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New Antitrust Law and Mergers and Acquisitions in Brazil

The new Brazilian Antitrust Law (Law No. 12,529/11) was enacted on November 30, 2011 and will be effective as from May 29, 2012. This new rule brings significant modifications to the current antitrust practice and presents new challenges for the negotiation of mergers and acquisitions (M&A) transactions.

The Brazilian antitrust law currently in force (Law No. 8,884/94) adopts a post-merger review system, under which the consummation of the transaction is not subject to its previous approval by the Administrative Council for Economic Defense (CADE). This means that today, following the closing of the transaction, CADE may veto or impose restrictions to the transaction. Pursuant to the current regime, transactions which may cause any participating company or group of companies involved to achieve 20% of market share of a relevant market, or in which any of the participants has achieved annual gross revenues in Brazil equivalent to at least BRL 400 million shall be filed before CADE.

Brazil's new antitrust law introduces a pre-merger review system whereby the closing of the transaction is subject to its previous approval by CADE; the maximum review period is 330 calendar days from the day of filing. Transactions must be submitted to CADE if any participating company or group of companies has achieved annual gross revenues in Brazil of at least BRL 400 million and at least any other party has achieved revenues in the same period of BRL 30 million - the current 20% market share test was eliminated by the new legislation. Transactions not filed before CADE which are subject to the mandatory filing criteria will be regarded as null and void and subject to the imposition of fines ranging from BRL 60,000 to BRL 60 million.

M&A transactions which fulfill the filing criteria of Brazil's new antitrust law shall, therefore, take into account the new pre-merger review system while drafting the relevant transaction documents. The following shall be taken into account:

Conditions Precedent to Closing. Closing of the transaction must be conditioned upon the previous approval by CADE. Conditions precedent shall be contemplated in the transaction documents, establishing that it cannot be waived by the parties. Parties may negotiate a deadline for the approval, in which case the agreement may be terminated if CADE does not decide within the deadline laid down by the parties. Another condition precedent that may be set forth is the absence of any material adverse change to the business or operations of the target company from the signing date until the completion and fulfillment of the other conditions precedent to which the transaction may be subject.

Adjustment of the Purchase Price. Given that CADE has a maximum review period of 330 calendar days, parties may decide to set forth mechanisms to determine the adjustment of the purchase price resulting from the variation of economic, financing and accounting elements (depending on the criteria used by the definition of the purchase price) between the dates of signing and closing.

Conduct of Business. Conduct of business clauses are commonplace in M&A transactions to ensure that the target company will conduct its business in the ordinary course between the signing and closing dates. Brazil's new antitrust law determines that competition conditions between the companies involved shall be preserved until a final decision is taken by CADE. Thus, special attention should be taken regarding the exchange of information among the parties and the target company and the interference of the buyer in the business and operations of the target company pending the closing. Penalties for gun-jumping range from BRL 60,000 to BRL 60 million.

Party Responsible for the Filing. Parties must determine and negotiate who will be responsible for the pre-merger filing (either the seller or the buyer), the terms and conditions

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under which the transaction would be submitted to CADE, and whether or not confidential treatment would be necessary. Other clauses may be set forth in the acquisition contracts in this regard (e.g., duty of the parties to provide documents and information necessary for the approval and the division of the expenses such as notification and legal fees).

Veto or Imposition of Conditions to the M&A Transaction. M&A contracts may set forth provisions dealing with the possible veto or the imposition of conditions on the transaction by CADE. In such cases, termination, further negotiation and/or indemnification provisions may be laid down in the transaction documents.

Due to the pre-merger system, Brazil's new antitrust law requires careful scrutiny of clauses of contracts in the context of M&A transactions. The analysis of competition effects of M&A transactions prior to their signing may determine that the pre-merger notification is not mandatory or suggest additional attention to the wording of certain clauses aiming at protecting the rights of the parties and easing the approval by CADE.

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