

Client Alert  
June 2012

## Brazil's New Antitrust Law Enters into Force

Brazil's new antitrust law (12.529/11) entered into force on May 29, 2012 and significantly changed the landscape of competition enforcement in Brazil. The main challenges are related to staff, the implementation of the new pre-merger review system, and the issuance of the new regulations.

**Single Competition Agency:** The new law consolidates the investigative, prosecutorial, and adjudicative functions of the Brazilian competition authorities into one independent agency. CADE was restructured to include (i) a Tribunal composed of six Commissioners and a President; (ii) a Directorate General for Competition and (iii) an Economics Department. The new DG is responsible for the former functions of SDE's Antitrust Division and SEAE. SEAE continues to exist but now deals exclusively with "competition advocacy" before the Brazilian regulatory agencies and other governmental bodies. An important element in the new law is the provision for 200 permanent positions in CADE. These positions would not require specialists in antitrust regulation but rather the new staff would be drawn from other specialties in the federal civil service.

**Pre-Merger Suspensory Regime:** The new law introduces a mandatory pre-merger notification system, *i.e.*, transactions that meet the Brazilian merger filing thresholds may not be consummated before CADE's clearance. Fines for "gun jumping" range from BRL 60,000 to BRL 60 million. In complex cases, the law also allows the Reporting Commissioner at CADE to authorize the parties to close the transaction before receiving CADE's clearance, subject to conditions such as 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. CADE's regulation does not prevent the implementation of a public bid that has been filed before the authority, provided that the acquirer does not exercise the voting rights attached to the security at issue or does so only to preserve its investment – the latter requires a derogation granted by CADE.

**Filing Fees:** The BRL 45,000 notification fee is retained and is allocated entirely to CADE.

**Review Period:** The maximum period to conduct the merger review is 330 calendar days from the day of filing (the initial 240 days period provided for in the law may be extended by either 60 or 90 days). CADE's Internal Regulation does not provide for a reduced review period for simple transactions.

**Deadlines or Recommended Period for Filing:** There is no deadline for filing. CADE's recent practice indicates that the authority prefers the parties to file only following the execution of a binding agreement but the authority may accept filings submitted in an earlier stage of the transaction provided the parties demonstrate a good faith intention to enter into a final agreement.

**Filing Thresholds:** The new 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 n. 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. It is expected a reduction of at least 40% in the number of transactions filed under the previous law, especially foreign-to-foreign transactions.

Pursuant to CADE's Resolution n. 2/2012, the following entities shall be considered as part of the same "economic group" for the purposes of

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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.

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.

The new law also introduces a clawback provision that allows CADE 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.

**Types of Transactions Subject to Filing:** The new law provides that “Any acts that may limit or otherwise restrain open competition, or that result in the control of relevant markets for certain products or services” must be submitted to CADE for review, provided that the turnover threshold is met. 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.

CADE's Resolution n. 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 of 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%.

**Substantive Criteria for Merger Review:** No relevant changes were introduced with respect to the substantive criteria for merger review in Brazil; case law under Law n. 8,884/94 is expected to govern future decisions by CADE.

**Transitional Rules:** Article 221 of CADE's Internal Regulation provides that transactions submitted while Law n. 8,884/94 was still in force will be reviewed under the proceedings of that law and therefore are not subject to a standstill obligation. Binding agreements executed by May 28, 2012 may be submitted to CADE for review by June 19, 2012 and the provisions of Brazil's previous competition law will apply.

**Fines for Anticompetitive Behavior:** The most relevant change relates to the fines applicable to anticompetitive behavior. Pursuant to the new provisions, fines will range from 0.1% to 20% of a company's (group of companies' or conglomerate's) gross revenues

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generated in the “sector of activity” affected by the infringement in the year prior to the initiation of the investigation. CADE may resort to the total turnover, whenever information on revenue derived from the relevant “sector of activity” is unavailable. CADE’s Resolution n. 3/2012 broadly defined 144 sectors of activity that shall be taken into account for the purposes of fine calculation. Finally, as was true under the previous law, the fine may be no less than the amount of harm resulting from the conduct.

Directors and other executives found responsible for anticompetitive behavior may be sanctioned from 1% to 20% of the fine imposed against the company. Individual liability for executives is dependent on proof of guilt or negligence in management.

**Leniency and Settlement Programs:** Leniency is now available to the “leader” of the cartel and protects the leniency applicant regarding criminal liability in connection with cartel and related crimes, such as fraud in public procurement. As for settlements, CADE is now authorized to simultaneously negotiate and settle with multiple defendants in connection with the same investigation. Also, CADE’s Directorate-General may proactively invite defendants to apply for settlement.

**Criminal Sanctions:** The new law establishes that anticompetitive behavior may be punished with a jail term of 2 to 5 years plus the payment of a criminal fine. The fact that the criminal fine is no longer an alternative sanction to the jail sentence will prevent individuals from settling the criminal investigation.

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