

BRAZIL EFFECTS NEW MERGER CONTROL REGIME

June 8, 2012

To Our Clients and Friends:

Brazil's new Competition Law (12.529/2011) came into force on May 29, 2012, effecting a comprehensive institutional and procedural overhaul of the Brazilian merger control system. The new suspensory regime combined with a lengthy review period turn Brazil into a priority jurisdiction when assessing antitrust risk from both a substantive and timing perspective. Key elements of the new law include:

- **Institutional reform:** The functions of the three existing competition agencies were consolidated into the Administrative Council for Economic Defence ("CADE").
- **New jurisdictional thresholds:** These have been raised to BRL 750 million for one party and BRL 75 million for another.
- **Suspensory effect:** Parties may no longer close a deal while clearance in Brazil is pending.
- **Lengthy review period:** CADE has a maximum of 330 days to reach a decision.
- **Detailed notification requirements:** The information required has been expanded to become more onerous.

NEW JURISDICTIONAL THRESHOLDS

Brazil's new Competition Law has eliminated the former market share test in favor of a secondary turnover threshold. Effective from May 31, 2012, a Brazilian notification is required where:

- at least one of the groups involved in the transaction had gross revenues in Brazil in the preceding fiscal year exceeding BRL 750 million (approximately USD 375 million or EUR 300 million); and
- at least one of the other groups involved in the transaction had gross revenues in Brazil in the preceding fiscal year exceeding BRL 75 million (approximately USD 37.5 million or EUR 30 million).

A party's "group" is broadly defined to include: (i) all companies subject to common control, and (ii) all companies in which the controlling entity or its controlled companies hold, directly or indirectly, at least a 20% interest. In the case of "investment funds," the group includes: (i) funds under common management; (ii) the managing entity; (iii) the investors that hold, directly or indirectly, more than 20% of at least one the funds; and (iv) any portfolio companies in which at least one of the funds holds 20% or more of the shares.

The "local effects" test has been retained, such that a transaction between foreign parties is only caught if the target (or any of the parties in a joint venture) has a direct or indirect presence in Brazil; for example, via a local subsidiary or assets or export sales into the country.

These changes should reduce substantially the number of notifications made each year, particularly in deals involving foreign companies. However, because the turnover thresholds remain defined by reference to the "groups" involved in the transaction, in certain transaction structures a filing may still be required even when the target entity has little sales in Brazil.

Of note, CADE now has the power to review non-reportable transactions within one year of closing. Thus parties will need to conduct a substantive competition analysis for those deals that fall below the thresholds or run the risk of a post-completion investigation.

REPORTABLE TRANSACTIONS, MINORITY INTERESTS AND INCREMENTAL ACQUISITIONS

In addition to mergers, joint ventures and acquisitions of controlling interests, an acquisition of a minority interest is notifiable where it conveys control of the target or where:

- the acquirer becomes the majority investor in the target;
- there is no competitive overlap between the parties on a horizontal or vertical basis, and the acquirer acquires 20% or more of the target's shares or increases its interest in the target by 20% or more; or
- the parties' activities overlap on a horizontal or vertical basis, and the acquirer acquires 5% or more of the target's shares or increases its interest in the target by 5% or more.

The acquisition by a controlling shareholder of a further 20% interest from a single seller is also reportable.

PRE-CLOSING SUSPENSORY EFFECT AND INCREASED FINES

Any transaction that meets the thresholds must be notified by the parties and cleared by CADE before it may be implemented. This also means that the parties must not take steps that may be viewed as integration of their businesses and should take care not to exchange commercially sensitive information during the suspensory period. CADE's new procedural rules do not permit carve-out arrangements whereby parties to a global transaction could close everywhere other than Brazil pending CADE's review, but do provide two specific exceptions to the suspensory requirement:

- Public takeover bids can be completed prior to clearance, provided the acquirer does not exercise the voting rights attached to the securities, or (with authorization from CADE) does so only to protect the full value of the investment.
- In a "failing firm" scenario, the transaction can be closed if (i) it does not pose a danger of irreparable harm to competition, (ii) it is fully reversible, and (iii) the parties demonstrate that the target would imminently suffer substantial and irreversible financial loss if it had to wait for a clearance decision. CADE has 30 days to rule on such cases.

Potential fines for "gun-jumping" range from BRL 60,000 to BRL 60 million (approximately USD 30 million or EUR 24 million). A transaction implemented before being cleared may also be legally void in Brazil.

REVISED WAITING PERIODS AND TIMING CONCERNS

Under the new law, CADE has 240 calendar days to complete its review, which may be extended by 60 days at the request of the parties, or 90 days by means of a reasoned decision by CADE. If a decision is not reached within the statutory period, the transaction will be considered tacitly approved.

In theory, the new regime gives parties significantly greater certainty as to timing. However, the review period does not start until CADE deems the notification to be complete, and the rules do not specify a deadline for such determination. Moreover, no provision has yet been made for a shorter first phase review period within the overall timetable (as is typical in most other major jurisdictions). In practice, these omissions leave business with substantial timing uncertainty.

A simplified procedure will be available for certain transactions considered unlikely to give rise to competition concerns; this reduces the information required in the notification form but does not formally shorten the review period. CADE retains discretion whether to permit a short-

form notification, and has indicated it will be available in joint ventures where the parties have no horizontal or vertical overlap, consolidations of control where the controlling party acquires a further 20% stake, acquisitions where the acquirer has no existing market presence, and transactions involving a “low market share” (20% on either a horizontal or vertical basis).

The outgoing President of CADE has indicated that he expects CADE to clear non-problematic deals within 40 days of notification, in line with best practice under the old law.

NOTIFICATION REQUIREMENTS

CADE’s new procedural rules state it is “preferable” that notification be made after execution of a binding agreement. In theory, therefore, it should now be possible to notify on the basis of a good faith intention to proceed with the deal. In addition, the rules allow parties to contact CADE prior to notification to address any questions they may have (as long as the transaction is not a candidate for the simplified procedure).

These time-saving procedures are important given the amount of information required by the notification form, which is much greater than is typical in other major jurisdictions. For example, the form seeks estimates of market size in terms of both value and volume of sales for the previous five years plus projected growth for the next five years, as well as extensive supporting documentation. Even the short-form notification used in the simplified procedure is comparatively onerous in its requirements.

TRANSITIONAL PERIOD

Any transaction signed before May 29, 2012, will be assessed under the old Competition Law (8.884/94), provided the parties submit their notification by June 19, 2012, and the parties will be able to close without waiting for a clearance decision. Conversely, if the parties enter into a binding agreement from May 29 onwards, they will fall under the new law and must observe the suspensory requirement.

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Please do not hesitate to contact us if you have any questions.

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