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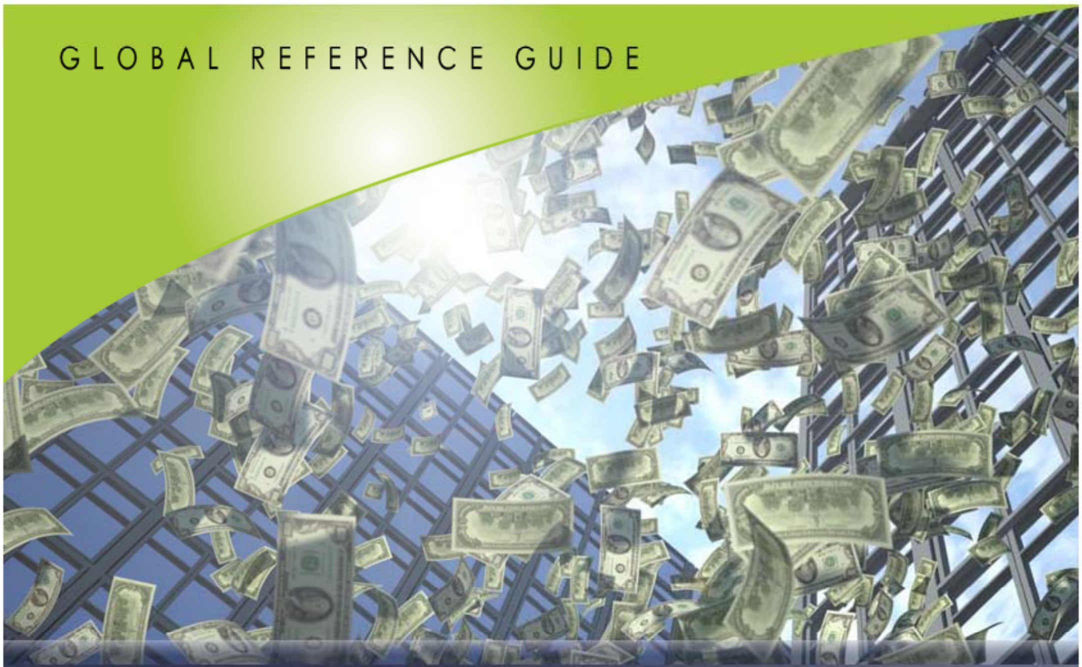

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Brazil's new competition landscape: relevant aspects for private equity funds

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LAW NO. 12,529 OF 30 NOVEMBER 2011 (Law No. 12,529/2011 or 'the new Law') took effect on 29 May 2012 and is expected to change the landscape of competition law and policy in Brazil in the coming years. Some of those changes are of particular interest to private equity funds, such as the introduction of a new pre-merger review system and revised mandatory notification thresholds. Behind these changes lies the creation of a single independent authority – the Administrative Council for Economic Defense (CADE) – that consolidates the investigative, prosecutorial, and adjudicative functions of the Brazilian competition authorities into one independent agency.

Brazil is now a suspensory jurisdiction: fines for 'gun jumping' will range from BRL 60,000 to BRL 60m. The maximum period for CADE to conduct the merger review is 330 calendar days from the day of filing. In complex cases, Law No. 12,529/2011 also allows the reporting commissioner to authorise the parties to close the transaction before receiving clearance, subject to conditions such as the prohibition to integrate activities, dismiss workers, close stores, terminate product lines, and alter marketing plans.

The new Law provides for minimum size thresholds, expressed in total revenues derived in Brazil by each of at least two parties to the transaction. One party must have revenues in the last fiscal year of at least BRL 750m and the other BRL 75m – both acquirer and seller, including their respective economic groups as a whole, should be taken into account. Pursuant to CADE's Resolution No. 2/2012, in private equity transactions, the following entities are considered part of the same economic group, and thus their respective turnovers included for the purpose of determining whether the minimum size threshold is met: (i) the management company; (ii) funds under the same management company; (iii) limited partners that hold directly or indirectly at least 20 percent of at least one of the funds under the same management; and (iv) portfolio companies in which one of those funds hold, directly or indirectly, at least 20 percent of their voting or total capital stock. Such expansive criteria results in virtually all private equity transactions requiring regulatory approval in Brazil.

With respect to the types of transactions that are subject to mandatory filing, if the parties meet the turnover threshold, the new provision specifically refers to 'concentration acts' which encompass: (i) mergers; (ii) direct or indirect acquisitions of sole or joint control, of minority shareholdings, of stock or assets, through contracts or any other means; (iii) absorptions; and (iv) joint ventures.

Through Resolution No. 2/2012 CADE also introduced objective standards to define the categories of shareholdings acquisitions that are subject to mandatory filing. In addition to the transactions that result in a change in control, regulatory approval will also be required for: (i) those, where as a result of the transaction, the acquirer becomes the largest individual shareholder of the target company; (ii) in cases that do not involve horizontally or vertically related companies, if a party acquires at least 20 percent of the voting or total capital stock of the target company, or where the party that already holds 20 percent of the voting or total capital stock of the target company, acquires at least 20 percent of the voting or total capital stock from the same seller; (iii) in cases involving horizontally or vertically related parties, if the party acquires at least 5 percent of the voting or total capital stock of the target company; or (iv) every time the shareholder holding at least 5 percent of the voting or total capital stock of the target company acquires an additional stake of at least 5 percent.

Legal documentation of private equity transactions should consider whether or not their closing should be subject to CADE's approval. In cases where such approval is required, transaction documents must set forth to deal with variations in the valuation of a given target company pending closing without the interference of the potential buyer. Such variations may increase or reduce the purchase price and affect the intention of the parties to close the deal. In this context, parties may put in place a set of conditions precedent, conduct of business pending closing provisions, walk-away rules in case of material adverse change, as well as procedures to determine the adjustment of the purchase price, among others.

Careful assessment of the private equity transaction from the competition standpoint is thus crucial to determine whether or not variations in the valuation should be treated in detail in the legal documentation, and whether or not the parties may expect to succeed in their request for antitrust approval and the allocation risks associated therewith. ■