The intersection between Competition Law and Employment Law in Brazil: Implications for business

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Debate over the intersection between competition law and employment law in Brazil began in 2021, when Brazil's antitrust authority, CADE (Conselho Administrativo de Defesa Econômica) began an investigation into the conduct of human resources departments in certain healthcare companies (Administrative Proceeding No. 08700.004548/2019-61). The investigation is still underway and focuses on alleged coordinated activities between competitors and the exchange of sensitive information. Although human resources is a new focal point, concerns about collusion are naturally part of the antitrust agenda.

More recently, in 2023, the 6th Chamber of the 15th Region Labor Appeals Court (TRT-15 – Tribunal Regional do Trabalho da 15a Região) added a new dimension to the debate. It ruled that CADE has a duty to consider labor and employment factors in its decisions on mergers and acquisitions (Proceeding No. 0012149-49.2014.5.15.0081). According to the TRT-15, in all acts of concentration, CADE should send official communications to the unions representing the workers in the companies involved in the transaction to obtain information on the potential impacts on the job market. In addition, CADE should give the Public Labor Prosecution Service (MPT – Ministério Público do Trabalho) access to documents that indicate possible collective dismissals. When the TRT-15's decision was issued, CADE responded by stating that job protection and analysis of the social impacts of transactions submitted for review do not fall within its purview. Motions for clarification were filed against the TRT-15's decision, which have not yet been decided.

Under Brazil's Antitrust Law, third parties, including unions and workers, can apply to CADE to join antitrust proceedings as interested parties. CADE will assess whether the issues raised by the interested third party are genuinely related to competition, and take appropriate measures to include those issues in its evaluation.

The broad scope of the TRT-15's decision raises concerns. CADE has an institutional duty to intervene whenever it identifies competition problems in mergers under review. The TRT-15's attempt to put protection of employment and non-competition-related impacts within CADE's jurisdiction therefore seems misdirected. This does not reflect a lack of sensitivity to social impacts, since there are specific tools to serve those purposes: Brazil's highest court, the Supreme Federal Court, has ruled that, irrespective of competition issues, in cases of collective dismissal, the worker's union or unions representing the affected employees must be contacted; similarly, the MPT has standing to challenge conduct by employers that may be harmful to social and collective interests related to labor and employment, without the need for CADE to provide it with data or information on transactions under merger control review.

There are cases where issues adjacent to antitrust law will impact merger review and must be examined. In the Boeing/Embraer case, CADE's General Superintendence emphasized that issues related to industrial or commercial policy, national sovereignty, and labor rights should only be addressed if they directly touch upon the competition analysis (Concentration Act No. 08700.009905/2022-83). In the Cargill/ADM/Louis Dreyfus/SusteinIt case, sustainability aspects were discussed during the proceeding, since the transaction involved the development of sustainability measurement software. CADE ruled, however, that it lacked jurisdiction to weigh other values (such as sustainability) against competition effects, and the transaction was approved on the grounds that it did not present competition problems (Concentration Act No. 08700.003896/2019-11).

With recent debates over sustainability, CADE's role should not be diverted to attend to interests or issues beyond its jurisdiction as a competition authority. The authority can and should act in any market affected by concentration of business, as long as there is an antitrust basis to do so.

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