

WHEN PRIVATE EQUITY FUNDS FACE THE ANTITRUST AGENCY

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Much has been discussed in the past about whether it would be mandatory to submit acquisition or transfer of control transactions by private equity funds for analysis by the Administrative Council for Economic Defense (CADE). Such discussions were resolved after the agency repeatedly stated that the transactions should, indeed, be submitted whenever the legal criteria for notification were met.

The issue is far from exhausted, however. The absence of clear guidelines to interpret the law results in difficulties not only in verifying the legal criteria for notification, but also in identifying which acquisitions do not require notification.

Many of the questions arise from interpretations of the legal thresholds for notification, namely: (1) earnings over R\$ 400 million in Brazil by the group; and/or (2) a 20% market share. Contrary to what might be assumed, the earnings considered by the CADE in private equity transactions are not those of the fund involved. There are also doubts about how to determine the economic group to which investment funds belong, in order to verify the 20% total market share limit.

The CADE's interpretation leans toward considering the earnings of a fund's shareholders as the determining factor. However, there are also precedents that consider the joint earnings of the operating companies controlled by the fund, or those in which the fund has a material interest. Another interpretation takes into account the earnings of the fund manager/administrator.

There is also not a clear legal definition as to which shareholders should have their earnings verified: some decisions mention the total of all shareholders (any one of them individually), while others refer to the controller. In this case, however, there are still inconsistencies in the treatment to be applied upon an impasse and/or impossibility of determining who that person might be.

Regarding the market share criterion, the CADE has already consolidated that it performs such verification if the 20% are achieved as a result of the transaction under analysis. In other words, cases where market shares will not be added together need not be notified

pursuant to this criterion (even if the target company itself exceeds this limit). When this discussion is resolved, the greatest challenge will be to determine the economic group to which the pertinent fund belongs, and what to do upon a subsequent verification of horizontal overlap between its companies and the target company. Though the CADE does not provide a clear understanding on the matter, its legal office is attempting to establish the theory that investment funds should be considered part of the economic groups of their shareholders.

Transactions that fit the legal criteria for notification, but can be considered non-notifiable, are another significant source of doubt. CADE precedents repeatedly affirm that there is no obligation to notify acquisitions of stakes that do not grant controller status to the acquirer.

The CADE also classifies minority stake acquisitions by majority shareholders as non-notifiable. However, given that this leaves the other situations unresolved, it raises many questions about mandatory notification of other types of minority stake acquisitions (by a minority partner or involving less than 1%, for example).

Given what is laid out above, although private equity transactions should certainly be subjected to the CADE notification rules, it can be seen that the practical aspects of defining this notification duty still runs into several controversial, non-clarified points. In the current scenario, transactions should be analyzed carefully on a case-by-case basis and submitted to the CADE whenever there is doubt, until greater legal certainty is achieved for this matter.
