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BRAZIL'S ANTITRUST LAW: STATUS QUO***

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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 competition 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 approximately 50 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 uncertainty regarding some aspects of the sanctioning provisions, particularly on 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: In October 2014, CADE published revised merger notification rules. Earlier in 2014, CADE levied its record fine and for the first time imposed structural remedies in connection with a cartel case in the cement sector.

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 current 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 competition 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 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 current competition law entered into force. In addition to the brief overview of the Brazilian competition policy system provided in this introduction, section II briefly describes the changes introduced regarding the prosecution of anticompetitive conduct and reviews the authorities’ enforcement record since May 2012; and section III provides a summary of the new pre-merger review system and discusses the relevant precedents established during the past two years.

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 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 directors⁴ 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 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 competition law entered into force, CADE has imposed sanctions in connection with approximately 50 investigations of anticompetitive conducts. 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 odds with the increasing role played by economics in antitrust analysis⁷.

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.

Since the current law entered into force, CADE has lived up to its promise to step 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 issued a final ruling on the cement cartel investigation, which has been ongoing since 2006. In January, the Reporting Commissioner recommended that the six companies, six individuals and three associations were found guilty of collusion. The judgment came to an end in May and sanctions include a record-fine of roughly US\$ 1.3 billion, plus other ancillary sanctions, such as the divestiture of assets and a ban on carrying out transactions in the cement and concrete sector for five years. It was the first time that CADE resorts to this type of sanction, which is relatively unusual in cartel cases. The parties have filed motions for clarification but no significant changes to the decision are anticipated.

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 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 DE ARAUJO, 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. CADE and the prosecutors have frequently cooperated since the beginning of the investigation and have conducted joint dawn raids in several cases. Since 2010, dawn raids were conducted in approximately 15 cartel cases.

Leniency Program

Approximately 40 leniency agreements have been 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 current 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

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

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 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 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 certainty 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 100 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 vary between (i) 30% and 50% for the first to propose to settle; (ii) 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 70 cases, almost 50 of which involved exclusivity agreements by Unimed, and 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 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's 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.

CADE's Tribunal has issued four public decisions regarding gun jumping since the competition law took effect in May 2012.¹⁰ In one of the cases, the discussion was centered on whether the transaction met the mandatory filing thresholds and not on the violation of the mandatory waiting period itself.¹¹ The three other cases adjudicated by CADE regarded contracts in the market for petroleum and natural gas production. OGX Petróleo e Gás Participações (OGX) reached a settlement agreement with CADE to close an investigation regarding OGX's alleged violation of the premerger waiting period requirement (see Case No. 08700.005775/2013-19). CADE concluded that OGX had taken steps to prematurely close the acquisition of shares held by Petrobras in a consortium formed to explore pre-salt oil and gas concessions in the city of Santos. OGX agreed to pay BRL 3 million (approximately US\$ 1,3 million) in fines. The relevant report issued by CADE's Directorate General lists the following elements as evidence that the parties had consummated the transaction prior to clearance from the authority: (i) a contractual provision that established that it would have entered into force before the date the contract was executed; (ii) the fact that the contract did not set forth prior approval from CADE as a condition precedent; (iii) as well as that, prior to CADE having cleared the transaction, (a) the payment of the price of the transaction

¹⁰ The report issued by the Reporting Commissioner that supports CADE's decision in Case n. 08700.007899/2013-39 that there was no gun jumping violation is not public.

¹¹ See Case No. 08700.002285/2014-41.

had occurred; (b) the parties had exchanged commercially sensitive information; and (c) the buyer had participated in management decisions regarding the target.

Under the OSX/Petrobras decision, regular business activities such as the payment of bills, acquisition of office materials and hiring of regular services such as maintenance, would not be declared null by the authority, even if the party is found guilty of gun jumping. Conversely, any acts that may potentially affect competition in the market would be void if taken place prior to CADE's approval.

The second case involved Potiόleo and UTC and the acquisition of shares in a concession contract to explore an oil field. CADE imposed the minimum fine of BRL 60,000 (approximately US\$ 28,000) on the companies for gun jumping (see Case No. 08700.008292/2013-76). The Tribunal's decision makes reference to the same elements established by CADE's DG in the report it issued in connection with the OGX/Petrobras case as evidence of gun jumping. Finally, and likewise, when reviewing UTC's and Aurizόnia's concession contract to explore an oil field, CADE also imposed the minimum fine against the companies for gun jumping (see Case No. 08700.008289/2013-52). In this case, CADE found that while there was no change in the management structure, the agreement provided for the payment of installments related to the price of the transaction before CADE's approval.

Although none of these decisions establish clear-cut rules on CADE's understanding regarding what constitutes an infringement of the premerger waiting period requirement, in all three cases the authority states that gun jumping in itself is a serious violation, regardless of whether the transaction at issue raises competition concerns or not.

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.¹² 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.

¹² Cases for which the parties are required to submit the standard notification form have been cleared on average in 86 days.

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"). In October 2014, CADE approved Resolutions No. 8 ("Resolution No. 8/2014"), and No. 9 ("Resolution No. 1/2014"), which amended Resolution No. 2/2012 and CADE's Internal Rules, and introduced key changes regarding such criteria, as further discussed below.

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. Also in October 2014, CADE put under public consultation a draft resolution on the procedure for the investigation of mergers that fall outside the statutory filing thresholds. New rules are expected to be published in 2015.

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.

Resolution No. 9/2014 introduced revised thresholds for the notification of private equity transactions, and now the turnover of the following entities shall be taken into account for the purposes of determining whether a filing is mandatory: (i) the economic group of each entity that holds 50% or more of the fund and (ii) portfolio companies controlled by the fund or in which the fund holds a stake of 20% or more of the total or voting capital.

Whereas the statutory 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.¹³

CADE's Resolution No. 9/2014 defined the following new rules to determine when an acquisition that does not involve change in control is subject to mandatory filing. A filing is now required if: (a) as a result of the transaction, the acquirer becomes the largest individual shareholder of the target company; (b) in cases that do not involve companies horizontal or vertically related, 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; (c) acquisitions between horizontally or vertically related parties 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 (d) acquisitions by the already controlling shareholder, when the controlling shareholder acquires at least an additional 20% stake from the same seller.

CADE's Internal Rules were modified through Resolution No. 8/2014 to waive CADE's clearance for transactions performed in the stock markets and in the over-the-counter market. Only the exercise of rights arising from such transactions are now subject to CADE's approval. Resolution No. 9/2014 also amended CADE's Internal Rules of Proceedings to provide for clearer rules regarding the notification of bonds and securities convertible into stock. Under the revised criteria, a filing will be mandatory only when the conversion of bonds into shares may meet other notification thresholds or allow the investor to (i) indicate members of the company's governing bodies or (ii) veto competition-sensitive decisions.¹⁴

Finally, 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 current statute, the DG cleared a transaction that was submitted for review simply because the buyer and seller fulfilled the Brazilian

¹³ 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.

¹⁴ Resolution No. 8/2014 also introduced additional categories of cases that may be reviewed under the fast-track procedure.

turnover threshold despite the fact that the target had no activities in Brazil (the target was an 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). Neither decisions issued by the DG were reviewed by CADE's Tribunal.¹⁵

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 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 21 cases since the competition law entered into force. In addition, it imposed 21 behavioral remedies

¹⁵ 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.

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 competition law took effect CADE has made use of this tool to set forth remedies in these two cases.¹⁶

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 million¹⁷ 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.

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

¹⁶ , The cases involving gun jumping were also settled through the same tool.

¹⁷ Approximately USD 132 million (exchange rate = 2,26)

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. New procedural provisions regarding the avocation proceedings were enacted on October 2014, without relevant changes to the material aspects of the analysis.

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 had been providing some direction through case law, but in October 2014, CADE issued Resolution No. 10 (“Resolution No. 10/2014”) and with that took an important step to increase legal certainty regarding the categories of associative contracts that meet the mandatory filing thresholds, as further explained below.

During the adjudication of the Monsanto cases, CADE's President had 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.

Under Resolution No. 10/2014, associative contracts that exceed 2 years where there is a horizontal or a vertical cooperation or a risk sharing arrangement, leading to an interdependent relationship between the contracting parties must be submitted for review, which are defined as involving (i) companies with more than 20% of the market, in case of horizontal overlap, or (ii) companies that hold over 30% of any vertical integrated market, whenever the agreements contain exclusivity clauses or provide for the sharing of losses or revenues between the parties.

The wording in Resolution No. 10/2014 is less expansive in several aspects than the draft put under public consultation, which shows that CADE continues open in its engagement with the bar and the business community to address potential concerns voiced regarding proposed regulation. At the same time, it is broader than what had been established by the DG and the Tribunal in cases reviewed under the current statute, and several agreements that raise no competition issues and that do not meet the mandatory thresholds in most other jurisdictions will require antitrust clearance in Brazil.

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.