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What a Difference a Year Makes! Brazil's New Merger Control Regime Reaches First Anniversary

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Historically, merger control in Brazil was a local peculiarity, performed in its own way at its own pace using informal procedures that were often opaque to “outsiders.” That all changed one year ago, when Brazil moved to the head of the line in Latin American merger control sophistication. To build its new merger control regime, Brazil first evaluated a wide range of merger control procedures used among the world’s leading jurisdictions and then, starting with a clean sheet of paper, Brazil combined best in breed features from elsewhere with Brazil’s own home-grown refinements, building an entirely new regime. The goal of this ambitious undertaking was to adopt locally

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appropriate, state of the art procedures geared toward speed, transparency, predictability and accuracy.

On the first anniversary of Brazil's new merger control law (12.529/11, or “the new law”), the early results show that Brazil has largely accomplished its goals and has joined the merger world's top-tier jurisdictions as measured by the metrics just described. The resulting transformation is not perfect, but it modernized Brazil's merger control regime, made it more business friendly, practical, transparent, and predictable. “Modern,” “practical,” “transparent,” “business friendly,” and “predictable” are terms that are not often associated with Latin American business regulation, so Brazil has achieved something unusual here. Some challenges lie ahead and some refinements may yet be needed, but Brazil has set Latin America's new standard for greatest positive change in merger control, in the shortest period, with the best results.

Most Significant Legal Changes Implemented (Pros and Cons)

The year 2012 has been of great significance to Brazilian merger control as it implemented changes capable of impacting a number of cross-border transactions having effects² in Brazil. The new law introduced major technical and structural changes, and it re-directed the enforcement activity of the Brazilian antitrust regulator, the Administrative Council for Economic Defense (*Conselho Administrativo de Defesa Econômica* or “CADE”).

CADE's New Structure - Consolidated Decision Making Powers

As per the new law, all functions are centralized under the new CADE, the aim being to avoid any overlapping and, thereby, to promote the authority's efficiency. For this purpose, the new CADE structure is divided into three main units: 1) the Administrative Tribunal (“Tribunal”) composed of one Chairman and six Commissioners, and maintaining jurisdiction over merger and conduct cases;³ 2) The General Superintendence (“GS”), competent for the approval of

non-competitive/"fast tracked"⁴ mergers, for reviewing submitted transactions and for forwarding litigious cases to the Tribunal⁵; 3) The Department of Economic Studies ("DES") responsible for producing non-binding opinions so as to support and ground the technical decisions rendered by both, the Tribunal and GS.⁶ The review starts at the GS, which is in charge of the initial investigation of transactions. The GS can then approve the merger with no further investigation due ("fast track" procedure/simple cases) or challenge it before the Tribunal. If the merger review goes to the Tribunal, the commissioner in charge of the review, which is assigned by draw, prepares a report and a vote which are then presented to the full commission during a public session.⁷ A final decision is taken by majority vote.

These changes will concentrate the decision making powers in one single entity, the CADE, and are consistent with recent reforms in the UK and French⁸ competition authorities,⁹ also centering the enforcement in one single regulatory entity with enhanced powers. The amplified review powers of the GS, specifically for simple transactions, will avoid the previous duplication of analysis by different CADE entities and allow the Tribunal to focus on relevant cases only.

Mandatory Pre-Merger Review & Gun Jumping Fines

One of the most significant changes of the new law is the pre-merger notification mechanism (i.e., concerned companies must notify the authority of a merger before its implementation). Pending CADE's approval, merging parties cannot: (i) modify their physical structures or transfer or combine assets; (ii) influence another party's decisions; or (iii) exchange competitively sensitive information that is not necessary for reaching a preliminary binding agreement.¹⁰ Consequently, merging parties no longer have the option to close the deal before CADE's seal of approval being granted. Parties that do not notify their deals before the closing¹¹ (also known as "gun jumping") are subject to fines ranging from R\$60,000 (approximately US\$30,600/€23,400) to R\$60 million (US\$30/€23.4 million)¹² and having the transaction declared void.¹³ Permission to close pending approval will only be allowed in very exceptional circumstances, such as serious financial harm for the parties.¹⁴

The new pre-merger framework enables a rationalization of CADE's resources. The increased legal certainty of a pre-merger regime means that companies will not now waste resources to set up the merger's structure until it has been validated by the competent authority. In fact, companies no longer have to suffer the anguish of being open to CADE's post-closing remedial action (possible under the previous law). However, recent criticism has pointed to the fact that large amounts of information (e.g., five years of sales data, market studies, *inter alia*)¹⁵ are required from the parties in order to prepare a filing - even in less complex cases - which might cause delays. Also, the legislation did not address whether companies need to notify cooperation agreements (e.g., distribution,

technology transfer, licensing). CADE is expected to further clarify this issue, probably during the current year.

New Double Turnover Filing Thresholds

The new thresholds were set by a joint Regulation¹⁶ issued by the Brazilian Ministers of Justice and Finance on May 30, 2012. The new law abolished the obsolete and difficult to apply 20% market share threshold and now focuses on the Brazilian turnovers of the merging parties. Currently, a merger is notifiable if: (i) the corporate group of one of the parties to the transaction had a turnover of at least R\$750 million (approximately US\$382/€292 million)¹⁷ in Brazil in the last calendar year; and (ii) the corporate group of another party to the transaction had turnover of at least R\$75 million (approximately US\$38.2/€29.2 million) in Brazil in the last calendar year. In some exceptional cases CADE will be able to follow transactions that do not meet such thresholds, provided it does so within the year following the merger.¹⁸

The updated thresholds, namely the abolition of the 20% market share threshold, have so far lead to fewer filings. In the past, CADE reviewed a significant number of cases presenting no real competition concerns, and now CADE will be able to focus on the subset of transactions that may be of greater concern. On the other hand, it is interesting to note that, in report of thresholds, the new law considers the turnover of the target's entire "corporate group" and not just the assets being acquired. This issue should be clarified by CADE as it could affect transactions that have limited or no effects in the Brazilian market — due to the small size of the target company in Brazil — but whose target's parents have considerable revenues in Brazil to trigger a filing.

Substantive Assessment - The growing Importance of Vertical Issues

The new law does not make profound changes to the substantive assessment tests which remain largely unchanged. CADE has been considering transactions with the potential to lead to market dominance or lessening of competition and, similarly to the European Commission, has looked at both unilateral and coordinated effects. As vertical issues become more relevant in merger reviews, CADE will surely implement further remedies supported on theories including foreclosure and essential facilities. The new filing forms used in complex cases seem to suggest that CADE will also consider the conglomerate effects of transactions.

The new CADE in Numbers - New Law, Fewer Merger Reviews, Faster Approvals

As per the OECD Annual Report on Competition Policy and Developments in Brazil,¹⁹ 2012 has seen 712 merger cases²⁰ being decided during the full year (i.e., under both the old²¹ and the new law), representing 87% of the CADE Tribunal workload. Also in 2012, 94.1% (670) of the merger cases were approved without restrictions, 5.5% (39) approved with restrictions and only 0.4% (3) prohibited. Comparatively, during the fiscal year 2012²², 1429 transac-

tions²³ were reported to the U.S. Federal Trade Commission ("FTC") for review under the HSR Act.²⁴ Early termination of the HSR waiting period was requested in 78%²⁵ of the reported transactions.²⁶ Also, in 2012, 49 transactions investigated resulted in a Second Request (3.5% of reported transactions).²⁷

Mergers Cases Decided Under the New Law (2012-2013)

After the first year implementing the new law, i.e., between May 2012 and May 2013, CADE has approved 250 mergers.²⁸ Out of the 250 approved operations, 227 (or 90% of the total) used the "fast track" procedure for simple transactions (not posing competition risks) and were analyzed by CADE in an average of 20 calendar days. As to more complex cases, there were 23 that were analyzed in an average of 69 calendar days. All in all, 262 cases of mergers and acquisitions were presented to the antitrust authority under the new law. As per the new regime, mergers in which there is no need to apply any competitive constraint may be decided directly by CADE's GS. Out of the 250 cases presented, 238 (or 95% of the total) were approved by the GS. In seven cases, CADE decided that no examination was required. The other five were decided by the Tribunal: two of them due to restrictions imposed by the Merger Agreement, two for not complying with the non-competition clause and one that was called by the Tribunal by avocation (when the proceeding already decided by the Superintendent is pulled by one of the Tribunal Commissioners for revision) and later approved.²⁹

New Law, Fewer Merger Reviews, Faster Approvals

In 2011, the last full enforcement year of the old law, CADE reviewed 695 merger filings. In the first full enforcement year of the new law 262 operations were filed for review, with CADE approving 250 operations in an average analysis time of 25 days. In 2011 the average analysis time was 154 days. In fact, under the new law CADE has reviewed 62.3% fewer cases when compared to 2011.³⁰

It might yet be too early to draw final conclusions regarding the effect of the new law, mostly because 2012-2013 was a transitional year to the new law and CADE was still clearing a number of backlog cases filed under the old regime. However, a raw analysis of the above numbers seems to suggest that the old Brazilian merger control law and filing thresholds were inadequate and at times even casting the net too wide on some deals lacking competitive significance in the relevant Brazilian markets. In this regard, the reforms implemented in the new Brazilian merger control law have helped to tackle the above issues. In fact, the fewer cases reviewed under the new regime will allow CADE to allocate its resources and time to more problematic deals presenting more substantial vertical or horizontal issues, leaving the easier/fast-track cases to be decided by the GS. These changes will be beneficiary to the business community.

Average Approval Timing: Simple Fast Track V. Complex Mergers

Under the new law, CADE claims to have taken around 20 days to analyze simple cases and an average of 69 days to clear more complex transactions.³¹ These figures have varied in the first year of implementation, but the general feeling is that the approval procedure has been quite time efficient, even though, so far, no extremely complex cases have been reviewed under the new law.

Fast Track Procedures - Average Decisional Timing Around 20 Days

Despite not having set a formal deadline for fast track procedures, CADE aimed at clearing such cases in no longer than 40 days. In fact those expectations were exceeded and the GS approved 227 fast track cases in an average of 20 days each. In October 2012, the joint venture between Itaú Unibanco S/A and Banco BMG S/A³² was the first regular merger filing completely analysed by the GS after the new law came into effect. The operation was analysed in 48 days.

Deals approved by the GS did not pose major antitrust concerns and overlaps were limited or non-existent. Contrary to the fears of many, CADE Tribunal did not interfere in the GS work as it only used its avocation³³ power once, and that transaction was ultimately approved.

Normal Procedures - Maximum Statutory Review Period 330 Days

The new law foresees a maximum statutory review period of 240³⁴ calendar days³⁵ which can be extended by 60 days at the parties' request or 90 days at CADE's Tribunal decision (i.e., the maximum review period can take up to 330 calendar days).³⁶ There were at least 23 complex cases analyzed by CADE Tribunal during the first year, taking an average of 69 days each to be reviewed. Also, five cases were referred by the GS to CADE Tribunal.³⁷

The two first examples of cases involving remedies approved under the new law are Ahlstrom / Munksjo³⁸ and Syniverse / Mach³⁹ decided by CADE Tribunal last April and May 2013 respectively. The Ahlstrom / Munksjo deal was announced in August 2012 and the companies filed the deal with CADE in November 2012. In late April 2013, CADE confirmed that the deal should be approved on the condition that Ahlstrom would dispose of its production lines of abrasive paper backings and PRIP⁴⁰ in Osnabruck/Germany. In total the deal took six to seven months to be reviewed by CADE. As for the mobile communications solutions Syniverse / Mach (€550 / US\$707 million) deal, CADE took slightly longer to come to a final decision. The transaction was filed in October 2012 and cleared with remedies⁴¹ in the GSM data clearing and Near Real Time Roaming Data Exchange (NRTRDE)⁴² markets in early May 2013, more than seven months later. Both approvals involved close coopera-

tion with the EC, including exchange of information and coordination of clearance timings.⁴³

Remedies Imposed - Preference for Structural Over Behavioural?

In the vast majority of complex cases CADE is open to negotiating remedies with the merging parties rather than prohibiting a transaction. CADE has in the past adopted structural and behavioural remedies. In *Ahlstrom / Munksjo* CADE showed a preference for structural commitments (as described above) and in *Syniverse / Mach* the regulator is reported to have opted for behavioural remedies. Despite having applied structural remedies in at least one cross-border deal reviewed to date (*Ahlstrom / Munksjo*)⁴⁴ it is still too soon to confirm a clear trend.

However, under the new law, the parties will be able to negotiate remedies with the GS (during the Superintendent's review)⁴⁵ or the reporting commissioner (in the Tribunal).⁴⁶ Remedies will ultimately have to be approved by the college of the Tribunal. In any event, the willingness to discuss remedies since the earlier stages of the filing demonstrates an open approach towards remedial negotiations and allows the parties more time to tailor appropriate remedies and to tackle complex transactions from an earlier stage. By front-loading the remedial negotiations it will be less likely that deals will be delayed by CADE due to last minute issues.

Mergers Cases Blocked by CADE in 2013

In 2013, CADE has prohibited two transactions as of this writing. However, both were filed under the previous law n.8,884/94. The most significant prohibition decision issued so far in 2013 was perhaps *Unimed Franca / Hospital Regional de Franca*.^{47 48} Unimed had agreed to acquire control over Hospital Regional de Franca in São Paulo as well as its regional health insurance plan. By putting together the two biggest hospitals in the region the merger would create a significant concentration in the health services and health insurance plans in Franca's area (São Paulo)⁴⁹, with market shares going up to 80/90%.⁵⁰ CADE's prohibition decision was based upon the fact that the market presented high barriers to entry, the combined parties had high market shares, the markets were vertically linked⁵¹ and the parties' competitors were weak. During its review of the case CADE invited the parties to negotiate remedies, however an agreement could not be reached. Despite the parties' use of the failing firm and efficiency defences,⁵² in the end CADE Tribunal and its commissioners unanimously decided to prohibit the merger. The health sector has recently been receiving a lot of attention from CADE. In 2012 the authority has blocked two similar transactions in the sector – *Amil/Casa de Saúde Santa Lúcia*⁵³ and *FMG/Hospital Fluminense*.⁵⁴

Conclusion: One Year Old, One Year Wiser? The Past Year and the Years to Come - Likely

Impact on Cross-border Transactions

Despite having been a very positive year for merger control clearance in Brazil, there are still a number of fields

which could benefit from further steering from CADE. First, the amount of information required for most transactions, especially those involving horizontal overlaps, can be burdensome and delay the parties' filing. Second, the absence of a formal maximum waiting period for the approval of simple transactions posing no competitive constraints (similar to an EC Phase I) might also lead to needless delay and uncertainty for smaller deals. Finally, the new thresholds should have included further guidance on the calculation of the target turnover. In fact, it does not seem reasonable that the turnover of the entire target group should be taken into account for filing purposes as this could cast the net too wide on foreign-to-foreign transactions with no substantive effects in Brazil.

Another issue worth noting was the percentage of merger cases involving investment funds: above 15% of the cases submitted for review. The rules regarding the submission of mergers involving investment funds are broad and the matter is under intense debate. Even though CADE's Resolution No. 2 regulated this matter, its interpretation and application remain uncertain and CADE is expected to shortly issue further guidance.

However, the new law is a major improvement when compared to the old regime. The concentration of powers in one single entity with a two-tier review system (with GS having jurisdiction to assess fast track cases) allows CADE Tribunal to devote most of its resources and time to deals actually presenting competitive issues. Further, the regulator must be praised for the impressive decrease in its average decisional timing, which dropped from 154 days under the old law (in 2011) to 25 days under the new law. This noteworthy success stems from the fact that the mandatory pre-merger review generates fewer filings, more efficient approvals and greater predictability, which will improve the regulatory environment.

Corporate transactions in Brazil now require more sophistication from the parties involved and an earlier start on the preparatory work. Before a merger, companies should undertake a risk assessment in order to consider whether a filing is needed and if so how to present it to CADE. As the merger control system becomes more advanced, undertakings with considerable activities, revenues or assets in Brazil will have to engage with the regulator as early as possible and compile all the relevant filing information in advance in order to adapt to the new regulatory regime and avoid unpleasant surprises in their closing timelines. □

1 Law No. 12,529/11 (Brazil). Adopted on the 30th of November 2011. Available at <http://www.cade.gov.br/Default.aspx?93a6778293889c66b09db788a5>

2 Foreign-to-foreign mergers must be notified whenever they produce effects in Brazil and the double Brazilian turnover jurisdictional threshold is met. See section on New CADE in Numbers later in this article. Effects, for the purposes of Brazilian merger notification, are defined very broadly to include the presence of assets or legal entities in Brazil or revenues originating in Brazil, even if only through exports.

3 Law No. 12,529/11, supra note 1, art. 9-11.

4 CADE Resolution 2/2012, May 29, 2012 art. 7 and 8 describe the nature of fast tracked cases. Law No. 12,529/11, supra note 1, art. 54 describes the role of the Superintendent in the approval of the fast tracked cases.

5 The Superintendent can clear notified transactions without review by the Tribunal. However, if the Superintendent believes that a transaction should be restricted or blocked, he must present a written opinion to the Tribunal. One of the Commissioners (the Reporting Commissioner) will review the transaction and the Tribunal will vote on the decision. The decision of the Superintendent to approve a transaction without restrictions becomes final within fifteen days of its publication unless appealed by a third party or by CADE's Tribunal (if it disagrees with the decision) within the fifteen-day time period. See, Law No. 12,529/11, supra note 1, art. 12, 13, 65.

6 Law No. 12,529/11, supra note 1, art. 19.

7 During the public session the parties can make oral arguments and the commissioners may disagree with and question each other.

8 See, e.g., Reform of the French competition regulatory system: the *Conseil de la concurrence* becomes the *Autorité de la concurrence* (Competition Authority), and the UK reform of the competition regime replacing the Office of Fair Trading ("OFT") and the Competition Commission by the new Competition and Markets Authority.

9 Also consistent with the International Competition Network ("ICN") and OECD recommendations for a Brazilian merger control reform.

10 CADE Resolution 1/12 May 29, 2012, art. 108, 2nd Paragraph.

11 Provided the transaction triggers the new double turnover filing thresholds described below.

12 As per the Brazilian Real v US Dollar/Euro 2012 average conversion rates.

13 CADE Resolution 1/12 May 29, 2012, art. 112.

14 Law No. 12,529/11, supra note 1, art. 56 and 57 and CADE Resolution 1/12 May 29, 2012, art. 115.

15 The new pre-merger forms released by CADE include requirements for parties to provide five years of sales data, market information and reports, customer and competitor information, as well as internal documents and other relevant studies or notes regarding the parties' activities and products.

16 Portaria Interministerial N-994, of May 30, 2012, which updated the original (lower) thresholds set by Law No. 12,529/11, art. 88.

17 As per the Brazilian Real v US Dollar/Euro 2012 average conversion rates.

18 Law No. 12,529/11, supra note 1, art. 88 (7).

19 See, OECD Annual Report on Competition Policy and Developments in Brazil 2013, DAF/COMP/AR (2013)19, available at the OECD webpage (www.oecd.com).

20 As compared to 695 cases reviewed in 2011.

21 Law No. 8,884/94 (Brazil), available at <http://www.cade.gov.br/english/internacional/Law-8884-1994b.pdf>

22 Fiscal Year 2012 of October 1, 2011 through September 30, 2012.

23 A 1.4% decrease from the number of HSR transactions reported during FY 2011.

24 Hart-Scott-Rodino Antitrust Improvement Act ("HSR" or "HSR Act") of 1976.

25 Down from 82% in Fiscal Year 2011.

26 See FTC and the Antitrust Division of the Department of Justice (DOJ) recently released Hart-Scott-Rodino Annual Report to Congress required under the HSR Act summarizing the agencies' merger enforcement efforts and providing information regarding the premerger notification program for fiscal year 2012.

27 In Fiscal Year 2011, the percentage of Second Requests issued was higher (3.9%).

28 Numbers reported as per CADE's official publication. See CADE's website for further details: <http://www.cade.gov.br/Default.aspx?7acd5cad47dc33f005320250e750> (published on May 31, 2013).

29 Ibid.

30 Ibid.

31 See, OECD Annual Report on Competition Policy and Developments in Brazil 2013 where CADE claims 19 days for simple transactions and less than 50 days for more complex deals.

32 Ato de Concentração nº 08700.006962/2012-39

33 If a commissioner from CADE Tribunal believes he or she should have a look at a case reviewed by the GS he or she can use his avocation powers to analyse the transaction at the Tribunal.

34 Law No. 12,529/11, supra note 1, art. 88 (2).

35 CADE Regulation 1/12, May 29, 2012, art. 62 - 64.

36 Law No. 12,529/11, supra note 1, art. 88 (9).

37 Two of them due to restrictions imposed by the Merger Agreement, two for not complying with the non-competition clause, and one that was called by the Tribunal by avocation

38 Ato de Concentração nº 08700.009882/2012-35.

39 Ato de Concentração nº 08700.006437/2012-13.

40 Pre-impregnated Decorative Paper (PRIP).

41 Please note that at the time of writing the precise scope of the remedies remained confidential.

42 GSM data clearing allows MNOs to charge for roaming services when a user of a mobile device connects to a network different from his or her home network. NRTRDE, in turn, is a service that allows fraud detection in roaming services.

43 CADE cleared both transactions earlier than the EC.

44 Complex structural remedies were also applied under the previous law. See, e.g., Brazil Foods or LAN/TAM Cases.

45 Law No. 12,529/11, supra note 1, art. 13 (X).

46 Law No. 12,529/11, supra note 1, art. 59 (1) and 61.

47 Ato de Concentração nº 08700.003978/2012-90 (April 4, 2013)

48 The transaction was filed and reviewed under Brazil's previous competition law, meaning that a decision of the superintendence is not binding for CADE's reporting commissioner.

49 Franca is a small Brazilian city (330,000 inhabitants) in the interior of the São Paulo region.

50 The high market shares are mostly due to a very narrow, but commonly defined, geographic market (i.e., regional/local market). High market shares were found in the health insurance market (collective and individual).

51 Vertical links come, inter alia, from the fact that health plan users of one party can be treated in the other parties' hospitals.

52 The merging parties presented a failing firm theory, arguing that if it was not acquired by Unimed, Franca Regional Hospital would be forced to exit the market. But the superintendence concluded that the parties did not present enough evidence to prove their argument and that efficiencies resulting from the merger were "not sufficient to outweigh the competitive concerns".

53 Ato de Concentração nº 08012.010094/2008-63.

54 Ato de Concentração nº 08012.006653/2010-55.

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