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BRAZIL'S ANTITRUST LAW: TWO YEARS ON

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Executive Summary

This paper will examine the central changes introduced by Brazil's competition law (Law No. 12,529/2011) to the country's legal and institutional framework, and the relevant developments and trends in law enforcement since it took effect in May 2012.

Key Aspects: The new law (i) consolidated the investigative, prosecutorial, and adjudicative functions of the Brazilian competition authorities into one independent agency – the "new CADE"; (ii) introduced a mandatory pre-merger notification system and new filing thresholds; and (iii) set forth new sanctioning provisions for anticompetitive conducts.

Conduct Enforcement: CADE has imposed sanctions in 20 plus cases in the last 2 years, most of them related to cartel conduct; has issued new settlement rules for cartel cases; and on unilateral conduct it has established important precedents regarding Resale Price Maintenance and exclusivity agreements. There is still uncertainly regarding some aspects of the sanctioning provisions, particularly regarding when CADE will resort to the group's revenues instead of taking into account only the turnover of the defendant to impose fines.

Merger Review: Brazil is now a suspensory jurisdiction, and in August 2013 CADE imposed for the first time fines for gun jumping. The definition of steps that parties are allowed to take prior to the adjudication of the case however is still missing. The new thresholds have decreased the number of filings and reduced the average review period. Earlier clearance decisions such as those based on the "effects test" and on the definition of merging parties "economic group" seemed to indicate that the agency was targeting cases with clear impact in the domestic market. This trend seems to have been overturned more recently.

Recent Developments: On February, CADE put under public consultation three amendments to the merger control regulation with the purpose to enhance transparency and legal certainly regarding substantive and process issues of the new system.

Key Words: antitrust, cartel, resale price maintenance, exclusivity agreements, merger, public consultation, CADE, Law No. 12,529/2011, Brazil.

I. Introduction

In October 2011, the Brazilian Congress approved Law No. 12,529, the country's new competition law, which was subsequently signed by President Dilma Rousseff on November 30th that same year and took effect on May 29, 2012 ("Law No. 12,529/2011" or "competition law"). The long expected reform was approved after several years of discussions within the Brazilian government and of congressional review, during which international fora such as the International Competition Network ("ICN") and the Organization for the Economic Cooperation and Development ("OECD") played a key role in providing support for its approval.

The modern era in competition policy in Brazil began with the antitrust law of 1994 ("Law No. 8,884/1994"), which coincided with the country's transition to a market-based economy. Law No. 8.884/1994 introduced the institutional framework of the Brazilian Competition Policy System ("BCPS") in place until Law No. 12,529/2011 took effect, comprised of two investigative and advisory agencies, the Secretary of Economic Monitoring at the Ministry of Finance ("SEAE/MF") and the Antitrust Division of the Secretary of Economic Law at the Ministry of Justice ("SDE/MJ"), and a third component, the Administrative Council for Economic Defense ("CADE"), an administrative tribunal in charge of issuing final rulings in both merger and conduct cases. The inefficiencies of that system became apparent fairly quickly, most of them related to its mandatory post-merger review system, the overlapping functions of the three agencies, and the lack of resources. As a result, policy makers began proposing amendments to the antitrust statute beginning in early 2000, but most were not enacted.

Notwithstanding such defects, during the past decade antitrust authorities in Brazil made significant progress. Improvements since 2003 eliminated overlapping functions, so the SDE concentrated on anticompetitive conduct investigations, with special focus on anti-cartel enforcement, and the SEAE on merger analysis. Its anti-cartel program is now widely respected in Brazil and abroad, and merger review was improved through infra-legal measures such as (i) the introduction of a "fast track" procedure for simple cases; (ii) consent decrees (*Medida Cautelar*) or agreements with the parties (*Acordo para Presevar a Reversibilidade da Operação* or *APRO*) that prevent complex transactions from being closed prior to CADE adjudicating the case; and (iii) the ability of administrative agencies to issue binding interpretations of law issued by CADE with the purpose of ensuring legal certainty regarding the notification thresholds.

The most relevant changes introduced by the new law are related to: (i) the new institutional framework; (ii) a mandatory pre-merger notification system and new

filing thresholds; and (iii) sanctions and other specific provisions addressing anticompetitive conduct investigation.

Under Law No. 12,529/2011, the investigative, prosecutorial, and adjudicative functions of the Brazilian competition authorities were consolidated into one autonomous agency. CADE has been restructured to include: (i) an administrative tribunal composed of six Commissioners and a President; (ii) a Directorate General for Competition ("*Superintendência Geral*" – "*DG*"); and (iii) an Economics Department. The new DG now performs the former functions of SDE's Antitrust Division and SEAE. SEAE continues to exist but deals exclusively with competition advocacy before the Brazilian regulatory agencies and other governmental bodies. CADE's Attorney General is now in charge of the agency's representation in court and may issue opinions upon request of the Commissioners or of the DG. The Federal Public Prosecutor renders opinions only on cases regarding investigations of anticompetitive conduct. The new Law also provides for additional 200 positions to be held by government employees within SEAE and CADE, preferably.

This paper will examine Brazil's developments regarding merger review and conduct enforcement since the new competition law entered into force. It is organized as follows: section II briefly describes the changes introduced regarding the prosecution of anticompetitive conduct and reviews the authorities' enforcement record since May 2012; section III provides a summary of the new pre-merger review system and discusses the relevant precedents established under the new law; and section IV concludes with comments on the recent draft regulations on key issues of the law.

II. Conduct Enforcement

The most relevant features of the Law No. 12,529/2011 with respect to anticompetitive conduct are related to (i) the introduction of a revised list of types of anticompetitive conducts; (ii) the applicable fines; and (iii) the Leniency Program.

The basic framework for anticompetitive conduct in Brazil is set by Article 36 of Law No. 12,529/11. Article 36 deals with all types of anti-competitive conduct other than mergers. The statute did not change the definition or the types of anti-competitive conduct that could be prosecuted in Brazil under the previous law. The law prohibits acts '*that have as [their] object or effect*' (i) limitation, restraint or, in any way, harm to open competition or free enterprise; (ii) control over a relevant market of a certain good or service; (iii) an increase in profits on a discretionary basis; or (iv) engagement in market abuse. Article 36 specifically excludes from potential violations, however, the achievement of market control by means of 'competitive efficiency'. Under Article 2 of

the law, practices that take place outside the territory of Brazil are subject to CADE's jurisdiction, provided that they produce actual or potential effects in Brazil.

The law is written broadly to apply to all forms of agreements and information exchange of sensitive commercial information, formal and informal, explicit and implicit. One of the changes brought by the new competition law was a reduction of the fine for anticompetitive behavior, from 1 to 30 percent of the company's turnover in the year prior to the beginning of the investigation to 0.1 to 20 percent of the turnover of the sector affected.[3] CADE has not issued to date secondary legislation clarifying in which cases the agency will resort to the group's revenues instead of taking into account only the turnover of the defendant.

Moreover, managers and directors[4] liable for unlawful corporate conduct may be fined an amount ranging from 1 to 20 per cent of corporate fines; differently from the previous law, CADE needs now to establish fault or negligence on the part of the directors and executives in order to find a violation.[5]

Pursuant to Article 45 of Brazil's competition law, the following shall be taken into account by CADE when setting fines: (i) degree of gravity of the infringement; (ii) good faith of the defendant; (iii) gain obtained or aimed by the defendant; (iv) whether the conduct has been consummated or not; (v) degree of actual or potential harm to competition, Brazilian economy, consumers or third-parties in general; (vi) detrimental economic effects caused by the conduct in the market; (vii) economic situation of the defendant; and (viii) recidivism. Finally, if the defendant was already sanctioned by CADE for antitrust offenses in the last five years, fines must be doubled.

Apart from fines, CADE may also: (i) order the publication of the decision in a major newspaper at the wrongdoer's expense; (ii) prohibit the wrongdoer from participating in public procurement procedures and obtaining funds from public financial institutions for up to five years; (iii) include the wrongdoer's name in the Brazilian Consumer Protection List; (iv) recommend to the tax authorities to block the wrongdoer from obtaining tax benefits; (v) recommend to the intellectual property authorities to grant compulsory licenses of patents held by the wrongdoer; and (vi) prohibit an individual to exercise market activities on its behalf or representing

[3] CADE's Resolution No. 3/2012 lists 144 'sector of activities' to be considered for purposes of fine calculation under the new law.

[4] Under Article 32 of the law, directors and officers may be held jointly and severally liable with the company for anticompetitive practices performed by the company. Considering the stiff sanctions that have been imposed to legal entities by CADE to date, this provision has been nearly forgotten as virtually no individual would be in a position to be held liable for the sanctions imposed against the company.

[5] Other individuals, business associations and other entities that do not engage in commercial activities may be fined from approximately US$ 22,200.00 to US$ 885 million.

companies for five years.[6] As for structural remedies, under the law CADE may order a corporate spin-off, transfer of control, sale of assets or any measure deemed necessary to cease the detrimental effects associated with the wrongful conduct.

The new law also includes a broad provision allowing CADE to impose any '*sanctions necessary to terminate harmful anti-competitive effects*', which allows CADE to prohibit or require a specific conduct from the wrongdoer. Given the quasi-criminal nature of the sanctions available to the antitrust authorities, CADE's wide-ranging enforcement of such provision may prompt judicial appeals.

Recent Rulings

Since the new competition law entered into force, CADE has imposed sanctions in connection with 24 investigations. Although most of the cases reviewed by the Tribunal were cartel matters, important unilateral conduct investigations were also adjudicated in the past two years.

In February 2013, the Tribunal issued a pivotal ruling in a Resale Price Maintenance (RPM) case, where it sanctioned auto-parts manufacturer SKF for setting minimum resale prices (see Case n. 08012.001271/2001-44). Pursuant to the decision, resale price maintenance will be deemed illegal unless defendants are able to prove efficiencies. An infringement would be found regardless of the duration of the practice (in this case, distributors followed orders for only 7 months); the fact that distributors follow or not the minimum sales price; or even the defendant's market share, as CADE considered the conduct illegal by object.

In its decision, the agency majorly also disregarded the efficiency defense. In fact, there is no case in CADE's case law — be it under the merger control system or prosecution of anticompetitive conduct — in which the Brazilian antitrust authority has cleared an anticompetitive merger or dismissed an anticompetitive practice based on efficiency arguments.

With this ruling, it seems that CADE has distanced itself from its traditional "rule of reason" approach in RPM cases, to a "modified per se" test, in which the conduct is presumed to be illegal, and parties would in theory have an efficiency defense. This change shows an enhanced skepticism or outright disregard towards the

[6] The idea behind this provision was to deal with situations in which CADE prohibited the wrongdoer from participating in public procurement procedures and obtaining funds from public financial institutions for up to five years. To avoid this penalty, the parties simply set up a new company and resumed activities in the same sector without being subject to the restrictions imposed by CADE's decision.

role of efficiencies in vertical practices, a trend which seems to be at odd with the increasing role played by economics in antitrust analysis[7].

CADE has also reviewed important exclusivity agreements cases, most executed between Unimed and local physicians. Unimed – one of the largest medical work cooperative and health insurance companies in Brazil – requires in its contracts with local physicians and hospitals for the provision of health care services that they do not affiliate with any other health plan. CADE prohibited such exclusivity arrangements in cases where Unimed held a significant market share (usually around 50 percent). CADE has imposed sanctions on Unimed for the same conduct in over 70 investigations.

Under the new law, CADE has stepped up sanctions against cartels – it has imposed fines that average 15% the annual gross revenues of the defendant. A great number of the decisions issued in cartel cases concerned the fuel retail sector.

In 2013, CADE adjudicated the air cargo case, which was one of the first high profile international cartel investigations initiated through a leniency agreement in Brazil in 2006. The parties were fined on approximately US$ 125 million, the third largest imposed by CADE do date.[8] This year, CADE's Tribunal is expected to issue a final ruling on the cement cartel investigation, which has been ongoing since 2006. In January, the Reporting Commissioner recommended that the six defendants were found guilty of collusion. The proposed sanctions include a record-fine totaling US$ 1.3 billion, plus other ancillary sanctions, such as the divestiture of assets. Should the majority of the Tribunal support the Reporting Commissioner's recommendation, it will be the first time that CADE resorts to this type of sanction, which is relatively unusual in cartel cases. The adjudication session was suspended after one of the CADE's Commissioners requested time to further review the case files.

Brazil has a dual enforcement system – certain anticompetitive conducts such as cartels are both an administrative infringement and a crime. State and federal prosecutors are in charge of criminal prosecution against individuals and, together with the criminal courts, enforce the criminal statute. Law No. 12,529/2011 also modifies the criminal sanctions applicable to anticompetitive conduct. The previous provision of the Federal Economic Crimes Law sets forth jail terms of 2 to 5 years or the payment of a criminal fine. The new Law amends such provision and establishes that anticompetitive behavior may be punished with a jail term of 2 to 5 years plus the payment of a criminal

[7] MARTINEZ, Ana Paula; TAVARES, Mariana . Resale Price Maintenance in Brazil: A Moving Target. CPI Antitrust Chronicle, October, 2013.

[8] The record fine imposed by CADE in connection with a cartel case was roughly US$1 billion for the cartel in industrial gases in 2010. The second largest fine, roughly US$ 170 million, was imposed in 2005 for the steel bars cartel.

fine. The fact that the criminal fine is no longer an alternative sanction to the jail sentence will prevent individuals from settling the criminal case.

The authorities' interaction and cooperation with public prosecutors also gave CADE the ability to tap into the different investigation tools and resources available through the police and prosecutors – for instance, the use of wiretaps.

Leniency Program

Approximately 40 leniency agreements were signed since 2003, when Brazil's antitrust authorities set forth the prosecution of cartels as its top priority.[9] The majority of the leniency agreements were related to alleged members to international cartels.

Brazil's Leniency Program had been introduced in 2000 through an amendment to the previous Antitrust Law. Two relevant aspects of the Program – the prohibition that leniency is awarded to the cartel leader and the scope of criminal immunity – were modified in the new law.

Under Law No. 12,529/2011, the DG is the antitrust agency with power to execute the leniency letter. Later on, while adjudicating a case, CADE must verify whether the applicant complied with the terms and conditions provided in the leniency agreement and, if this was the case, confirm the full or partial immunity granted by the DG.

The applicant must fulfill the following requirements to benefit from full or partial leniency: (i) the applicant (a company or an individual) is the first to come forward and confesses its participation in the unlawful practice; (ii) the applicant ceases its involvement in the anticompetitive practice; (iii) the applicant agrees to fully cooperate with the investigation; (iv) the cooperation results in the identification of other members of the conspiracy, and in the obtaining of documents that evidence the anticompetitive practice; and (v) at the time the applicant comes forward, the DG had not received sufficient information about the illegal activity to ensure the condemnation of the applicant.

Companies and individuals will be eligible for full or partial leniency depending on whether the DG was aware of the illegal conduct at issue. If the DG was unaware, the party may be entitled to a waiver from any penalties. If the agency was previously aware, the applicable penalty can be reduced by one to two-thirds, depending on the effectiveness of the cooperation and the parties' good faith in complying with the Program's requirements. Directors and managers of the cooperating firm will be

[9] Since then, more than 400 search warrants have been served to collect direct evidence in cartel cases.

sheltered both from administrative and criminal sanctions if the individuals sign the agreement and fulfill the same requirements.

Under the previous law, leniency was not available to a "leader" of the cartel; such requirement was eliminated from Law No. 12,529/2011. The elimination of the disqualification of the "leader" as an applicant in the law does not necessarily mean that the authority will disregard the roles played by each cartel participant in determining whether to grant leniency or not − Article 86 of Law No. 12,529/2011 provides that the authority may grant leniency if the program requirements are fulfilled. On the other hand, Brazil's Leniency Policy already provided that the leadership requirement was interpreted in a very limited way. Therefore, from now on, the authority will not be required to address arguments that a leniency applicant must be disqualified for having been a leader in a conspiracy, but this will most likely not be followed by policy changes resulting in immunity from sanctions independent of the role played by each party.

Further, a grant of leniency under the previous antitrust law extended to criminal liability under the Federal Economic Crimes Law but not to other possible crimes under other criminal statutes, such as fraud in public procurement. The new law broadens the leniency grant to extend to these crimes as well. In the past, CADE and the SDE had been able to prevent that criminal charges for other conducts were pressed against individuals that had confessed their participation in a cartel due to their close cooperative relationship with the criminal authorities. Still, such amendment significantly enhances legal certainly and therefore tends to increase incentives for the Leniency Program, in particular for individuals involved in domestic bid-rigging cases.

Settlements

Brazil's Settlement Program for cartel investigations was introduced in 2007, through an amendment to the previous antitrust law. This represented a remarkable improvement as early cooperation on the part of the defendants saves public resources, cuts down litigation, provides expedited treatment and more certainty and transparency to the business community. Settling also proves beneficial for the defendant, as it often means a more efficient use of resources on the part of the company.

Over 80 settlements have been executed by CADE since 2007 when CADE issued its revised Settlement Regulation, 15 of which in connection with cartel investigations. Parties to international cartel investigations, such as the marine hose and the compressors cases, have also settled with CADE. The 2007 Settlement Regulation also included rules on Settlements for other types of anticompetitive conduct, which had been in place since 1994.

In March 2013 CADE issued the revised settlement rules, which raise imperative issues for the parties to ongoing cartel investigations. One of the most important provisions in the new Regulation refers to the requirement that the parties acknowledge their involvement in the investigated conduct. Such requirement would apply for all cartel cases, and not only for those initiated through a leniency agreement, as it is today. There has been some criticism to preventing defendants from pleading nolo contendere, as it could decrease the incentives for settlements where CADE does not have a strong case, where it could also be in the government's best interest to do so. The provision does not refer to a "confession" and the requirement "to acknowledge participation" may allow for some flexibility with respect to its terms, compared to a strict "confession" requirement. Still, since the amendment to the criminal statute, this may prevent individuals from settling with CADE, since "acknowledging its participation" in connection with the administrative investigation may compromise their respective defenses in criminal investigations in case the conduct at issue continued until after May 29, 2012. This situation is specific to Brazil, where there is dual enforcement by administrative and criminal authorities with respect to individuals. Differently therefore, than jurisdictions such as the United States, that is purely criminal, or the EU, that is exclusively administrative, where the investigated party has to deal with only one investigation in each jurisdiction and does not have to take into account the consequences of its strategy in another parallel case.

The Regulation also introduces a scale of discounts that will apply to the settling sum that defendants that wish to settle are required to pay. Reductions may very between (i) 30% and 50% for the first to propose to settle; (i) 25% to 40% for the second in; and (iii) for up to 25% to the other parties that come after. For settlement

proposals submitted after the DG has concluded the investigation the reductions may be no greater than 15%. Those discounts are in theory based on the fine that would apply to the parties under investigation for cartel and are supposed to vary according to (i) the order in which the parties come forward; and (ii) the extent and usefulness of what the parties provide in cooperation (that is also mandatory now) with the authorities. Clearly the purpose of providing benchmarks is to increase transparency and predictability for the parties, however, since CADE is yet to issue sentencing guidelines, and case law for hard-core cartel cases is still limited, these standards may be of little help.

With respect to the negotiation rules, as it was the case before, defendants can propose to settle at any stage of the investigation, regardless of whether the case is being handled by the DG or the Tribunal. The general rules are: (i) defendants can only try to settle once ("one-shot game"), and (ii) the negotiation period is for 30 days, renewable for another 30 days. The negotiation process may be confidential at the discretion of CADE. The revised Settlement Regulation now provides that the negotiation will take place at the DG for all cases still under investigation, differently than before, where the entire procedure was conducted at the Tribunal.

Finally, pursuant to the 2007 rules, the investigation was suspended for the parties that settle, during a specified period of time for the conditions set forth to be fulfilled, after which, they would be excluded from the proceedings. Under the new Regulation though, the assessment on whether the parties have or not fulfilled the settlement conditions will only take place when CADE adjudicates the case, and therefore, just like the leniency applicant, the parties that settle will be bound to cooperate with the authorities until the end of the investigation.

It is soon to tell how those changes will affect the proposition of settlements – since the new competition law CADE has settled over 50 cases, but 42 involved exclusivity agreements by Unimed, which did not require the acknowledgement of the involvement in the conduct. Those settlements with Unimed, however, are considered a milestone for CADE, since proceedings related to similar exclusivity clauses accounted for almost a third of the agency's convictions since 1994.

III. Merger Review

Brazil's new antitrust law introduced a mandatory premerger notification system, *i.e.,* transactions that meet the Brazilian merger filing thresholds cannot be consummated before CADE's clearance. Penalties for "gun jumping" include fines ranging from BRL 60,000 to BRL 60,000,000 and the transaction may be also declared null and void by the authority. The new law does not specifically determine what constitutes gun jumping, generally stating that "*[t]he parties should maintain their physical structures and competitive conditions unaltered until CADE's final approval, being prohibited any transfer of shares or any influence of one party over another' business, as well as the exchange of competitively sensitive information outside of what is strictly necessary for the execution of the relevant binding agreement by the parties*." Violations can occur even if the parties to the transaction do not compete in the same markets. In gun jumping cases involving competitors, coordination of competitive activities or detailed information exchanges can also lead to a cartel violation, subjecting the parties to fines from 0.1% to 20% of a company's (group of companies' or conglomerate's) gross revenues generated in the "sector of activity" affected by the infringement in the year prior to the initiation of the investigation.

In August 2013, CADE reviewed its first gun jumping case. OGX Petróleo e Gás Participações (OGX) reached a settlement agreement with CADE to close its investigation regarding OGX's alleged violation of the premerger waiting period requirements of Brazil's new competition law. CADE concluded that OGX had taken steps to prematurely close the acquisition of Petróleo Brasileiro's (Petrobras) shareholding in a consortium formed to explore pre-salt oil & gas concessions in the city of Santos, and OGX agreed to pay BRL 3 million (approximately US$ 1,3 million) in fines. Relevant sections of the decision and of the reports issued by the Attorney General's Office and the DG were redacted for confidentiality reasons.

CADE adjudicated two other cases involving gun jumping in 2014, both related to the market of petroleum and natural gas production. The first one involved companies Potióleo and UTC and the acquisition of shares in a concession contract to explore an oil field (see Case n. 08700.008292/2013-76). CADE imposed the minimum fine of BRL 60,000 (approximately US$ 28,000) against the companies for gun jumping. The Tribunal's decision states only that the parties had not waited for CADE's approval prior to closing the transaction. Likewise, when reviewing UTC's and Aurizônia's (see Case n. 08700.008289/2013-52) concession contract to explore an oil field, CADE also imposed the minimum fine against the companies for gun jumping. In this case, there was no change to the management structure, but the agreement provided for the payment of installments before CADE's approval. Other than reference to this

aspect of the contract, the agency did not provide further clarity on its understanding regarding what constitutes a gun jumping violation. Moreover, since secondary legislation does not specifically address this issue, it is still unclear which steps the parties would be allowed to take pending a final decision by CADE.

The maximum period to conduct the merger review is 330 calendar days from the day of filing or the day CADE considers the filing to be complete. Many of the cases notified to the Brazilian antitrust authority, however, are reviewed under a fast track proceeding, under CADE's Resolution No. 02/2012, and cases are cleared, on average, in approximately 19 calendar days.[10] In complex cases, the law also allows the Reporting Commissioner to authorize the parties to close the transaction before receiving CADE's clearance, subject to conditions such as the limitations on the freedom of the acquirer to liquidate assets, integrate activities, dismiss workers, close stores or plants, terminate brands or product lines, and alter marketing plans.

Filing thresholds

Brazil's competition law requires that a transaction be filed in Brazil if the following criteria are met: (i) each of at least two parties to the transaction meet the turnover threshold; (ii) the transaction amounts to "*an economic concentration*", as defined by CADE's Resolution No. 2/2012; and (iii) the transaction produces effects in Brazil, as defined by Article 2 of Brazil's competition law ("effects' test"). The law also introduces a clawback provision that allows Brazil's antitrust agency to review transactions that fall outside the merger thresholds within one year of its closing. Consumer associations, clients, suppliers, and competitors may file complaints against a transaction before the agency, prompting CADE to act.

The competition law provides for minimum size thresholds, expressed in total revenues derived in Brazil by each of at least two parties to the transaction. Ministries of Finance and Justice Joint Resolution No. 994/2012 established that one party must have Brazilian revenues in the last fiscal year of at least BRL 750 million and the other BRL 75 million – both acquirer and seller, including the whole economic group, should be taken into account.

Pursuant to CADE's Resolution No. 2/2012, the following entities shall be considered as part of the same "economic group" for the purposes of calculating the group's revenues: (i) entities subject to common control; (ii) all the companies in which any of the entities subject to common control holds, directly or indirectly, at least 20% of the voting or total capital stock.

[10] Cases for which the parties are required to submit the standard notification form have been cleared on average in 86 days.

In private equity transactions, the turnover of the following entities shall be taken into account for the purposes of determining whether a filing is mandatory: (i) management company; (ii) funds under the same management company; (iii) limited partners that hold at least 20% of at least one of the funds mentioned in item (ii); and (iv) the portfolio companies in which one of the funds mentioned in item (ii) holds at least 20% of their voting or total capital stock.

Whereas the new provisions specifically refer to "*concentration acts*," it defines those very broadly as when (i) two or more companies merge; (ii) one company acquires sole or joint control of the stock or assets of another, or even a minority shareholding; (iii) an absorption of other companies takes place; or (iv) a joint venture, an association or a consortium is formed. The provisions do not apply to consortia that are formed in connection with public bids[11].

CADE's Resolution No. 2/2012 defined clear criteria to determine when an acquisition that does not involve change in control is subject to mandatory filing. That would be the case:

(i) If, as a result of the transaction, the acquirer becomes the largest individual shareholder of the target company;

(ii) In cases that do not involve companies horizontal or vertically related, if a party acquires at least 20% of the voting or total capital stock of the target company, or in cases the party already holds 20% of the voting or total capital stock of the target company, if the party acquires at least 20% of the voting or total capital stock from the same seller;

(iii) In cases involving horizontal or vertically related parties, acquisition that result in the buyer having at least 5% of the voting or total capital stock of the target company. In cases the party already holds at least 5% of the voting or total capital stock of the target company, every time the shareholder acquires an additional stake of at least 5%; and

(iv) In cases involving the already controlling shareholder, when the controlling shareholder acquires at least an additional 20% stake from the same seller.

Secondary legislation has not yet addressed whether associative contracts that refer to licensing, distribution, supply, and other commercial arrangements that are not typical mergers fall under the mandatory filing thresholds. As it will be discussed in the sections below, this should become clear when the proposed resolution currently under public consultation is issued, through new case law.

[11] The reasoning for that is that the government authority in charge of the procurement will undertake the antitrust authorities' role to ensure that the bids will be competitive.

The effects' test is met whenever a given transaction is wholly or partially performed within Brazil or, if performed abroad, it is capable of producing effects within Brazil. This will be the case if the target to the transaction has a direct and/or indirect presence within the country. Direct presence is achieved through a local subsidiary, distributor, sales representative, etc. Although indirect presence is most commonly established through export sales into the country, we cannot rule out the possibility that CADE would consider third party sales (*e.g.,* via a licensing agreement) as evidence of indirect presence in Brazil.

In a case reviewed under the new law, the DG cleared a transaction that was submitted for review simply because the buyer and seller fulfilled the Brazilian turnover threshold despite the fact that the target had no activities in Brazil (the target was as international airport in Curaçao – see Case No. 08012.002945/2012-81). In another case adjudicated in March 2013, the DG concluded that the review was not mandatory given the absence of effects in Brazil as (i) the target had no activities in Brazil; (ii) there were no horizontal or vertical relationships between the parties that could affect Brazil; and (iii) the geographic market was local in scope (see Case No. 08700.001204/2013-13). It is worth mentioning that neither of such DG's decisions were reviewed by CADE's Tribunal. [12]

However, more recently, in a case adjudicated in January 2014, the parties argued that, even though they fulfilled the turnover threshold, the transaction was not subject to merger review in Brazil as (i) the transaction did not result in horizontal overlaps or vertical integration; and (ii) the target sales into/in Brazil were "*insignificant when compared to the size of the market in Brazil and worldwide*". CADE's DG, however, concluded that a filing was required and stated "*the Parties seems to place the effects' test as the preliminary step in the merger review process, which is a contradiction. The effects of a given transaction can only be verified after CADE*

[12] Under the old system CADE took the approach that it had no jurisdiction over some international transactions given the absence of effects in Brazil (see Cases No. 08012.003246/2002-86, 08012.009254/2002-36, 08012.006025/2001-89, 08012.005749/2003-77, and 08012.005925/2003-71). The common feature of these transactions was that: (i) the target had no direct presence in Brazil; (ii) the target had low or no sales to Brazil in recent years; (iii) such sales were made on a sporadic basis; (iv) there were no horizontal or vertical relationships between the target and the buyer in the relevant market which affects Brazil. Also, in a 2011 case (Case No. 08012.003505/2011-60, adjudicated by CADE's Tribunal on June 8, 2011), Schneider Electric acquired control over Summit Energy Services, a company that had reported no sales in Brazil and no Brazilian clients. The parties argued that the notification was not mandatory since the transaction did not generate effects in Brazil. CADE, however, considered the notification mandatory based solely on the fact that the parties met the turnover threshold. Moreover, in Case No. 08012.009358/2006-74, the then investigative agency SDE stated that the filing was not mandatory because "the transaction did not involve Brazilian companies and the product at issue is not sold in Brazil". CADE's Tribunal dismissed SDE's opinion stating that "SDE's opinion is based on a partial assessment [of the effects test] […] in order to assess whether an international transaction does not produce effects in Brazil […] it is not sufficient to establish whether the transaction involves Brazilian companies or exports into the country." CADE stated that if the target's production capacity is within a relevant market that includes Brazil, a Brazilian filing is mandatory.

conducts a substantive review of the case. And in order to allow the authorities to reach this stage, the transaction must be filed in Brazil." (see Case No. 08700.011324/2013-10). The decision seems to suggest that, as long as the parties fulfill the turnover and the type of transaction thresholds, a filing is always required and CADE would then assess during its review of the case whether the transaction is expected to affect Brazil or not.

Remedies

CADE has required divestiture undertakings from the parties in 13 cases since the new law entered into force. In addition, it imposed 21 behavioral remedies so as to provide conditional clearance in those cases. In Mach/Syniverse, a transaction filed under the old law that involved the market for roaming technology to mobile operators, CADE was concerned over the elevated concentration that would arise from the transaction in the markets of GSM data clearing and Near Real Time Roaming Data Exchange (see Case No.08700.006437/2012-13). The parties, then, offered commitments to divest a significant part of Mach's assets that adequately addressed CADE's concerns and the transaction was cleared in May 2013.

The Ahlstrom Corporation/ Munkjö AB case was also filed under the former statute. CADE took the view that the transaction would lead to a high concentration in the markets for abrasive paper backings and pre-impregnated décor paper lines with no possibility of new entrants to compete with the incumbents (see Case No. 08700.009882/2012-35). To address the agency's competition concerns, the parties proposed the divestiture of Ahlstrom's assets in these two markets to a third party.

In these two cases, CADE and the parties negotiated divestiture undertakings, which was a tool introduced by the new competition law - the Agreement in Merger Control or *Acordo em Atos de Concentracao* in Portuguese. Since the new law took effect CADE has made use of this tool to set forth remedies in these two cases.[13]

When reviewing the KPMG/BDO acquisition (see Case No. 08012.002689/2011-41), however, which involved the market for auditing services, CADE approved the transaction with restrictions that prohibited KPMG for 24 months from engaging in other transactions with competitors, through which it would gain access to clients with over BRL 300 million[14] turnover. After this period, KPMG will need to file all transactions involving clients with turnover greater than BRL 300 million. Pursuant to CADE, the rationale for such restriction was to promote entry into the market for auditing services.

[13] , The cases involving gun jumping were also settled through the same tool.
[14] Approximately USD 132 million (exchange rate = 2,26)

Avocation Process

In merger cases, the DG is allowed to clear simple transactions without the need of submitting its decisions to CADE's Tribunal. However, the law contains a provision allowing CADE's Tribunal to reexamine any decision issued by the DG, either by the initiative of a Commissioner or any third-party (the so-called "avocation process"). Until now, CADE's Tribunal has resorted to this mechanism three times.

The first case in February 2013 involved the acquisition of the remaining 49% shares of Anhembi Morumbi, a private university, by the Laureate Education group, active in the same segment, which already held 51% of the target. According to the Commissioner who avocated the case, the Tribunal should conduct a more thorough analysis of the files, due to the concern of possible interlocking directorate between the parties. The transaction was finally cleared by the Tribunal, which nonetheless fined the parties for having omitted information in the notification form.

Two other cases involved associative contracts executed between Monsanto and Embrapa and Bayer, respectively. When assessing the cases, CADE's DG took the view that non-exclusive licensing agreement that (i) did not contain non-compete clauses; (ii) did not provide for transfer of assets; and (iii) did not create corporate relationships, would not require antitrust approval in Brazil. CADE's Tribunal, however, avocated the cases and ruled that (i) from a procedural perspective, the criteria to establish whether licensing agreements meet the thresholds are complex and should be further discussed by CADE's Commissioners with the purpose to promote consistency regarding its precedents; and (ii) on substance, the Monsanto transactions were subject to antitrust review in Brazil.

Associative contracts

The Monsanto cases touch on another gray area regarding Brazil's merger notification system – the types of associative contracts that meet the mandatory filing thresholds in Brazil. Up to now, the agency has been providing some direction through case law, but further clarity is expected to come from the regulation that is currently under public consultation, as will be further discussed below.

During the adjudication of the Monsanto cases, CADE's President stated that *"[…] the definition of a licensing agreement as an economic concentration is not related exclusively to the presence of cooperation or collaboration […] it includes more detailed considerations of the independency between the parties and possible effects that contractual clauses have on the possibility of one party to influence another on relevant contractual decisions and the way the financial risk is shared*". In January

2014, CADE's Tribunal cleared the Monsanto/Bayer association under the condition that clauses that represent a barrier to entry in the transgenic seed market were excluded from the transaction agreement.

In Petrobras/MPEC Consortium, which involved a partnership between the two companies to create a joint venture to offer environmental and risk management services to important consumers of oil products, CADE's DG concluded that a filing was mandatory, highlighting that although the parties would remain structurally and economically independent, they would jointly develop an economic activity and that could lead to elimination or reduction of competition in the affected markets. Moreover, the transaction agreement included an exclusivity clause preventing the companies from individually providing environmental and risk management services outside the partnership, which was considered a potential antitrust issue by CADE.

In the Vidigal Prado/Yasuda/Marítima case, CADE for the first time assessed how to calculate the group's turnover in cases involving joint ventures. The parties argued that the acquisition was not reportable since the buyer, the seller, and the target individually considered would not meet the turnover thresholds and that CADE should not include the target's turnover in the economic group's turnover of both the buyer and the seller as this would result in double counting. CADE took a different approach and concluded that since both buyer and seller held over 20% of stock of the target, it was part of both economic groups and, therefore, its turnover should be considered for both buyer and seller.

IV. Recent Developments

On February 2014, CADE put under public consultation three amendments to the current merger control regulation with the purpose to enhance legal certainty and transparency on substance and process of the new system.

Public Consultation n. 01/2014 proposes amendments to CADE's Resolution n. 02 related to: (i) the definition of economic group involving investment funds – the economic groups of the investors holding, directly or indirectly, at least 20% of the fund, the portfolio companies in which the fund involved on the transaction holds, directly or indirectly, at least 20% stake and the portfolio companies under the same management as the fund involved in the transaction and the companies in which the fund holds, directly or indirectly, at least 20% stake shall all be considered as the same economic group; (ii) mandatory filing – CADE proposes the exclusion of transactions involving consolidation or change of control and for those resulting in the status of largest individual shareholder from mandatory filing; (iii) the fast track procedure – transactions resulting in combined shares over 20% can be reviewed under the fast track

procedure if the increment in market share is not relevant and ; and (iv) the filing of convertible debentures – transactions involving acquisition of convertible debentures shall be notified whenever they result in one of the hypothesis of mandatory filing. The draft also allows CADE to decide if a new filing is required whenever the debentures are converted into shares.

Public Consultation n. 02/2014 proposes amendments to CADE's Internal Rules related to: (i) acquisitions through the stock exchange - the draft clarifies that not only public takeovers, but all transactions made trough the stock exchange can be completed before CADE's approval. The parties must, however, refrain from exercising political and voting rights connected to shares until CADE's assessment; and (ii) "avocation process "– the draft provides for a procedure to be adopted whenever one of the Commissioner wishes to bring a case approved by the DG to the tribunal's assessment.

Public Consultation n. 03/2014 regards a draft Resolution that establishes when associative contracts must be submitted to CADE. Under the draft the following transactions shall be of mandatory filing if the revenue threshold is met: (i) contracts between competitors; and (ii) contracts between vertically-related companies, as long as one of them holds at least 20% of market share and the contract provides the sharing of revenues and costs or results in formal or *de facto* exclusivity between the parties.

When the deadline for submissions expires,[15] CADE is expected to review the submissions and then introduce the appropriate amendments to the current regulations. Brazil's merger review system will greatly benefit should CADE effectively take into account what comes out of the public consultation and introduce the necessary changes in due time.

[15] The drafts were put under public consultation until April 2014.