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MERGER CONTROL: BRAZILIAN COMPETITION AUTHORITY UNWINDS GUN JUMPING CASE

The Brazilian Competition Authority, the Administrative Council for Economic Defense (CADE) decided to nullify a joint venture implemented before CADE's approval. This was the first time CADE took such a decision since the *ex-ante* merger analysis came into effect in Brazil in 2012.

The rejected transaction involved the incorporation of a joint venture (Blue Cycle Distribuidora S/A) among bicycle parts distributors RR Participações Ltda. and Douek Participações Ltda. and the bicycle parts manufacturer Shimano Inc. It also foresaw that Shimano would discontinue the direct supply of its parts to seven active distributors in Brazil, which would be taken over by Blue Cycle.

CADE decided to unwind the joint venture, requiring Shimano to inform its distributors of the nullity of the transaction and to submit, to CADE's review, a detailed report on its activities, agreements and invoices issued during the existence of the joint venture.

The parties also had to submit the transaction to CADE's merger control. After a thorough review and only if the transaction is approved (unconditionally or with the imposition of remedies), the parties will be allowed to resume the implementation of the joint venture.

The unwinding of the transaction should cost the company much more than the penalty applied for gun jumping (BRL 1.5 million).

In the past, CADE fined other gun jumping cases, but never imposed the unwinding of any transaction. Even though the law foresees gun jumping penalties reaching BRL 60 million, CADE applied a relatively modest fine in this case. It is worth mentioning that the highest fine applied so far was of BRL 30 million (applied to Cisco System and Technicolor).

Although the law grants CADE the powers to unwind transactions, it had only been applying fines in gun jumping cases and requiring the submission of the transaction, in case it had not been submitted spontaneously.

In the case under scrutiny, the Reporting Commissioner had voted solely for the imposition of a fine and the mandatory notification of the transaction. However, the majority of CADE's Tribunal members decided to also declare the transaction null.

One of the determining aspects for CADE to understand that the unwinding would be feasible in this case, was a contractual provision that foresaw the possibility of having an abrupt termination of the joint venture.

This case draws attention to the importance of a thorough analysis of the legal obligation to submit transactions to CADE's review. The losses for those who fail in this analysis are increasing significantly.

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