsections present the classification of different structural divestments, as well as guidelines to possibly sensitive issues as to defining the remedy type and assets; the detailed process of selecting a buyer; and the divestiture process itself in addition to the terms for divestment.

3.1 Asset Package

3.1.1 Defining asset packages

As a rule, the asset package must comprise the smallest business unit of a business that includes all operations pertaining to the market at issue and that can effectively compete independently.

In other words, the asset package part of a divestiture remedy must be sufficient for the buyer to become an effective competitor in the relevant market. Thus, the seller(s) must make available a package with all necessary assets (tangible and/or intangible) so that the buyer becomes a de facto, long-term and permanent competitor.

The asset package must be described as clearly and precisely as possible. The description shall comprise all items part of the package, such as tangible assets, intangible assets, permits and authorizations required for the business, supply contracts, lease contracts, amongst others. Such items are further detailed in the following Section "Best practices and precautions to be followed in the definition of asset packages."

Subsequently, examples of usual remedies applied to mergers are briefly listed.

3.1.1.1 Viable autonomous business

A viable autonomous business functions regardless of transactions/relationships with the divesting party, i.e., regardless of supply inputs, technical assistance or other means of cooperation from the divesting party, although transitional agreements may be required.

The viable autonomous business regards a divestiture package provided with all necessary resources – e.g., physical assets, personal assets, client base, information systems, intangible assets (intellectual property rights), and infrastructure management – to compete effectively with applicants. Thus, the divestiture shall be a viable and marketable business that represents a sustainable value.

A pre-existing business provides customers and potential customers a background to assess whether the business unit will continue to be a reliable supplier for the relevant product. Consequently, the background of a pre-existing business stipulates an assumption that the business can become a viable competitor in a given market.

On the other hand, the optimal firm size matter deriving from the intervention shall be taken into consideration, that is, the divestment and the applicants' remaining business. To ensure that a given divestiture is attractive to potential buyers, it may be necessary to consider beyond the set of assets required to compensate for the observed competition issues. Such a hypothesis shall be assessed in a case-by-case manner to ensure remedy proportionality and hinder opportunistic behaviour from possible parties interested in the divestiture.

3.1.1.2 Carving-out: divestiture of a business unit part of a larger structure

In the case of a carving-out, the package to be divested consist of a business unit to be separated, i.e., "carved" and partitioned from a larger firm structure. Subsidiary, points of sale and production plants are some common examples.

The business to be divested, subject of a carve-out, must fulfil some requirements so that the firm remains competitive on a continuous basis. Assets subject to carve-out must be explicitly separated from the other assets, which implies in legal and physical separation. Thus, it is required a separate organizational structure with the ability to operate on its own regardless of applicants.

In this type of divestiture, the applicants and the divested business cease to operate in an integrated manner. Temporary shifts and supply agreements can be necessary and suitable while assets are integrated with the buyer. However, for carve-out divestitures, it is not suitable that business units overlap with one another and require continued cooperation from applicants for its functioning.

In some cases, a carve-out may not be a sufficient remedy. For instance, the loyalty of important customers may be affected when a divestiture involves sales activities without the transfer of the corresponding productive capacity. In such case, customers are likely to oppose the seller, that is, to the applicant divesting the business. Therefore, the transfer of market shares does not occur without the simultaneous transfer of production and distribution.

The carve-out process to be held by the applicants requires oversight by the monitoring trustee in cooperation with the hold-separate trustee (see Section 5 - Trustees). The assets and part of the personnel that are shared between the business to be divested and the remaining businesses of the parties must be allocated in a way that ensures the viability and competitiveness of the divestiture. The allocation of assets and personnel will be monitored and must be approved by the monitoring trustee.

Additionally, the carve-out process may require duplicate assets and personnel as a way to ensure the viability and competitiveness of the divestiture. To illustrate, the shares of the business to be divested in an IT core network pertaining to the parties may require the installation of a different IT system.

In sum, the key actions to be adopted in a carve-out varies on a case-by-case basis, which includes the possibility of duplicating assets and functions. Concurrently, the parties shall provide the assets and services necessary for the feasibility of the divestiture until it can operate on a stand-alone basis.

3.1.1.3 Mix-and-match: divestiture of a package combining assets of more than one of the parties involved

Mix-and-match remedies combine assets of the parties involved in a merger without pre-existing mutual coordination. Mix-and-match divestitures may raise concerns on their viability and competitiveness as they do not provide certainty regarding: (i) whether the previous separate parties will be able to operate jointly in an effective manner; (ii) whether the parties can be promptly integrated after the remedy (divestiture); and (iii) whether the new business unit will be able to operate effectively.

However, such concerns do not imply that this type of remedy is not suitable for specific cases. In certain cases, the remedy can be necessary to ensure that the buyer of the divestiture has the adequate assets to continue to compete effectively. In such cases, to mitigate risks related to mix-and-match remedies, the antitrust authority may consult suppliers, customers, competitors and potential buyers to observe the feasibility of the package and whether the package will provide the buyer with the effective competition.

3.1.1.4 Divestiture or granting of an exclusive license for a long or indefinite term or until the expiration of the term of patent

In particular cases, the divestiture of specific assets (such as a patent or a granted license) may be a suitable remedy. Under certain circumstances, the granting of an exclusive, irrevocable and unlimited license is acceptable, as long as the license is in fact sufficient to transfer the market position. However, the preference is usually for the divestiture of an asset package or a business unit, as they involve levels of uncertainty and lower risks related to the possible transfer of market position on a permanent basis.

3.1.2 Best practices and precautions to be followed in the definition of asset packages

3.1.2.1 Completeness

A Merger Control Agreement must be complete, i.e., it must comprise all assets necessary to the remedy effectiveness. To illustrate, it is important to have reference to key personnel transfers or to key contracts with third parties, which can be significant aspects for the success of a new player in certain relevant markets.

In some cases, the divestiture package must expect the transfer of contractual relationships, such as agreements of long-term purchases, exclusive contracts for rendering services or the supply of goods and services - for both the upstream and downstream markets.

The competitiveness of the business to be acquired can be severely undermined if the contractual relationships are not transferred along with the divestiture and remain with the applicants. In such a case, the market position would not be successfully transferred to the buyer.

Similarly, lease contracts related to production plants, points of sale and logistic facilities require applicants' best efforts to obtain consent from the other contracting party (lessor) regarding the substitution of the applicant by the buyer of the divestiture in the lease contract. Thus, the applicant must ensure that the lease contract is promptly transferred and within the term of the divestiture.

3.1.2.2 Need for detailed definition of assets: tangible assets, intangible assets, authorisations, personnel, documents, contracts, brands and licences

The Merger Control Agreement shall clearly detail all the assets involved in the divestiture package, such as the following:

All significant tangible assets (e.g. production facilities; points of sale; logistic facilities; storage facilities, which includes inventories and stocks; IT and R&D facilities; amongst others.)

All significant intangible assets (e.g. patents; brands; licences; amongst others.) Markets in which brands play a significant role, such as the market of consumer goods, often need to include rights to use consolidated brands in the divestiture package. Correspondingly, licences relating to patents or other industrial property rights or the transfer of know-how, as a rule, must be exclusive so that the licensor's market position is transferred to the licensee. It is not required for the licence to have worldwide coverage regularly. The licence must cover the locations in which the business activities are significant, as the geographic markets defined in the merger.

All authorizations and permits required for the independent and permanent function of the business subject to divestiture (e.g. operating licences, official certifications, quality certifications, certification marks, amongst others.)

Key personnel: staff and managers who are part of the divested business or are required on a permanent and independent basis as they have contact with key customers and suppliers or have specific skills and know-how related to R&D, IT, production and logistics that are relevant for the business competitiveness subject to the divestment. The buyer must be allowed to sign employment contracts in place of the applicants.

All relevant documents and records related to the business subject to the divestment.

All required contracts for the functioning of the business subject to the divestment (e.g. contracts with suppliers and customers, as well as lease contracts.) The buyer must be allowed to enter into existing contractual relationships in place of the applicants.

3.1.2.3 Possibility of involving assets of other relevant markets

In addition to the firm or business unit to be divested, in specific cases the divestiture package must include specific human resources or assets to ensure the competitiveness and economic viability of the divestiture:

Activities in close geographic or product markets or close facilities that, if available and combined with the business to be divested, make the divestiture economically feasible.

Specific functions, such as key functions that a buyer cannot substitute immediately, particularly in cases that a firm part of a business group provides specific services to all the firms of the group.

Additional business units that are not related directly to the competition issues derived by the transaction but have to be included to ensure that the divestiture package is the best strategic fit for potential buyers. For instance, entering a certain market is only efficient if there is a minimum scale of activities or a greater product portfolio.

3.1.2.4 Key personnel non-inducement clause

In some cases, it is required, at defining the asset package, contract clauses regarding the obligation of non-inducement of personnel by the applicants. This is applicable when the competitiveness of the divestiture is inherently related to the key personnel as to their skills, expertise, credibility or relationship with customers.

If applicants attract the key personnel part of the business to be divested, an essential part of the business is undermined since the competitive potential of the divestiture can be transferred back to the applicants. Thus, it is required that, in some cases, the applicants waive rights through non-compete clauses established in employment contracts regarding their key personnel.

3.1.2.5 Market tests

Market tests mean an important source of information to review whether the proposed remedies are sufficient, required and proportional to eliminate competition concerns identified by CADE. Therefore, key customers, suppliers and competitors, as well as interested third parties whose motion to intervene have been granted, are usually questioned by CADE to provide the authority different perceptions as to the suitability of the proposed remedies and their possible effects on the affected markets.

In sum, CADE send them a draft of the commitments proposed along with some questions. The market tests also allow interested third parties – granted a motion to intervene in the case – an opportunity to express themselves as to the consequences of the proposed remedies in the market. Conversely, CADE will not hold market tests if the commitments proposed are clearly unsuitable for eliminating competition concerns.

Depending on the circumstances of the case, market tests can address the following issues or assist on answering them:

Whether the remedies package (or which package) would eliminate competition concerns identified in the investigation.

Whether some potential risks or concerns can arise during remedies enforcement.

Whether there are potential constraints to the efficiency of remedies.

As to the enforcement of structural remedies, particularly divestitures, the following issues may be relevant:

Which requirements are necessary for the divestiture to ensure the effective transfer of the market position to the buyer?

Which conditions should be fulfilled by the buyer to ensure their role as an effective competitor?

Whether there are potential buyers interested in acquiring the business subject to the divestment. Would potential buyers be able to enter into a competitive position in the relevant markets based on the remedies package established or which conditions should be fulfilled for such matter?

Market tests can be held at an early stage, within the pre-filing and before the official submission (through waivers).

In case the Office of the Superintendent General or the Tribunal consult market players on the remedy efficiency, the confidentiality of the information and the existence of negotiation and its terms shall be observed. The consultations must avoid the sharing of competitively sensitive information of the applicants, as well as information that may compromise the parties' ability to negotiate the assets to be divested.

According to practice, whenever deemed suitable, interested third parties consulted on certain remedies shall have up to 3 business days to give expression on the matter.

The answers provided usually offer important information that can assist CADE's investigation and serve as remarkably useful evidence to CADE's review. However, it must be taken into consideration the quality and bases of the answers, as well as that the answers express the respective economic interests of the consulted agents. Therefore, the responses provided by the market players is non-binding to CADE's investigation.

Lastly, to ascertain the real status of the assets involved in the remedies package or other significant aspects for the specific case, CADE can request on-site visits to production plants or logistics centre pertaining to the applicants or other players. In general, the function of the facilities are explained on-site. Additionally, meetings with potential buyers prior to defining the remedy to be adopted can be relevant in certain cases.

3.1.2.6 Crown Jewels

In particular cases, when a potential buyer presents a high level of uncertainty under CADE's perspective, the authority may establish the adoption of crown jewels. In crown jewels, the divestiture package is broadened in relation to the markets considered problematic in the merger, aiming at increasing the economic attractiveness of the business to be divested.

Consequently, the divestiture process has two stages, i.e., the first divestiture is substituted (or supplemented) by an alternative divestiture (or additional), which is known as a crown jewel. This alternative divestiture occurs if observed that the first divestiture will not take place within the established term.

A divestiture will be accepted as an alternative solution (crown jewel) in case the existence of a suitable buyer is not evident to CADE, which means a sale without difficulties, observing the principle of proportionality.

As a rule, crown jewels must be more attractive than the first divestiture from the perspective of both the potential buyer and the seller.

There are cases in which the divestiture through a crown jewel is a solution when observed the buyer faces other difficulties, such as preferential rights of shareholders in joint-venture agreements, intellectual property rights established in licences, difficulties to sign contracts, amongst others.

The total term for divestiture should not be substantially longer than expected in general in this guide, including both stages of the divestiture process. Otherwise, the implementation of remedies is effective only at a later stage. A considerably extended term for the adoption of crown jewel remedies could also put at risk the divestiture itself, which would require additional measures to safeguard the economic viability and competitiveness of the business.

On the other hand, an overly short term would favour interested third parties to take advantage on the alternative business. Therefore, CADE must be attentive so that buyers do not make use of crown jewels to obtain a divestiture package more valuable than the necessary to address competition concerns derived by the transaction, particularly in cases the number of potential buyers is low.

3.1.2.7 Further precautions in defining asset packages

Introducing structural divestiture remedies entails the difficulties of making an asset package that turns the buyer into an effective competitor, with all resources and expertise required by the market at issue.

Thus, in defining the asset package, the competition authority must watch out for applicants' cherry-picking behaviour (that is, selecting the assets whose sale is most beneficial to them) whenever this behaviour hinders the success of the remedy in solving the competitive harm.

The divestiture is also subject to an empty shell problem, i.e. a hollow divestiture package. This may occur where the human resources of a divestiture package are difficult to identify or transfer, whether because of unwilling employees or issues with the labour legislation.

A divestiture package whose assets did not use to operate independently before the remedy is also more prone to be insufficient and to bring about problems in its implementation. Mix-and-match remedies, for instance, which combine the assets of several merging companies, risk failure due to the huge information gap between the seller and the buyer. The seller has an incentive not to incorporate the right assets into the package; the competition authority, for its part, may not have enough information to

verify whether the package is appropriate.

On the other hand, an independent and viable business is not always the best divestiture solution. Even though a remedy would run the risk of being insufficient, if the buyer already holds some of the assets required to operate the business, making a divestiture package of just a few assets could be more appropriate. Thus, incorporating these assets in the divestiture package may render the purchase inefficient, as the buyer is compelled to buy assets it would not need for efficiently competing in the relevant market. Moreover, requiring the entire business to be sold could be disproportionate to the competitive harm, excessively restricting the potential efficiencies of the transaction.

The competition authority should also avoid maintaining existing vertical dependency relationships in the upstream and downstream markets (e.g. the provision of raw materials or technical support). In these cases, the remedy generally fails to restore competition, whether because the buyer struggles to operate properly (as it is dependent on the supply and/or support provided by the seller) or because the buyer and the seller start to coordinate their behaviour.

3.1.3 Hold-separate and ring-fencing obligations

It is important to avoid the assets deteriorate before the divestiture is completed, and thus divestiture remedies should include obligations to prevent this from happening. Such obligations might comprise (i) maintaining the business and avoiding the adoption of measures that would have relevant negative effects on its value, management, and competitiveness; (ii) providing the financial resources necessary for continuing the business; (iii) retaining the business' key personnel; amongst others.

In addition to steps to protect the divestiture package, there should be others intended for separating the divested business from the business retained by the applicants.

3.1.3.1 Appointment of a hold-separate trustee

Some cases require appointing a hold-separate trustee to preserve and separate the divestiture package. This trustee is appointed by the parties and is responsible for managing the business during its transfer, up to its closing. The trustee is responsible for preserving the divested business and ensuring it is held separate from the business retained by the parties, under the supervision of a monitoring trustee.

It is the hold-separate trustee's duty to make sure the divested assets are independent and to promptly eliminate all the influence of the parties in the divested business so as to preserve its viability, marketability, and competitiveness.

For further information on the hold-separate trustee, see Section 5.1.2.

3.1.3.2 Ring-fencing: preventing information sharing between the divested business and the seller

Another means to separate business information is establishing a ring fence between the transferrer and the divested business.

It is important to ensure the key personnel of the merged company (seller) has no access to the divested business, and vice versa. The exchange of information between the divested business and the seller must be avoided.

In this regard, the parties must take all the steps necessary to make certain they will not find out trade secrets or other confidential information from the divested business. Any confidential documents and information related to the divested business received from the parties before the ring fence is set should be returned to the divested business or destroyed.

Theoretically, a ring fence is more easily created when the divested business is already an independent, standalone enterprise with a distinct management from the seller. However, there is a significant problem of information asymmetry in ring-fencing, which makes it particularly hard for CADE to monitor this kind of obligation.

3.1.3.3 Trademark maintenance commitment

Although trademarks are part of intellectual property, its characteristics and functions are very different from those of patents and industrial designs. Basically, trademarks are distinctive signs whose main function is differentiating competitors in a market. In addition to protecting the identity of manufacturers, vendors, and service providers, trademarks reduce transaction costs, since they help consumers find their desired product.[3]

When a remedy entails the right to use a consolidated brand in the asset package, the authority must protect this asset whilst the divestiture is not completed. In this regard, CADE's decisions usually require the business to continue normally until the divestiture is closed. A way to maintain trademark value whilst the divestiture has not been completed is keeping the trademark's level of marketing investment.

[3] With the exception of geographical indications, intellectual property is protected for a limited period of time. Trademarks have a ten-year term, extended for equal and successive periods under Article 133 of Law 9279/1996.

3.2 The buyer

Regarding structural remedies, a buyer must be, in principle, an economic entity unrelated to the parties' business structure. Additionally, buyers must prove to CADE their capacity and interest to keep the assets fully operational and competing in the relevant market.

A competent buyer with the potential to enter the relevant market is more likely to solve competition concerns arising from a transaction than a buyer that already operates in that market, as the remedy may create or strengthen pre-existing dominant positions. Larger players, with more financial power, are more likely to make a competition concern arise again. This is the case when the buyer is already a strong player in the relevant market or when it is a significant supplier or customer, potentially leading to market foreclosure.

However, it is possible that a buyer that already operates in the market mitigates the concern, considering its expertise and experience. In any case, applicants must have the buyer approved by CADE. Proposing CADE a buyer when filing the remedy proposal reduces the time needed to consummate the first transaction.

3.2.1 Selection[4]

The act of proposing a buyer can take place at different times. In a fix-it-first remedy, the buyer is selected before merger clearance, and the asset package is made specifically for the chosen buyer. In an upfront buyer remedy, the consummation of the transaction is conditional on choosing the buyer, which occurs after merger clearance. In a post-consummation remedy, the buyer is selected after the transaction is consummated — that is, the transaction may be consummated immediately after clearance.

The table below sums ups these three cases, and the following sections detail each of them.

[4] Competition authorities around the world, such as the Federal Trade Commission (FTC) and the European Commission, have different understandings regarding the fix-it-first, upfront buyer, and post-consummation approaches.

<table>
<tr><td></td><td colspan="3">STRUCTURE</td></tr>
<tr><td></td><td>FIX-IT-FIRST</td><td>UPFRONT BUYER</td><td>POST-CONSUMMATION</td></tr>
<tr><td>PRE-MERGER NOTIFICATION</td><td></td><td></td><td></td></tr>
<tr><td rowspan="2">REMEDY DESIGN</td><td>DEFINE DIVESTITURE
BUYER SELECTION (sign binding agreement with buyer)</td><td>DEFINE DEVESTITURE</td><td>DEFINE DIVESTITURE</td></tr>
<tr><td colspan="3"></td></tr>
<tr><td rowspan="2">HEARING</td><td>MERGER CLEARANCE
SIGNING OF MERGER CONTROL AGREEMENT (where necessary)</td><td>MERGER CLEARANCE
SIGNING OF MERGER CONTROL AGREEMENT</td><td>MERGER CLEARANCE
SIGNING OF MERGER CONTROL AGREEMENT</td></tr>
<tr><td colspan="3"></td></tr>
<tr><td rowspan="4">REMEDY MONITORING</td><td>CONSUMMATION OF DIVESTITURE
+
CONSUMMATION OF TRANSACTION</td><td>BUYER SELECTION (sign binding agreement with buyer)
2 TO 4 MONTHS
CONSUMMATION OF TRANSACTION</td><td rowspan="2">CONSUMMATION OF TRANSACTION</td></tr>
<tr><td rowspan="3">IN GENERAL, NO DIVESTITURE MONITORING</td><td rowspan="2">CONSUMMATION OF DIVESTITURE</td></tr>
<tr><td>BUYER SELECTION (sign binding agreement with buyer)
3 TO 6 MONTHS
CONSUMMATION OF DIVESTITURE</td></tr>
<tr><td>POST-DIVESTITURE MONITORING</td><td>POST-DIVESTITURE MONITORING</td></tr>
<tr><td>FULFILLMENT OF REMEDIES</td><td>FULFILLMENT OF MERGER CONTROL AGREEMENT</td><td>FULFILLMENT OF MERGER CONTROL AGREEMENT</td><td>FULFILLMENT OF MERGER CONTROL AGREEMENT</td></tr>
</table>

Source: CADE.

Note: in a fix-it-first, the divestiture may also be consummated before signing the Merger Control Agreement. See section 3.3.1 "Deadlines for divestiture" for deadlines for defining a buyer.

3.2.1.1 Fix-it-first remedy[5]

In a fix-it-first solution, the choosing of a buyer for the asset package and the signing of a binding agreement happen before merger clearance. A fix-it-first remedy is appropriate in cases where the parties offer recovery structural measures during merger review. The parties indicate a buyer for the assets to be divested and enter into a binding agreement during merger review. In case CADE clears the transaction — meaning the

[5] Some jurisdictions define a fix-it-first remedy as selling the divestiture to a buyer appointed by the applicants, forgoing the execution of a Merger Control Agreement (ICN, 2016 — Merger Remedies Guide, p. 16). In Brazil, only in specific cases can a fix-it-first remedy solve the competitive harm without a Merger Control Agreement.

buyer has also been approved — the divestiture process can be carried out as soon as the transaction is cleared.

A fix-it-first remedy is implemented when the identity of the buyer is crucial for the effectiveness of the proposed remedy; in such cases, very few buyers can be considered suitable. It happens where (i) the divestiture is not a viable business by itself, depending on a buyer's specific assets to achieve viability; or (ii) the buyer needs to have specific features for the remedy to solve competition concerns raised by the transaction.

One of this remedy's advantages is having an asset package tailored to the identified buyer. Hence, the package can be more modest than one that needs suit any buyer, as is the case with upfront buyer or post-consummation remedies. Moreover, a fix-it-first remedy allows consummation immediately after merger clearance.

This relief is also recommended where assets can lose value between the signing of a Merger Control Agreement and the conclusion of a divestiture process. For instance, where (i) the key personnel and/or clients of the divested business may be lost; or (ii) it is difficult to conduct a carve-out process in the meantime, since it depends on entering into a binding agreement with the buyer.

3.2.1.2 Upfront buyer remedy

Some cases demand an upfront buyer for CADE to be sure the business will be transferred to an appropriate buyer. In such instances, as a condition for the consummation of the transaction, the parties must undertake to sign a binding agreement with a CADE-approved buyer. Unlike the fix-it-first relief, in this remedy the buyer is only appointed after merger clearance. Thus, the asset package tends to be larger than in a fix-it-first remedy, since it should suffice to turn any buyer (irrespective of its identity) into an effective competitor.

This solution is recommended where there are relevant obstacles to a divestiture, such as third parties' rights or uncertainties about whether an appropriate buyer can be found. In such cases, an upfront buyer allows CADE to be sufficiently certain the commitments will be fulfilled, as the buyer is appointed before consummation.

An upfront buyer is also preferable to a post-consummation solution where risks of asset depreciation are high. This is because in the time between signing a Merger Control Agreement and transferring the asset, the signatory (applicant) has significant incentives to stop investing and operating the asset. Hence, an upfront buyer ensures the signatory keeps the facilities, machinery, and its units' equipment in a perfect state of repair, and that its personnel is ready to operate without interruptions.

Implementing this remedy may be beneficial to the applicants, since it expedites the divestiture process; increases the certainty of having a viable divestiture (more than the conventional decision to look for a buyer only after the transaction is completed); and avoids a sale in which the parties have to divest larger asset packages (e.g. crown jewels). In addition, it helps the authority, as it is more certain that the divestiture will bring about competitive effects.

3.2.1.3 Post-consummation remedy

In a post-consummation remedy, a buyer must be selected and a binding agreement must be signed by a certain deadline after merger clearance. This relief is appropriate in most cases in which, due to an uncomplicated divestiture, it is easy to find severable potential buyers. Where buyers are demanded specific qualifications, the remedy can still be applied if enough potential buyers hold these qualifications.

At the same time, CADE must be sufficiently confident the asset package will be able to attract suitable buyers and that the assets will not depreciate by the time the sale is concluded. As with an upfront buyer remedy, some measures must be taken to preserve the asset package until the divestiture process ends. This type of relief usually involves more risks in its implementation than fix-it-first or upfront buyer solutions.

3.2.2 Requirements

3.2.2.1 Independence from merging firms

From a competition standpoint, an appropriate buyer should have economic incentives to operate the divested business as a competitor of the applicants and of other players of its market. This means the buyer must be independent from the applicants and their affiliate companies, which entails being independent from (i) any equity interest — including minority stakes — and (ii) management connections (e.g. where a CEO or managing director of one of the buyer's affiliates participates in the applicant's board of directors).

Owning a minority stake in a connected company frequently opens up the possibility of influencing the company's competitive behaviour. Where a buyer holds equity interest in companies belonging to the applicants' business group, this buyer is less inclined to compete with the applicants if the divested business operates in the same market than the applicants or in upstream or downstream markets.

Similarly, having a contractual relationship with the applicants in the markets

affected by the transaction may call into question the independence of the buyer and the remedy's competitive effects. This may be the case for financially relevant supply agreements, as well as for cooperation agreements in the markets affected by the transaction or in geographic or product markets close to the affected markets.

Finally, the price paid for the assets may be used to indicate how much independence from the applicants a buyer has. This price can help proving fraud, as if the asset is sold at an unreasonably low price, it may suggest the buyer has no interest in applying the acquired asset to compete in that market.

3.2.2.2 Avoiding new competition concerns

A buyer must prepare a convincing business plan detailing how it will operate the divestiture so as to fully develop its competitive potential, specifically mentioning the markets where competition concerns had been raised. Otherwise, the buyer's business may raise new competition concerns, such as in the following instances:

- The buyer plans to employ its acquired business for activities that differ from its current activities. e.g. operating in different markets.
- The acquired divestiture will be resold to a third party in the near future.
- The buyer has incentives to transfer the acquired business.
- Loans granted by the asset seller can reduce the buyer's business risks and may lead to a situation in which the acquired business becomes dependant on the creditor (i.e. one of the applicants). By receiving a loan from one of the applicants, the buyer may indicate lack of interest in using the acquired business to compete with the applicants, or that it will not make use of its full competitive potential.

3.2.2.3 Incentive/capacity to maintain and develop the divested business

The intended effects of a divestiture will only be reached if the business is transferred to a buyer capable of making it effectively competitive. To that end, the buyer should have economic incentives and the capacity to maintain and develop the divested business.

a) Financial health

A buyer must demonstrate it has the financial resources required to develop the business in a competitive way.

In case the applicant (transferrer) is responsible for the funds needed to purchase the assets, the transferrer will most likely have partial control over the assets and the

buyer; it also implies the buyer has difficulties in acquiring a bank loan.

Hence, by receiving a loan from one of the applicants, the buyer may signal it has no real interest to compete with the applicants and, consequently, it will not make full use of the business' competitive potential.

b) Capacity to satisfy the regulatory requirements

An appointed buyer's acquisition of a divested business should neither raise new competition concerns nor risk delaying the fulfilment of the established obligations. Therefore, the buyer is expected to be capable of satisfying every regulatory requirement to purchase the business.

c) Expertise

As the case may be, it is desirable a buyer has proven expertise in the relevant market and enough experience and financial resources to successfully operate the purchased business. This is the case for markets that require companies have specific expertise or resources for successfully competing in it.

3.2.3 CADE Approval

A structural remedy requires a suitable buyer to be effective. As seen above, divestiture remedies set criteria for potential buyers, e.g. independence from the merging firms, not raising new competition concerns, financial health, etc.

Against this backdrop, regardless of the criteria applied in choosing a buyer and the moment to do so — that is, through a fix-it-first, upfront buyer, or post-consummation approach, depending on the transaction — the nominated buyer must be approved by CADE before the business is sold. This is true for buyers selected by the applicants or not.

As a rule, applicants are free to choose to whom they will sell, as long as they meet the obligations set in the Merger Control Agreement, submit the appointed buyer to CADE, and receive the authority's approval. However, there is also the possibility of selling assets through processes such as auctions, public offerings, etc.

In the case of government procurement processes, specifically, it is worth noting the players most likely to win are also those who can give raise to new competition concerns. This is because, due to their market power, these players can present higher turnovers in their proposals, whilst smaller players cannot. On the other hand, these concerns can be avoided if the authority identifies these problems and restricts

eligibility before the auction.

Thus, in approving a buyer, CADE must ensure all requirements provided by the Merger Control Agreement are met, which applies both for where a buyer is selected by the applicants as well as where the selection is carried out through the other processes.

3.3 The divestiture process

3.3.1 Timetable for the divestiture process

The divestiture must be accomplished within the shortest time frame possible; our experience has it that it should take three to six months. During the time frame set for divestiture, obligations can be fulfilled in parts, and failure to fulfil them may result in penalties and the parties losing their ability to conduct the divestiture process as they see fit. Where the time limit for divestiture has expired, except in the event technical problems prevented compliance, a Merger Control Agreement must provide for auctioning (rather than negotiating) the assets and the possibility of not having a reserve price so as to ensure divestiture obligations are met. Failure to comply with divestiture commitments leads to CADE blocking and undoing the transaction, regardless of any provision in the Merger Control Agreement for any kind of integration between the parties.

After the contract of sale is signed and the asset transfer is concluded[6], the parties must sever all ties with the divested assets, except for those indispensable to preserve the remedy, such as authorisations and/or licenses; supply contracts; distribution channels; or other contracts and relationships necessary for the divested business' operations. In such exceptional instances, post-sale ties must be transparent, be severed as soon as possible, and preserve the remedy's effects of mitigating the anticompetitive harm of the transaction.

It is worth mentioning compliance with structural obligations may continue to be monitored after the divestiture stage. The reason for it is that the sale, transfer of assets, and contracts between customers/suppliers may not be enough to assure the buyer of the viability of the business, especially when it comes to a new entrant in the market.

In this sense, maintaining the integrity and commercial viability of the assets extends beyond the sale stage. The issues that could emerge after the asset transfer is consolidated are more easily solved when parties are aware CADE is still overseeing the divestiture process.

[6] It is worth mentioning that signing a purchase and sale agreement does not necessarily mean the divestiture is being implemented. The divestiture process entails not only this signature, but the actual transfer of assets and contractual relationships (i.e. contracts with suppliers and clients, lease agreements, use of distribution channels, etc.) and the transfer of authorisations and permits (e.g. a business licence) required to operate the divested business.

3.3.2 Appointment of a divestiture trustee

Merger Control Agreements can provide for a divestiture trustee to carry out the divestiture process where the Applicants fail to perform it by the set deadline. Thus, the divestiture trustee is tasked with selling the business by a second deadline. In this case, the divestiture trustee sells the divested assets for the best price possible, without being limited by a reserve price or depending on the Applicants' instructions.

For further information on the divestiture trustee, see Section 5.1.3.

3.3.3 Pricing terms

In case the first deadline for divestiture has been missed, the divestiture may occur without a reserve price. This minimises the risks involved in implementing the divestiture process and increases the chances of finding an appropriate purchaser that, in this case, will be assisted by a divestiture trustee.

CADE emphasises the agency does not take into account whether the sale will be profitable for the signatory. It only ensures the criteria for purchasers set forth by the Merger Control Agreement are met, so that the divestiture process achieves its main goal: restoring competition.

As a consequence, CADE's clearance is not conditioned on the price paid by a buyer. Nonetheless, prices paid in such purchases may be used to verify the possibility of fraud, as excessively high or low prices may suggest the buyer has no interest in employing the acquired assets to improve its competitiveness.

3.3.4 Due diligence

A divestiture process must ensure potential buyers can conduct due diligence review and obtain, depending on the stage of the process, sufficient information on the divestiture process so as to fully assess the value, scope, and commercial potential of a business, in addition to have direct access to its personnel.

The trustee (or the parties) should grant potential buyers all documents and information necessary for a thorough assessment of the divested business.

3.3.5 Approval process

The parties must have CADE's clearance as to the buyer and the purchase and sale agreement. This requirement applies to all divestiture remedies, regardless of the type. CADE must be informed of the buyer's identity and be provided the purchase and sale agreement and all necessary information by the end of the divestiture deadline.

Furthermore, the agency requires a sufficient amount of time to ascertain the

buyer and the purchase and sale agreement suit the requirements established by the Merger Control Agreement. This assessment is conducted according to the documents presented and to meetings with the potential buyer and the monitoring trustee. This does not exempt firms from notifying the new transaction whenever it meets the criteria for pre-merger mandatory notification.

4 Behavioural remedies

Where structural remedies fail to successfully address competition concerns or, due to regulatory or factual matters, remedies are inefficient, CADE may impose behavioural remedies to mitigate the transaction's anticompetitive harm if effective to revert this harm. In addition, behavioural remedies can be used to complement and increase the efficiency of structural remedies. With regard to the proportionality principle, a behavioural remedy should be measured by its capacity to solve a transaction's competition concerns, whether by itself or accompanied by structural remedies.

Generally, behavioural remedies apply to vertical integrations, as they can better preserve potential efficiencies (e.g. externalities, lower transaction costs) of a merger whilst mitigating the risk of market foreclosure.

In considering structural remedies, the amount of assets transferred for a successful remedy is proportional to the synergy between the assets — whilst being careful not to lose the efficiencies of the divestiture package. Conversely, the more assets transferred, the higher the chances of losing the efficiencies created by the merger, as fewer assets will remain with the Applicant. In case a transaction leads to vertical foreclosure, a divestiture package may be created, functioning as an independent business with assets with two or more links in the production chain. However, this may result in an exceedingly large divestiture package, which can jeopardise the proportionality principle of the remedy.

When this happens, and the relationship between different links in a production chain can potentially cause anticompetitive harm, one solution is to apply behavioural remedies — which may or may not be added to the structural remedies.

The main behavioural remedies in vertical integrations are obligations to grant access to fixed inputs (e.g. infrastructure with the characteristics of an essential facility) or to intellectual property rights.

The success of such measures, especially in remedies that facilitate market access, depend on the anticompetitive harm caused by the transaction. For instance, if it entails the acquisition of a relevant market player, in the majority of cases the harm is only offset through divestiture. Conversely, if a transaction mainly raises pre-existing entry barriers — through vertical integration, for instance — measures to facilitate market access are usually enough to offset anticompetitive effects.

With regard to intellectual property rights, the granting of licences may constitute a suitable remedy where the effects of a merger only involve raising pre-existing entry barriers. In cases like these, the licence should enable competitors enter

the market or facilitate their entry to a degree that offsets the anticompetitive harm.

We should note that the process of granting a licence should be transparent and non-discriminatory. If the licensor is a competitor, the terms of this licence should not jeopardise the licensor's competitiveness. However, in considering the long contractual relationship between competing firms in a licencing agreement, CADE can take into account the possibility of future problems such as the need for negotiations on licence fees, for instance, which can hinder the success of a remedy.

It is worth noting behavioural remedies entail more risks, as they take longer to implement than structural ones. Unlike with structural remedies, CADE does not suggest time limits for these, since they will depend on the specificities of each case. In addition, the issue of asymmetry of information between CADE, the merging firms, and third parties is more common with behavioural remedies.

The very nature of these remedies makes them more difficult to define and assess and more expensive to the agency and parties. Behavioural remedies can also create unwanted and unpredictable distortions in the affected markets. Lastly, they may be ineffective as to competition, since they do not remove the incentives for Applicants' abuse of dominant position. Thus, the competition authority needs to be cautious with their design and, most importantly, their supervision.

Despite these risks, behavioural remedies at times are appropriate, since they can address different kinds of competition concerns, especially where divestiture is disproportional and/or may significantly compromise the efficiencies generated by the transaction.

4.1 Precautions and best practices to be followed when designing behavioural remedies

As far as behavioural remedies go, we should note measures that directly control the prices and quality of the products offered by the parties should be exceptional. These costly measures run a substantial risk of being ineffective and constitute a regulation in the strict sense. In the majority of cases, those not involved in the business and operation of the business units lack information to make a proper assessment of these competitive conditions.

On the other hand, the experience of CADE and other countries has it that behavioural remedies — non-exclusivity and non-discrimination, for instance — are common and suitable for mergers that raise vertical concerns such as those seen above. This experience does not exclude the possibility of structural remedies, if the principles of viability, proportionality, timeliness, and verifiability are properly addressed.

In a behavioural remedy related to vertical relationship of parties and third

parties (such as non-discrimination or access to essential facilities), CADE usually does not mediate any disputes that may rise between them. Nonetheless, the authority may receive information on non-compliance with obligations to verify whether the remedies have been properly performed.

As an example, in a vertical integration, Chinese walls are behavioural remedies aimed at reducing the flow of information between the upstream and downstream departments of a verticalised firm. When the flow of information between the departments is stopped, upstream and downstream discrimination of competitors is less likely to occur.

Whilst Chinese walls target the issue of exchange of sensitive information, which can cause an Applicant's discrimination against its competitors, there is also a problem in the information asymmetry between the Applicant and the competition authority, which may jeopardise the monitoring of the remedies. As a result, remedies such as Chinese walls are usually more effective as ancillary remedies.

Generally, it is advisable that a monitoring trustee participates in the design of behavioural remedies to track, document, and report on compliance with the remedies to the competition authority. Depending on the behavioural remedies adopted, the outcome of independent audits may be included in the monitoring. CADE's experience suggests there is little need for reports of limited or reasonable assurance prepared according to the Brazilian Standards on Accounting (NBC TO 3000), Assurance Engagement Other Than Audits or Reviews (approved by Resolution 1160/09 of the Brazilian Federal Accounting Council). In this cases, the remedy must necessarily provide for, and impose, a direct relationship between CADE and the independent auditor with no the intervention by the signatories. The provision allows the independent auditor to provide all the information CADE requires to make a critical assessment of whether the obligations established in the remedies have been met. Moreover, it enables CADE to change the way the monitoring is conducted dependent on the authority's assessment and the provisions that were established[7].

[7] NBC TO 3000 clarifies the work plan of an independent auditor is an "ongoing, interactive process developed throughout the engagement" (Paragraph 13) and that "if an independent auditor learns about an issue that leads to questioning whether a relevant modification should be made in the object information, the auditor must address the issue by carrying out enough procedures to allow including the issue in the audit report" (Paragraph 37).

5 Trustees

Where necessary, CADE instructs the parties to hire trustee to take part in a remedy's implementation and monitoring. Trustees report directly to CADE, according to mandates established in a Merger Control Agreement or in a decision by CADE's Tribunal. These trustees must know the business described in the remedy and are compensated by the parties to the transaction, who may appoint them before the hearing.

5.1 Roles

5.1.1 Monitoring trustee

A monitoring trustee is tasked with supervising and ensuring remedy implementation. Against this background, a monitoring trustee helps both the competition authority and the Applicants in examining whether the obligations established are met. The trustee is independent from the applicants, even though compensated by them, and is responsible for ensuring the Applicants implement the remedies thoroughly, effectively and without delay.

To this end, a monitoring trustee must point out potential obstacles in the way and check the Applicants' success in planning , preparing and executing all intermediary stages required. Trustees also verify whether applicants have been meeting their obligations so as to not compromise the economic viability of the business set for divestiture.

We must stress that, although monitoring trustees have an active role in enforcing remedies, they cannot decide on behalf of CADE. They work under the supervision of CADE through a mandate and regularly report to the authority about the implementation of the planned measures and fulfilment of the remedy obligations. Concurrently, Applicants must give a mandate to the trustee, with powers sufficiently broad to effectively monitor the agreement.

Following the end of a trustee's mandate, established in a Merger Control Agreement or a decision by CADE, he or she sends CADE and the Applicants a final report and ensure potential business secrets from one Applicant have not been not disclosed to the other.

In general, the structural or behavioural obligations set forth in a Merger Control Agreement will guide the tasks of the monitoring trustee.

The mandate signed by the Applicants and trustee specifies the trustee's obligations and responsibilities, whilst the work plan further details the trustee's duties.

In summary, the main duties of a monitoring trustee, depending on the case, are

the following:

- Ensure the behavioural obligations are met, monitoring the performance of the firm's daily obligations and of its relationship with customers, suppliers, and other third parties that may be affected by the obligations negotiated with CADE. Trustees should have free access to the firm, documents, systems, and other assets entailed in properly monitoring the obligations; moreover, dependent on the mandate given by CADE, they may suggest corrections in order to ensure the obligations are fulfilled.
- Trustees supervise safeguard measures related to the divested business from the moment the Merger Control Agreement is signed to the completion of the divestiture process. During this time frame, trustees are responsible for supervising the management and preservation of the assets as a separate business (preservation monitoring trustee).
- In case of an asset carve-out, trustees are responsible for monitoring the splitting of the assets of the divested business from those of the businesses retained by the parties; personnel reallocation; and, if need be, duplication of assets and duties previously retained by the Applicants (carve-out monitoring trustee).
- Oversee the Applicants' efforts to find a potential buyer, oversee the asset transfer, and certify potential buyers are given sufficient information on the business. Once a buyer has been defined, the monitoring trustee writes a report to CADE explaining how the suggested buyer satisfies the requirements and if the business is being sold according to the commitments made in the Merger Control Agreement. At the end of the process, the monitoring trustee supervises the business' legal and effective transfer and writes a final report attesting to the transfer (divestiture process monitoring trustee).
- Guide and supervise the activities of the operating trustee, which are related to the day-to-day operations of the business to be divested. The operating trustee manages the business until the divestiture process is completed, preserving the divested business and ensuring its independence from the Applicants' other businesses (hold separate monitoring trustee).

5.1.2 Operating trustee

An operating trustee is the manager specifically appointed to manage the asset package whilst it is not transferred to the buyer. The monitoring trustee is tasked with giving instructions and supervising the activities of the operating trustee, which are related to the day-to-day operations of the business to be divested.

Operating trustees also inform the team involved in the divested business on the divestiture process and its implications on the rights and duties of this team.

This trustee must be timely appointed, according to the deadlines set forth in the Merger Control Agreement or in the decision issued by CADE. The Applicants must carry out every instruction of the operating trustee connected to the implementation of remedies. An operating trustee works under the supervision of both CADE and of the monitoring trustee, never of the Applicants.

5.1.3 Divestiture trustee

Where the parties cannot find the divestiture package a suitable buyer within the set time frame, a divestiture trustee is appointed to carry out the divestiture process. As with the monitoring trustee, parties must appoint a divestiture trustee to ensure the effectiveness of the commitments undertaken in the Merger Control Agreement.

A divestiture trustee does not receive any instructions for the Applicants in selling the divestiture package. During the auction the trustee sells the package at best possible price and is not necessarily bound to a reserve price. The buyer, in turn, must satisfy the requirements set forth in the decision that included the remedy.

The divestiture trustee is given a mandate to conduct the business transfer within the established time frame. A divestiture trustee's mandate is exclusive, irrevocable, and subject to the supervision of CADE in order to complete the transfer by the deadline set.

The commitments must provide that the parties support and inform the divestiture trustee in the same manner as for the monitoring trustee. The parties must grant, through power of attorney, extensive powers in all divestiture stages.

5.2 Additional information

5.2.1 Timing of appointment

It is crucial that a monitoring trustee assumes his or her role as fast as possible. Thus, the parties must suggest a suitable trustee in a timely manner and by the agreed deadline. The agreement may include a provision establishing the merger or acquisition can only be consummated after CADE nominates a monitoring trustee.

Unlike the monitoring trustee, a divestiture trustee should be appointed where the first deadline for divestiture is missed. A divestiture trustee's mandate comes into effect when the time frame set for its intervention starts.

5.2.2 Requirements

CADE will assess the necessary requirements in the light of the circumstances of each case, which includes geographic factors and the economic sector at issue. Auditing and consulting companies are potential candidates for the position of monitoring trustee, as they usually perform the duties of this position with success. Likewise, individuals

with experience in the sector of the economy at issue are potentially suitable candidates, as long as they have the resources needed to perform this role. As for divestiture trustees, investment banks are particularly fitting[8].

Trustees should be independent from the parties[9], have the necessary qualifications to meet the obligations prescribed in the mandate, and should not be subject to conflicts of interest.

Conflicts of interest arise when a trustee is linked to a firm owned by the business group of an Applicant, either as a shareholder or through a financial link. A conflict of interest also exists where a trustee provides economically relevant services to the Applicants — e.g. legal consulting, auditing services, as an investment bank, etc. In cases where a conflict of interest arises during a trustee's mandate, the competition authority must be immediately informed. In these situations, CADE requires the parties to terminate the mandate of the trustee and appoint a new one.

Finally, the parties should provide CADE with the necessary information for it to confirm the trustee satisfies the mandatory requirements.

Divestiture trustees should meet the same requirements as monitoring trustees with regard to qualifications, credentials, resources. Their appointment process, mandate, and compensation also follow the same rules. Thus, an individual or firm appointed as a monitoring trustee can also be appointed as a divestiture trustee.

5.2.3 Selection of a trustee

According to the case, the monitoring trustee and the divestiture trustee may be the same person or institution. As for the selection of a trustee, unless otherwise specified in Merger Control Agreement, the Applicants should first prepare a list of candidates and submit it to CADE. The agency may confirm all nominations, in which case the Applicants are entitled to nominate the one that suits them best. In cases where CADE rejects all proposed candidates, applicants should prepare a list with new candidates.

The submission of the candidates must also include a work plan covering the procedures, mechanisms, and monitoring stages of the remedy so as to enable CADE to verify whether the proposal grants the trustee the powers and duties necessary to supervise the execution of the obligations of the Merger Control Agreement.

[8] A monitoring trustee, specifically, may or not be an auditing firm. It is important for a trustee to be capable of monitoring the Merger Control Agreement, not only in relation to accounting and finances, but also to the affected market. Failure to fulfil these conditions may lead to the rejection of a candidate for trustee. Furthermore, the trustee may also be replaced within the duration of the agreement in case he or she fails to deliver reports that enable a proper assessment of compliance with the agreement.

[9] Depending on the case, an operating trustee may be an employee of the merging firm. This may be the case, for instance, when a given person is part of the key personnel needed to preserve the viability of the business.

5.2.4 CADE approval

CADE is tasked with, at its own discretion, ascertain the candidates for trustee are suitable for the roles to be performed in each case. The agency's approval of a trustee is conditioned on an appropriate mandate. Where suitable, the identity and a summary of the trustee's duties may be made public by publication. In addition to the approval of a candidate, the agency must approve the trustee's mandate, which establishes the rights and obligations of both the trustee and the Applicants.

CADE will endeavour to make a timely analysis of the candidate and decide for the candidate's approval or rejection. Approval may be contingent on improving or solving issues in the work plan presented by the trustee; in this case, the hiring depends on whether the changes suggested by CADE have been adopted.

5.2.5 Duties and obligations of the parties to the appointed trustee

Monitoring, operating, and divestiture trustees must all be nominated based on a mandate signed between the trustee and the parties. The nomination and mandate are submitted to CADE for approval.

A trustee's mandate must establish the trustee's duties in the manner provided in the commitments undertaken, and includes all provisions required for a trustee to fulfil his or her role.

The signatory must cooperate with the trustee, providing unrestricted access to all documents, systems, and information necessary for the performance of the trustee's obligations.

In the same way, the signatories must give the trustee lists of potential buyers; powers to conduct the asset sale; and, if necessary to fulfil the trustee's duties and obligations, pay for consultants (of corporate finance, technical matters, R&D, etc.).

CADE may share confidential information on Applicants with the trustee, who must sign a Non-Disclosure Agreement related to this information, under the provisions of the trustee's the mandate.

5.2.6 Compensation

The Applicants are responsible for compensating the trustee in a manner that does not hinder the trustee's independence from the Applicants nor the trustee's effectiveness in fulfilling the mandate.

It is important to be aware of a potential problem: the party is the one who pays the trustee, whilst the trustee's obligation is to the Authority.

Thus, considering different kinds of mandates, a trustee's compensation varies according to the complexity and duration of the adopted remedy.

5.2.7 Replacement, dismissal, and renewal of term

A trustee's nomination is, fundamentally, irrevocable. However, in the event a trustee fails to perform its activities according to the Merger Control Agreement or a conflict of interest arises, CADE may require the Applicants to replace the trustee. Alternatively, the Applicants may seek CADE's permission to replace the trustee themselves.

The mandate of a trustee must provide for the trustee's exemption from further liabilities to CADE when the obligations set in the mandate have been fulfilled, e.g. (i) the signing of a sale contract, (ii) the transfer of assets to the buyer, and (iii) compliance with specific post-divestiture agreements.

However, even where such exemption has been given, a trustee may be renominated if CADE later considers relevant obligations were not fully or satisfactorily met.

6 Monitoring of Merger Control Agreements

Every remedy contains monitoring obligations, which include gathering and reporting to CADE information on the development of the business and of the commitments set forth in the remedy. From this information, CADE will be able to examine whether the remedies are being applied or not.

This examination is also important to anticipate problems and avoid conflicts with the obligations, which would incur considerable expenses for the Government or the parties.

Monitoring also creates direct costs related to the collection, organisation, submission, and processing of information received by CADE. These costs can be kept to a minimum if the information is well substantiated and details how successful the remedy was in attaining its goals. Some ways to reduce monitoring expenses include defining the scope of information, the frequency of information submission, and the role of the monitoring trustee.

Defining the scope of information may include an examination of the competitive capacity of the assets to be divested (such as current turnover), information on the buyers involved in the negotiations after the preliminary phase, amongst others. The frequency of information submission may change according to the remedy's stage of implementation.

CADE strongly advises the participation of a monitoring trustee should be considered, either to supervise the sale for the parties or to supervise compliance with the indicators and goals defined in the remedy. Such monitoring trustees have a specific mandate, report directly to CADE, and are compensated by the Applicants.

The established monitoring obligations do not conflict with the provision for access to the facilities and investigations into the merging firms aimed at collecting additional information to inspect compliance with the obligations. The agreed remedies must provide for this access, following due process.

6.1 Monitoring by CADE vs. monitoring by a trustee

Under Article 52 of Law 12529/2011 and at the discretion of CADE's Tribunal, the Office of the Superintendent General may monitor compliance with the commitments and agreements[10].

[10] Article 52. After the Tribunal issues its judgement, and at its own discretion, it may send the proceedings to the Office of the Superintendent General, which will analyse compliance with the judgement and with agreements and commitments signed under this Law.
(1) In inspecting the observance of the Tribunal's decision and of the agreements and commitments signed under this Law, the Office of the Superintendent General can make use of every investigating

The Enforcement of Judgements Office, part of the Office of the Attorney General at CADE, prepares opinions on the development and monitoring of the parties' out-of-court compliance with CADE's judgements, Cease and Desist Agreements, and Merger Control Agreements. Whenever possible, public versions of these opinions are prepared, allowing interested third parties to offer their comments and participate in CADE's assessment.

Under CADE's Resolution 6 of 3 April 2003, the Office of the Attorney General at CADE issues a document analysing compliance with commitments, agreements, and the Tribunal's judgement. Following, the Office of the Superintendent General may request information or documents necessary to this analysis, which in turn must be confirmed by the Tribunal's President.

In a Merger Control Agreement, CADE's compliance assessment must verify if rules such as deadlines related to each stage of the remedy have been observed; and look into the remedy's effects, analysing the impact and success of the implemented measures.

The supervision conducted by the trustee, on the other hand, must stay under the lead of CADE. It is not feasible for the competition authority to regularly supervise if commitments are being met. Hence, the competition authority advises the Applicants to appoint a monitoring trustee, who oversees the performance of the commitments undertaken by the applicants during the divestiture process.

As mentioned before, the duties of a monitoring trustee include preserving the divested business up to its transfer, monitoring the carve-out process of the divestiture package, searching for an appropriate buyer, and tracking compliance with behavioural remedies.

Thus, a trustee supports the competition authority in the monitoring process and parties' observance of obligations, according to the provisions of the trustee's mandate. Therefore, amongst the many duties of a trustee, the position requires regularly writing reports to the agency informing it about the parties' compliance with the obligations of the remedies.

These reports must include an executive summary detailing the performance of commitments (whether behavioural or structural). To this end, a trustee must describe the procedures adopted during the monitoring process, the evidence collected, and the rationale behind his/her conclusions[11].

power provided for in this Law.
(2) Once the Tribunal's decision, Merger Control Agreement, or Cease and Desist Agreement has been fulfilled, the Office of the Superintendent General, on its own motion or at request of an interested party, provides a statement of compliance (Law 12529/2011).
[11] In case the monitoring is conducted by independent auditors, assurance reports delivered to CADE

The reports may also include additional information about the fulfilment of commitments as to the trustee's view on the performance of obligations; in this case, the trustee must explain the reasons for the addition to CADE[12]. Such information will be taken into account according to the case. Where there are doubts on whether the obligations have been met, the parties may be heard.

Thus, it can be stated that one of the tasks of a monitoring trustee is to mitigate the asymmetry of information between CADE and the Applicants.

6.2 Sanctions and penalties

A Merger Control Agreement must provide for the possibility of CADE reconsidering the clearance given to a transaction where an Applicant violates Article 91 of Law 12529/2011 and/or of applying daily fines for non-compliance or delays as to the obligations established by the Agreement. The penalties should be proportional to the severity of the non-compliance and, in case of a financial penalty, take into account the firm's turnover.

Fines and penalties are split into (i) fines for non-compliance with main obligations and (ii) fines for non-compliance with ancillary obligations. Main obligations are those related to divestiture, asset sale, doing or failing to do something: that is, obligations to prevent competition concerns from arising. Ancillary obligations comprise the documents, reports, and any other obligations aimed at informing CADE about the observance of main obligations. For instance, every six months a trustee's report should be presented, and failing to do so incurs a penalty. Moreover, there are fines related to non-compliance with specific commitments and daily fines for delays (of reports, for instance).

Where a Merger Control Agreement has been partially or entirely reneged, the Agreement must provide for the reconsideration of the transactions referred to in Article 91 of Law 12529/2011, in addition to other implications (such as having the transaction

(whether limited or reasonable, depending on the needs of the remedy package) must be "long form" (forma longa) prepared observing Paragraph 48 of the NBC TO 3000 standards: the reports must "detail the terms of the engagement, criteria applied, remarks on specific aspects of the engagement, and, in some cases, recommendations and basic elements. Any remarks and recommendations by an independent auditor must be clearly separated from its conclusion, and be phrased so as to ensure there is no intention of them detracting from the conclusion. The auditor may use titles, paragraph numeration, formatting such as bold, and other ways to improve the report's clarity and readability."

[12] In case the monitoring is conducted by independent auditors, assurance reports delivered to CADE (whether limited or reasonable, depending on the needs of the remedy package), Paragraph 50 of NBC TO 3000 provides that "an independent auditor may include in the assurance report other information and explanations not intended to change its conclusion. For instance, details on the qualifications and experience of the auditor and others involved with the engagement, disclosure of materiality levels, comments on the engagement, and recommendations. The inclusion of this information depends on its relevance to the needs of the intended user. This additional information must be clearly separated from the conclusion of the auditor and be phrased so as to ensure it does not affect the auditor's conclusion.

undone or the clearance reconsidered).

If the signatories fail to meet any of the deadlines or commitments prescribed in the Merger Control Agreement, CADE provides them with the opportunity to express their views and reasons within the period detailed in the Agreement; if the Agreement does not refer to such a period, the parties have five days to do so.

6.3 Amendments to Merger Control Agreements

Following the signature of a Merger Control Agreement, the signatories may, under exceptional circumstances and presenting their reasons for it, request the agency to amend the Agreement, i.e. to delete, change, or replace the obligations established by it. The agency may extend the time limits provided by the agreement at request of the signatories or, where appropriate, on its own motion or by request of the Office of the Superintendent General.

Any such amendments require the Tribunal's approval. Rejection of such amendments to a Merger Control Agreement might lead to obligations not being met. In these circumstances, CADE may reconsider the transaction, as established by Article 91 of Law 12529/2011.

7 Compliance with Merger Control Agreements

The examination of whether obligations have been fulfilled should be clear and legally verifiable, without placing an excessive burden on the parties or CADE, particularly in the case of behavioural remedies.

In addition to CADE's use of supervisors or trustees — who are compensated by the parties — to obtain the information necessary to meet the obligations, a Merger Control Agreement may include provisions for the investigation and on-site information gathering, aimed at fulfilling obligations.

Non-compliance constitutes failing to meet main commitments (e.g. not divesting, selling devalued assets) or ancillary ones (related to supervision or information, such as not writing reports or delivering them incomplete).

These may lead to fixed, daily, cumulative fines or even blocking the transaction. A statement of non-compliance adopts the procedures needed for its consideration by the Tribunal. Non-compliance with the obligations does not induce a review of agreements or terms of a decision. A Merger Control Agreement must always constitute an executable instrument, so as to ensure its enforcement before the Judiciary.

The verification of compliance with the remedies required for merger clearance is carried out by the Office of the Attorney General at CADE and the Office of the Superintendent General. The latter forwards it to the Tribunal, which is responsible for putting it for a vote.

During a merger review, the best pieces of available information are used, with the appropriate methodologies, to predict the transaction's effects on the competitive environment and, where necessary, to design and implement remedies. However, over time, the effects of a transaction may divert from its predicted path. In order to enhance CADE's decision-making, the Department of Economic Studies may carry out post-merger studies on the impact of a merger or acquisition — including of the remedies imposed — as a regular procedure. This study of a merger and its remedies seeks to determine, through quantitative and qualitative techniques, the effects of a decision on the market after some time. It will be used to assess the validity of the remedies and is a relevant source of information to restructure or complement the measures in force.

8 Additional information

8.1 Regulated sectors

The existence of a regulator for a specific sector does not prevent CADE from imposing remedies where it deems necessary to protect competition. The competition authority aims at complementing, whenever needed, the requirements of the sector's regulator. The remedies CADE applies on those sectors must interact with the sector's rules to make them more efficient. CADE and the regulatory agency may establish a connection to make the remedies more suitable for the regulatory framework of the sector

in cases where this is relevant for the economic activities developed in the markets negatively affected by the transaction. The parties must observe the regulatory prerequisites and the deadlines for obtaining the licences, authorisations, and statements needed to conduct a business in that sector. CADE cannot influence the development of proceedings nor the regulatory procedures unless a collaboration with the regulatory agency had been previously established or the regulatory agency changes its own procedures.

Conversely, in regulated sectors that demand exchange of information between the regulator and the regulated firms, remedies must provide for manners to monitor and inspect compliance that include this flow of information, thus contributing for a timely, feasible, and proportional remedy.

8.2 International cooperation

Whether conducted abroad with effects in Brazil or conducted in Brazil with effects in foreign jurisdictions, a merger review and its judgement are always independent from other jurisdictions.

It is possible the same merger is target of a concurrent and parallel review, in Brazil and abroad. In these cases, cooperation between authorities is desirable for designing, implementing, and monitoring the remedies. This mitigates the risks of having opposing or inconsistent remedies, whilst preserving the sovereignty of the affected countries and the independence of the competition authorities involved.

The cooperation may include sharing information on the remedy, both before and after the transaction is adjudicated. The exchange of confidential information demands previous consent from the firms, which may be done through a Waiver of Confidentiality. To this end, CADE has a bilingual Portuguese-English version of the document available for companies (Annex B).

In case of coordinated remedies, it is preferable to have a single trustee for both jurisdictions, so as to ensure more consistency in the implementation and monitoring of the remedies.

The remedies adopted by CADE may be the same adopted by foreign authorities, provided that the parties fulfil their obligations in Brazil during the several stages of monitoring and implementation. In this context, CADE requires a Merger Control Agreement is signed in Brazil, so that the agreement's main and ancillary obligations are honoured in the country as well.

Annexes

Annex A – Glossary

Information asymmetry: unbalance in the access to information by two agents that interact with one another. The unbalance may create failures or inefficiency in resource allocation in a market.

Carve-out: the separation of a business unit from the structure of a firm. In this case, the business to be separated is not autonomous.
Thus, the carve-out process may require the assets or personnel are doubled so as to ensure the divested business is viable and competitive.

Chinese wall (firewall): a behavioural remedy aimed at restricting access to confidential information within a merged firm. In the case of a vertical integration, for instance, information is not shared between the upstream and downstream departments of the verticalised firm.

Consummation of the transaction (consummation of the merger, closing the deal): changes in the physical structure and competitive conditions of the parties involved in the merger. These changes comprise asset transfers, influence of one party over the other, and the exchange of competitively sensitive information that is not strictly necessary for the signature of a formal document that binds the parties (the purchase and sale agreement).

Consummation of the divestiture: transferring to the purchaser the assets; contractual relationships (i.e. contracts with suppliers and clients, lease agreements, use of distribution channels, amongst others); and authorisations and permits (e.g. a business licence) required for the operation of the divested business.

Crown jewels: where the first deadline for divestiture is missed, it is replaced or complemented by an alternate or additional divestiture (called crown jewels). Thus, the divestiture package extends beyond markets where the transaction raises competition concerns, aiming to attract potential buyers in new markets.

Empty shell: a divestiture whose asset package that is empty. It may occur where the human resources of a divestiture package are difficult to identify or transfer, whether by the employees' will or issues with the labour legislation.

Fix-it-first: a structural remedy offered by the Applicants during a merger review, in which a purchaser and an asset package are selected before the merger is cleared. This remedy may provide the Applicants with more flexibility in designing the divestiture package.

Mix and match: divestitures that combine assets and business segments of more than one Applicant.

Moral hazard: market players tend to change their behaviour after signing a contract. This happens because individuals have bounded rationality, that is, they cannot anticipate all circumstances entailed in a business relationship. For instance, in the health insurance market, people tend to demand more services than they would if uninsured.

Key personnel: the personnel necessary for keeping the divested business viable and competitive.

Price-cap: a model of regulation with incentives, where price caps are fixed for a given period. As a consequence, companies look for efficiency gains and cost reductions to make better profits. For instance, in the CPI-X regime, price caps reflect the rate of inflation minus the efficiency savings expected until the price caps are next reviewed.

Limited Assurance Report: it seeks to reduce engagement risk to an acceptable level in the circumstances of the engagement but where the risk is higher than that of a Reasonable Assurance engagement. It supports an independent auditor's conclusion in a negative form, i.e. that he or she is not aware of any relevant changes that should be made in the information used in the engagement.

Reasonable Assurance Report: it seeks to reduce engagement risk to an acceptably low level in the circumstances of the engagement. It supports an independent auditor's conclusion and expresses it in a positive form.

Applicants or Parties: companies applying for a merger or acquisition.

Ring-fencing: unlike a Chinese Wall, which takes place within the merged firm, a ring-fencing blocks information sharing between the seller and the package of assets to be divested. It is a separating measure aimed to protect trade secrets or other confidential information regarding the divestiture.

Trustee: one or more individuals or legal entities appointed by the signatories and confirmed by CADE where there is a Merger Control Agreement. A trustee's main duties include the following: i) preserving the business to be divested; ii) monitoring the carve-out process of the divestiture package; iii) holding the divestiture package separate from the other businesses of the seller; iv) monitoring the signatories' compliance with the conditions and obligations established by the Merger Control Agreement (e.g. the process of selecting an appropriate buyer, compliance with the obligations of a behavioural remedy, where applicable); and v) enabling the sale of the divested business.

Upfront buyer: a remedy in which the purchaser is selected after merger clearance, and is a prerequisite for its consummation.

Annex B – Trustee mandate

Identification (i) of the parties (signatories) and (ii) the trustee.
Identification of the decision that ordered the nomination of a trustee, informing: (i) The type of decision (a Merger Control Agreement in a merger or a Cease and Desist Agreement in an investigation into an anticompetitive practice); (ii) the legal provisions that support the decision and negotiated measures.

According to the decision above, the party(ies) or signatory(ies) commitment to (sum up the structural and/or behavioural obligations set by the agreement).

Definitions:
Parties: firm A, firm B.
Obligations: a group of behavioural and/or structural remedies that compose the duties to be fulfilled by the parties throughout the implementation of the agreement.

Monitoring trustee: responsible for monitoring the divestiture process and the maintenance of the divested business or, in the case of behavioural remedies, for verifying whether the obligations about what to do and what not to do are being properly fulfilled.

Divestiture trustee: responsible for organising the sale of assets where the parties failed to complete the divestiture process by the first deadline.

Operating trustee: responsible for managing the divestiture package whilst it is not transferred to the buyer. The specific duties of an operating trustee must be established according to the specificities of the case.
Work plan: a plan each potential trustee must present to CADE so the authority is able to decide between the options offered by the signatories.

1. Trustee nomination

CADE names a monitoring trustee after the parties submit their candidates by the deadline set in the agreement.

After nomination, the trustee must fully adhere to the terms of the mandate, starting at the nomination date, and is thereafter bound by the obligations and deadlines set in the agreement and mandate.

The trustee's personal staff is made up of the following professionals: (...) without prejudice to hiring additional professionals to provide specific services (such as audit, reporting, etc.).

CADE nominates a divestiture trustee after the first deadline for divestiture expires, according to the deadlines agreed.

From the moment of nomination, the divestiture trustee also adheres to the terms of the mandate and the obligations set in the agreement.

The divestiture trustee's staff is introduced from the moment of a trustee's nomination, where necessary.

2. General duties of a trustee

A trustee must work towards the fulfilment of the obligations assumed by the signatories, and exclusively on behalf of CADE. A trustee must follow the work plan approved by CADE. Nonetheless, the approval does not prevent the authority from requesting changes and imposing additional measures when deemed required for the performance of the responsibilities assumed.

3. General duties of signatories

Signatories and their legal representatives must provide all necessary conditions for the fulfilment of a trustee's mandate, intending to meet the assumed obligations. To this end, signatories must grant full, unrestricted access to the parties' facilities, especially to the assets to be divested, information systems, ledgers, personnel, technical information, amongst others that become necessary for the implementation of the mandate. Access to these resources and assets must be granted within a reasonable time so as not to hinder or unduly postpone the work conducted by the trustee.

Moreover, the signatories must provide the trustee and the trustee's staff with the financial and material resources necessary to support the work being carried out.

The signatories must also keep the trustee informed about every relevant aspect of the assumed obligations, such as: making a list of potential asset buyers, ongoing negotiations, offered conditions, deadlines for implementation, business plan, and any obstacles to the performance of obligations, amongst others.

In case a trustee deems appropriate to hire experts to perform specific tasks, such as an auditor, technical expert, etc., these professionals must be provided by the signatories within a reasonable time.

4. Duties of a monitoring trustee

These are the duties monitoring trustee (who, where necessary, should act jointly with an operating trustee):

- monitor the maintenance of the divested business, the viability of the business, and the competitiveness of its assets until they are transferred;
- ensure the parties do not take any action aimed at, or that may result in the assets' loss of value, competitiveness, or attractiveness;

- ensure the signatories offer all necessary resources for preserving the assets until the obligation is in force; and
- ensure the assets to be transferred form an independent unit, separate from the signatory, so as to maintain the assets' competitiveness when they are removed from the parties' structure.

In cases where there are behavioural obligations, a monitoring trustee has the following duties:

- Monitor the signatories' compliance with the duties and prohibitions assumed by them.
- Require, if need be, actions taken by the signatories are corrected, so as to meet the obligations assumed in the agreement and according to CADE's requirements.
- Seeking to ensure full compliance with the behavioural responsibilities undertaken, a trustee and the trustee's staff should be granted unrestricted access to the parties' facilities. Furthermore, where necessary, the trustee is allowed to participate in meetings, negotiations with third parties potentially affected by the obligations (clients, competitors, suppliers), and interviews with third parties (with the third parties' consent), preserving the confidentiality of the signatories.

A monitoring trustee must inform CADE of any actions or omissions by the signatories that may jeopardise the fulfilment of the assumed responsibilities and of the mandate, so that CADE may intervene or inspect compliance with the obligations.

5. Duties of a divestiture trustee

A divestiture trustee is nominated after the first deadline for divestiture is expired, taking on the duty of transferring the assets described in the agreement. These are the duties of a divestiture trustee:

- indicate the criteria for the asset sale (reserve price, zero bid prices, etc.);
- indicate a deadline for divestiture;
- indicate the criteria for selecting potential buyers; and
- report to CADE and comply with the authority's orders.

6. Obligation to inform

A monitoring/divestiture trustee must present regular reports to CADE (establish the frequency according to the case or duration of the obligations). In the reports, the trustee must inform CADE on the following:

- Performance of structural/behavioural obligations.

- Compliance with action plan and negotiated deadlines.
- Compliance with the obligations taken on by the signatories. In case of non-compliance, the trustee should state the reasons for it, detailing the signatories' liability or if it occurred as a result of force majeure.
- Whether the obligations have been met or not, a trustee must identify the actions taken in response to the signatories' behaviour aimed at ensuring the fulfilment of the obligations. A trustee must detail such actions, in addition to the signatories' efforts in adopting the recommendations, and their compliance or non-compliance with any of the obligations.

The trustee is the sole responsible for presenting the reports. The deadlines provided in the agreement must be observed, subject to fines for delay or for not presenting the reports. In case the signatories explain their delay or incomplete reports, the trustee must report it to CADE in detail so that the authority decides on issuing a statement of non-compliance with the agreement.

7. Conflict of interest

A trustee and the trustee's staff cannot have a conflict of interest with the signatories (report potential conflicts).

Where a conflict of interest rises, the trustee must immediately report it to CADE, and the authority may require the trustee or a member of the trustee's staff to be replaced.

8. Conclusion

The compensation of the trustee, the trustee's staff, and any additional professionals hired is a responsibility of the signatories of the agreement.

This compensation must seek the trustee's independence from the signatories and should not encourage a situation where the interests of a trustee are aligned with those of the signatories; where this is the case, CADE may penalise the parties.

CADE suggests a divestiture trustee's compensation should be bound to the deadline for divestiture.

The trustee's compensation must be included in the action plan submit to CADE for analysis. The trustee mandate ends only when CADE declares all obligations have been met, unless otherwise specified.

Annex C - Confidentiality waiver

Modelo Termo de Renúncia a Confidencialidade [identificar empresas proponentes] Ato de concentração n°: [ ]	Model Confidentiality Waiver [identify proposing companies] Merger File number: [ ]
RENÚNCIA	WAIVER
1. Em nome da [nome da empresa A], [tipo de sociedade sob a lei brasileira], com sede à [endereço completo], inscrita no CNPJ/MF sob o nº [ ], representada por seu administrador, [nome do administrador ou outro representante], [profissão], [nacionalidade], [estado civil], portador da carteira de identidade brasileira nº [ ], inscrito no CPF sob o nº [ ], com endereço comercial acima mencionado e da [nome da empresa B], [tipo de sociedade sob a lei brasileira], com sede à [endereço completo], inscrita no CNPJ/MF sob o nº [ ], neste ato, representada por seu administrador, Sr. [nome do administrador ou outro representante], [profissão do representante], [nacionalidade], [estado civil], portador da carteira de identidade brasileira nº [ ], inscrito no CPF sob o nº [ ], renunciamos a toda e qualquer restrição de confidencialidade e sigilo protegidos por lei no que for necessário para fomentar a cooperação e a troca de informações entre o Conselho Administrativo de Defesa Econômica – Cade – e [o órgão análogo no estrangeiro], de forma a colaborar com a instrução processual do Ato de Concentração em epígrafe, doravante Ato de Concentração proposto.	1. On behalf of [name of the firm A], [type of establishment under Brazilian law], located at [complete address], registered at the National Registry of Legal Entities no. [ ], represented by its manager, [name of manager or representative], [occupation], [nationality], [marital status], holder of the Brazilian identity card no. [ ], registered under Brazilian fiscal (CPF) no. [ ], with the same commercial address of the above mentioned and of [name of firm B], [type of establishment under Brazilian law], located at [complete address], registered at the National Registry of Legal Entities no. [ ], represented by its manager, [name of manager or representative], [occupation], [nationality], [marital status], bearer of the Brazilian identity card no. [---], registered under CPF no. [ ], with the same commercial address of the above mentioned, we agree to waive all confidentiality and secrecy restrictions on what may be necessary to endorse cooperation and information exchange between the Brazilian Administrative Council for Economic Defense (CADE) and [similar foreign institution], in order to assist the instruction of the Merger File in Title, hereinafter called proposed Merger.

2. Concordamos em submeter este Termo de renúncia ao conhecimento do [o órgão análogo no estrangeiro] para permitir que aquela autoridade possa compartilhar com o Cade informações obtidas a partir da [empresa A] ou da [empresa B], ou outras empresas de seus respectivos grupos, durante a instrução processual de autorização para a [objeto do Ato de concentração proposto].	2. We agree to submit this Waiver to the assessment of [similar foreign institution] to allow that authority to share with CADE information acquired from [firm A] and/or [firm B], during the filing instruction for the authorization of [object of the proposed Merger].

3. A [empresa A] e a [empresa B] consentem que os servidores do Cade e do [o órgão análogo no estrangeiro] compartilhem quaisquer documentos, declarações, dados e informações, fornecidos pelas signatárias, assim como quaisquer análises internas das mencionadas agências, que seriam de outra maneira impedidas pelas regras de confidencialidade, desde queestejam relacionadas ao Ato de Concentração proposto.	3. [firm A] and [firm B] accede that CADE's and [similar foreign institution]'s servants share any documents, declarations, data and information, given by the signatories, also any analyses of the mentioned institutions which would otherwise be subject to the confidentiality rules of that jurisdiction, as long as they are related to the proposed merger.
GARANTIAS	CAVEAT
4. Este Termo não constitui renúncia de qualquer modoaos direitos de confidencialidade da [empresa A] ou da [empresa B] frente a quaisquer outros terceiros, não nomeados aqui, ou quaisquer outras instituições diferentes do [o órgão análogo no estrangeiro].	4. This waiver does not constitute any sort of confidentiality rights renunciation of [firm A] nor of [firm B], before any third persons, not nominated here, or any other institutions different from [similar foreign institution].
5. Este Termo está limitado às informações obtidas pelos órgãos para analisar o ato de concentração proposto e não se aplica as informações obtidas no curso de qualquer outro caso ou análise presente ou futura que não o Ato de Concentração proposto.	5. This waiver is limited to information acquired by theinstitutions to analyze the proposed Merger and it does not apply to the information acquired during any other case or analysis in the present or in the future that is notthe proposed Merger.
CONDIÇÕES	CONDITIONS
6. Informações transmitidas por força deste Termo somente poderão ser utilizadas pelo [o órgão análogo no estrangeiro] com o fim de conduzir a instrução processual do Ato de Concentração proposto e nunca para qualquer outro fim. O Termo de renúncia está sujeito à condição de as informações mencionadas serem mantidas confidenciais pelo [o órgão análogo no estrangeiro] e, portanto, não podem ser divulgadas a qualquer outro terceiro.	6. Information transmitted pursuant to this Waiver mayonly be used by [similar foreign institution] for the purposes of conducting its enquiry into the proposed Merger and never for any other purpose. The Waiver is subject to the express condition that such information remains confidential by [similar foreign institution] and may not be disclosed to any third party.
7. Acordamos que o não cumprimento das condições deste Termo pelo [o órgão análogo no estrangeiro] não gera qualquer responsabilidade ao Cade.	7. We agree that [similar foreign institution] failure to comply with the foregoing does not engender any liability to CADE.
8. A renúncia mencionada no primeiro item está sujeitaas seguintes condições:	8. The waiver as specified in the first paragraph is subject to the following conditions:
8.1. O Cade deve manter a confidencialidade das informações e dos documentos enviados pelo [o	8.1. CADE shall itself maintain the confidentiality of the information and/or documentation provided by [similar

análogo no estrangeiro] e deve tratá-las como se fossem informações confidenciais recebidas diretamente pelas [empresas A e B];

8.2. O Cade deve tratar todas as informações e os documentos enviados pelo [o órgão análogo no estrangeiro], por força deste Termo, como confidenciais, a não ser que esteja claro que as informações foram obtidas de fonte de acesso público;

8.3. O Cade não divulgará quaisquer das informações e dos documentos enviados pelo [o órgão análogo no estrangeiro] para qualquer terceira pessoa incluindo concorrentes, clientes e fornecedores das [empresas A eB];

8.4. As informações e os documentos enviados pelo [o órgão análogo no estrangeiro] devem ser utilizados pelo Cade somente para instrução do Ato de Concentração proposto;

8.5. O Cade não divulgará a [o órgão análogo no estrangeiro] quaisquer das informações e dos documentos obtidos das [empresas A e B] que tenham sido classificados como protegidos pelo segredo profissional na jurisdição do [o órgão análogo no estrangeiro] e que estejam claramente identificadas como tal. As [empresas A e B] ficam responsáveis por informar ao Cade sobre a existência de tais informaçõesou documentos.

DISPOSIÇÕES FINAIS

Cada [nome da empresa A e B] afirma ter obtido o consentimento de suas sociedades controladas para compartilhar de suas informações e documentos apresentados por cada [nome da empresa A] ou [B], sobas mesmas condições mencionadas acima.

Caso queira discutir qualquer questão pertinente a essa renúncia, favor contatar [representante da empresa A erepresentante da empresa B, telefone e endereço de e-mail].

foreign institution] and shall treat such information as ifit had been obtained directly from [companies A and /orB];

8.2. CADE shall consider all information and/or documentation obtained from [similar foreign institution] pursuant to this waiver as confidential information unless it is clearly identified as having beenobtained from a publicly accessible source;

8.3. CADE shall not make any information and/or documentation obtained from [similar foreign institution] available to any third party including competitors, customers and suppliers of [companies A and B];

8.4. information and/or documentation obtained from [similar foreign institution] shall be used by CADE only for the purposes of enquiry into the proposed Merger;

8.5. CADE shall not disclose to [similar foreign institution] any information and/or documentation that [companies A and/or B] have asserted a claim of legal client/attorney privilege in the jurisdiction of [similar foreign institution] and that is clearly identified as being subject to such privilege. [Companies A and B] are responsible for informing CADE of the existence of such privileged information and/or documentation.

FINAL PROVISIONS

Each [name of companies A and B] has obtained the consent of its affiliates to the sharing of their information and documents produced by each [names of firms A and B], under the same conditions as outlined above.

If you wish to discuss any matter arising from this waiver, please contact [name of responsible representative(s) of firm A and of firm B,telephone no. and email address].

Uma cópia deste Termo foi enviada a [o órgão análogono estrangeiro]. No caso de qualquer desacordo entre as versões em Português e Inglês deste Termo, a versão em Portuguêsdeverá prevalecer.	A copy of this letter has been sent to [similar foreign institution]. In case of any disagreement between the Portuguese and the English versions of this Waiver, the Portugueseversion shall prevail.

Brasília, [dia] de [mês] de [ano]

Brasilia, [day] [month] [year]

_____

[EMPRESA/FIRM A]

_____

[E EMPRESA/FIRM B]