



EFFICIENCIES OF BRAZIL'S NEWLY APPROVED COMPETITION LAW

On October 5, 2011, Brazil's Congress approved a new competition law that significantly restructures the landscape of competition enforcement in Brazil. Brazil's Congress will now forward the bill to the desk of President Dilma Rousseff, who has 15 working days to approve or reject the bill.¹ If the new competition act is approved, which many believe it will be, it shall enter into force six months from the date of its publication in the Federal Official Gazette (meaning that the current law will continue to be valid until at least April 2012).

As Brazil's economic stature grows, its role in upholding and maintaining a globally reputable antitrust policy becomes increasingly important, both within Latin America and throughout the world. With a significant reorganization of Brazil's merger review process on the verge of becoming law, companies doing business in Brazil should closely evaluate the newly passed legislation.

This *Commentary* will briefly survey the current merger review process in Brazil. It will also evaluate the newly passed competition law and the impact the changes in the new competition law will have on companies and corporations looking to do business in Brazil.

BRAZIL'S CURRENT ECONOMIC SITUATION

While most countries around the globe are struggling to recover from the global financial crisis of 2008, Brazil's economy has shown remarkable resilience. In 2009, as the economies throughout Latin America contracted by 1.9 percent, Brazil's economy remained stable.² According to early estimates, in 2010 the Brazilian economy expanded by more than 7.5 percent.³ One result of the increase in economic activity is a corresponding increase in high-value mergers and acquisitions in Brazil. In 2005, 386 mergers were reviewed by Brazil's Administrative Council for Economic Defence ("CADE"), the principal authority

in charge of rendering final decisions after the Brazilian merger review is complete.⁴ In 2006 and 2007, the number of mergers reviewed by CADE grew to 411 and 591 respectively.⁵ In 2010, CADE reviewed 640 mergers,⁶ and signs indicate that this upward trend will continue in 2011.⁷ As the economy grows and economic activity flourishes, the anti-trust system, particularly the merger control system, is of increasing importance. Fernando Furlan, the president of CADE, agrees: “We have a great responsibility, as the country is going through big changes, and I believe competition advocacy institutes have a great role to play.”⁸

OVERVIEW OF CURRENT LAW

Brazil’s current competition law went into effect in 1994 by way of Law No. 8,884/94.⁹ The law states 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, shall be submitted to CADE for review.”¹⁰ The law creates a triangular institutional system of three separate governmental entities that work together to monitor competition in Brazil. The three agencies created by Law No. 8,884/94 are the Secretariat of Economic Law of the Ministry of Justice (“SDE”), the Secretariat for Economic Monitoring of the Ministry of Finance (“SEAE”), and the aforementioned CADE.¹¹ The law designates different merger review responsibilities to each. The SDE is in charge of investigating anti-competitive practices and issuing nonbinding opinions of its analysis of the merger.¹² SEAE also submits a nonbinding opinion regarding the economic aspects and impacts of the merger.¹³ CADE, the one agency with authority to make binding decisions and rulings, reviews these nonbinding reports from SDE and SEAE, conducts its own review of the merger, and is ultimately responsible for the final ruling on merger approvals.¹⁴

Brazil’s current law creates a *post-merger* notification system, meaning merging parties are generally not precluded from consummating their transaction before or during the review process. The law states that notification of a “merger or other agreement” is mandatory within 15 days after its “occurrence,”¹⁵ if the merger meets certain threshold notification requirements.¹⁶ The existing law establishes the factors that determine whether the merger must be sent to

CADE for review: (i) the transaction will have some effect in Brazil; and (ii)(a) if, as a result of the transaction, the market share held by any of the participants is higher than 20 percent or (ii)(b) any participant has a reported revenue in the fiscal year prior to the transaction equal to or higher than R\$400 million.¹⁷ Over the past 16 years, CADE has made efforts to better define these broad rules to create a more reliable and standardized merger review process; however, the current structure of the Brazilian merger review process still contains significant inefficiencies.

OVERVIEW OF NEW COMPETITION LAW

On October 5, 2011, the Brazilian National Congress, following in the footsteps of the Federal Senate¹⁸ and supported by both Brazilian competition agencies and companies,¹⁹ approved the new competition law.²⁰ The bill has been sent to President Rousseff for approval. The three most important substantive changes that the new competition law includes are: (i) the introduction of a *pre-merger* notification system; (ii) the consolidation of merger review responsibilities into a single competition agency, CADE; and (iii) the simplification of the required notification threshold.

The most significant change in the new competition law is that it establishes a mandatory pre-merger notification system.²¹ The pre-merger notification system requires merging parties to notify CADE of a transaction meeting the thresholds set forth in the new law and receive approval from CADE prior to the closing of the transaction unless the statutory time period for CADE review expires, in which case the parties are then free to consummate the transaction.²²

Along with creating a pre-merger notification requirement, the new competition act consolidates the merger review responsibilities from its current triangular approach to a singular one—placing all investigatory, review, and decision-making authority with CADE. Under the newly passed law, CADE will comprise three principal bodies, all of which will work together within one agency: (i) the Administrative Tribunal; (ii) the Superintendence General; and (iii) the Department of Economic Studies. The Administrative Tribunal is the decision-making body in charge of rendering final and binding administrative decisions on merger notifications

that are not cleared by the Superintendence General.²³ The Superintendence General, led by an appointed Superintendent General, will conduct investigations of anticompetitive practices and is empowered to render final administrative decisions to clear merger notifications.²⁴ The Superintendent General will also be able to render nonbinding opinions on merger notifications that it believes should not be unconditionally cleared. The Department of Economic Studies, headed by CADE's chief economist, will be responsible for rendering nonbinding economic opinions and studies.

Finally, the new competition act amends and clarifies the mandatory notification thresholds. Under the recently passed bill, a transaction is subject to mandatory notification if one of the parties in the transaction reported revenues in Brazil of at least R\$400 million in the previous year and the other party reported revenues in Brazil of at least R\$30 million in the previous year. The new competition law does not contain the mandatory notification requirement in the existing competition law when a party has 20 percent market share in the relevant market.²⁵

EFFICIENCIES OF THE NEW LAW

The newly passed competition law, although not perfect, contains several aspects that will generally benefit the Brazilian competition system as well as companies and corporations intending to do business in Brazil; even Brazil's iconic former President Luiz Inácio Lula da Silva endorsed the legislation.²⁶ The three primary improvements that the new competition act presents are: (i) the creation of a pre-merger notification requirement ensures that businesses and regulatory agencies will not face the possibility of having to undo a fully completed or partially completed merger; (ii) the new consolidated merger review structure will be quicker and less cumbersome for all parties involved; and (iii) the notification requirement threshold is clarified.

The most significant change to the merger review process is the change to a pre-merger notification system. The existing competition law's post-merger notification system allows for consolidations to have been completed, or at least initiated, before CADE is able to rule whether or not they should

be approved or should be denied due to anticompetitive effects. The pre-merger notification system in the newly passed bill will allow the competition agencies the ability to review the merger before it has been executed, evaluate any potential anticompetitive effects, and approve or deny the merger without the mess of undoing a consolidation or unraveling certain consolidated aspects of a merger. Furthermore, pre-merger notification will benefit CADE because it optimizes the agency's ability to utilize structural remedies as a more effective way to make an anticompetitive merger more competition friendly. Finally, while companies will no longer have the flexibility of deciding whether it is in their interest to close a transaction prior to CADE's approval, they will no longer be faced with the possibility of a forced unwinding of a partially or fully consummated consolidation. As one attorney put it, "the new law gives an important tool to the authorities and should also increase legal certainty to private parties."²⁷

The second major change in the new merger review law is the consolidation of merger review powers within a singular entity. The new guidelines consolidate the powers and responsibilities currently held by three separate agencies into CADE. No longer will CADE have to rely on SEAE and SDE for their investigative reports, nor will the agencies duplicate one another's efforts.²⁸ Rather, within CADE, the Superintendence General, the Administrative Tribunal, and the Department of Economic Studies will be able to work together to fully review and approve all mergers. Moreover, with the entire review being conducted by one agency, the new review deadline is able to be much more straightforward with a maximum term for the issuance of a final administrative decision of 240 days from the date of notification. This timeline may be extended up to 90 days if CADE determines the transaction requires deeper analysis. Not only will the process be more efficient on the regulatory side, but businesses will now have a clearer picture as to the review timeline of their proposed mergers and will be able to work with a single agency. The confusion created by a system where merging companies had to communicate with three separate, seemingly autonomous agencies will be eliminated. In fact, the new centralization of merger review powers into CADE received praise from antitrust attorneys in Brazil: "Merging the agencies was crucial as the existence of three separate bodies has been something of a nightmare."²⁹

The third major change in the new merger guidelines is the clarification of the merger notification requirements. The new competition law outlines a simple set of factors that must be met in order to require the reporting of a proposed transaction to CADE. Under the new law, if one of the parties has revenues within Brazil from the previous year of at least R\$400 million and the other party has revenues in Brazil from the previous year of at least R\$30 million, then the merger must be reported. No other factors would need to be met in order to require notification, and the ambiguous 20 percent market share test in the existing rules is eliminated. The elimination of the market share test and the clarification of the threshold requirements, stating that the revenues had to have occurred in Brazil, make the notification thresholds very clear to both the parties involved in the transaction as well as the reviewing antitrust authorities.

Of course, just as the Brazilian merger control system is “improved,” it becomes a more significant regulatory hurdle for merging companies. Adding a pre-merger review requirement and consolidating government agency authority will likely lead to a more active and effective system for challenging, and sometimes blocking, mergers whose notification is triggered by the established thresholds under the new Brazilian competition law. The new pre-merger notification system will bring further clarity to parties involved in merger transactions by establishing a definitive review period and certainty concerning the ability to close a merger transaction prior to the parties actually completing the contemplated transaction. In addition, the clarified thresholds for merger control and definition of transactions requiring notice should reduce the number of transactions that require notification to the Brazilian competition authority. However, it is likely that the transactions that require notification to CADE under the pending competition law will receive stricter scrutiny from the Brazilian competition authority.

CONCLUSION

By signing the bill into law, President Rousseff can effectuate a productive and efficient overhaul and restructuring of Brazil’s merger review process. Brazil has been a leader among Latin American countries, and all emerging economies, with respect to its competition law. In fact, Brazil’s

main antitrust agency, CADE, was recently recognized by the Global Competition Review as the best agency in the Americas for 2010.³⁰ The new competition law will allow CADE, and the Brazilian merger review process in general, to eliminate many of the inefficiencies inherent in a post-merger notification system, particularly a post-merger system with responsibilities divided among three different regulatory agencies.

Moving forward, it is important for corporations doing business in Brazil or companies considering consolidation activities that could affect Brazilian markets to closely evaluate the final version of the new competition law if and when it is ratified by President Rousseff. The law will likely make Brazil a friendlier environment for consolidation activity, as potential merging parties would have a clearer understanding of the regulatory framework of the merger review, and several inefficiencies both for the merging parties and the regulatory agencies would be eliminated.

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ENDNOTES

- 1 President Rousseff is expected to approve the bill. If the bill is not enacted by the president within 15 working days from the day it is received by her from congress, the bill will automatically be enacted.
- 2 In 2009, Brazil's GDP contracted by 0.2 percent. "Brazil's GDP grows 7.5 percent in 2010," Yahoo! Finance (March 3, 2011), available at <http://finance.yahoo.com/news/Brazils-GDP-grows-75-percent-apf-2049557650.html?x=0%20Gray%20Newman%20et%20a>.
- 3 *Id.*
- 4 OECD, *Competition Law and Policy in Brazil: A Peer Review 2010*, at 32 (2010), available at <http://www.oecd.org/dataoecd/4/42/45154362.pdf>.
- 5 *Id.*
- 6 Of those 640 mergers reviewed, 573 were cleared without any conditions, 25 were cleared under certain conditions, and one was not cleared. Petro Dutra and Patrícia de Campos Dutra, "Competition—Brazil: Recent Antitrust Developments and Expected Future Changes," International Law Office (Jan. 20, 2011), available at <http://www.internationallawoffice.com/newsletters/detail.aspx?g=aa0f8b67-c00e-47bd-958a-635b0c546d9f>.
- 7 Kenneth Rapoza, "Slower Brazil Economy Doesn't Stop US Deal Flow," *Forbes* (Aug. 25, 2011), available at <http://www.forbes.com/sites/kenrapoza/2011/08/25/slower-brazil-economy-doesnt-stop-us-deal-flow/>.
- 8 Clare Bolton, "Antitrust Agencies Have 'A Great Responsibility' for Brazil's Future," *GCR* (Nov. 26, 2010), available at <http://www.globalcompetitionreview.com/news/article/29382>.
- 9 Lei No. 8.884, de 11 de Junho de 1994.
- 10 *Id.*
- 11 <http://portal.mj.gov.br/data/Pages/MJ34431BE8ITEMID-3DAD7B1909B2482EB4A0C2456D06789DPTBRIE.htm>.
- 12 *The International Comparative Legal Guide to Merger Control 2011*: Chapter 8, "Brazil," Global Legal Group, at <http://www.iclg.co.uk/khadmin/Publications/pdf/4049.pdf>.
- 13 *Id.*
- 14 *Id.*
- 15 While the term "occurrence" is not explicitly defined within the law, a 2007 CADE Resolution defined the "occurrence" as the execution of the first binding agreement between the parties even though it may not be the final agreement nor be in full force. *The International Comparative Legal Guide*, *supra* n.12.
- 16 Lei No. 8.884, *supra* n.9.
- 17 *Id.*
- 18 The Federal Senate approved Bill of Law No. 06/2009 on December 1, 2010. Neil Montgomery, "Brazil: Antitrust Merger-Review Rule Changes," Mondaq, (Jan. 17, 2011), available at <http://www.mondaq.com/article.asp?articleid=120266>.
- 19 Business Community Support, "the improvements in the quality of the enforcement by the Brazilian NCAs have convinced the Brazilian business community to accept an ex-ante system of review," Marco Botta, "The Brazilian Senate Approves the Text of the New Competition Act," Kluwer Competition Law Blog (Feb. 7, 2011), available at <http://kluwercompetitionlawblog.com/2011/02/07>; Antitrust Agency Support, "The bill had effective sponsorship in both houses of Congress and the sponsors were optimistic about its eventual passage," *Competition Law and Policy in Brazil*, *supra* n.4, at 56.
- 20 Faez Samadi, "Brazil Passes New Antitrust Bill," *GCR* (Oct. 6, 2011), available at <http://www.globalcompetitionreview.com/news/article/30717>.
- 21 *Id.*
- 22 The new competition act sets stricter statutory time periods for the review of transactions, establishing a maximum term for the issuance of a final administrative decision of 240 days from the date of notification, which may be extended for up to 90 days if CADE determines the transaction requires a further review and analysis.
- 23 The Administrative Tribunal will continue to be composed of a president and six commissioners, but they will now be limited to serving four-year terms, without the possibility of reappointment.
- 24 The Superintendent General will be appointed to a two-year term, with the possibility of one reappointment.
- 25 "Brazil Passes New Antitrust Bill," *supra* n.20.
- 26 *Competition Law and Policy in Brazil*, *supra* n.4 "The country's [former] President had strongly endorsed it; the business community, which had had reservations about some aspects of it in the past, especially about pre-merger notification, professed support for it."
- 27 "Brazil Passes New Antitrust Bill," *supra* n.20.
- 28 SEAE will remain; however, its focus will be on competition advocacy, and its merger review responsibilities will transfer to CADE.
- 29 "Brazil Passes New Antitrust Bill," *supra* n.20.
- 30 The agency was nominated alongside three other agencies, beating both Canada's Bureau of Competition and the Antitrust Division of the Department of Justice of the United States of America. See <http://www.cade.gov.br/Default.aspx?2c1fef39c85eb270ba87d96cf85f>.

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