April 19, 2012

The views stated in this submission are presented jointly on behalf of these Sections only. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and therefore may not be construed as representing the policy of the American Bar Association.

The Sections of Antitrust Law and International Law (“Sections”) of the American Bar Association (the “ABA”) are pleased to submit these comments on the (1) Draft Regulation for the Request of Approval for Merger and (2) Draft Regulation for Fast Track Review of Merger Cases (collectively, “Draft Regulations”), each issued March 19, 2012, by the Brazilian Administrative Council of Economic Defense (“CADE”) setting forth the regulations applicable to CADE’s new merger control regime, including the Draft Resolution on the Application for Approval of the Acts of Economic Concentration (the “Notification Form”); and on the Draft Regulations on the Calculation of Fines issued March 22, 2012. The Sections applaud CADE for its transparency and consideration of public comments regarding these significant changes introduced by Law no.12,529 of November 30, 2011 (“Law”) to Brazil’s merger control regime, and appreciate the opportunity to participate in this important process.

Executive Summary

The Sections’ major comments on the draft merger control regulations relate to three principal areas: the duration of merger review and the Fast Track Procedure; the scope of covered transactions; and the requirements imposed by the form itself. The Sections also have suggestions regarding confidentiality, opportunity to cure deficiencies in the form, and the conditions for accepting the notification. In addition, the Sections also express concerns about the manner in which CADE proposes to calculate fines in cartel cases, specifically regarding the concept of “business segment.”

Duration of Review and the Fast Track Procedure

The initial waiting period in all of the major jurisdictions other than Brazil is either 30 days or one month. See Exhibit A. This structure—short initial waiting period followed by longer period to review problematic deals—is of course based on the fact that most notifiable transactions are unproblematic.1 and that one month is long enough for agencies to rule out any

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1 To take the U.S. as an example, between 2001 and 2010, the Department of Justice and Federal Trade Commission received 15,200 notifications of proposed transactions under the premerger notification law, the Hart-Scott-Rodino (“HSR”) Act. Only 465 notified transactions proceeded to an “in-depth” investigation (Second Request) – approximately 3%. The record in the European Union is very similar: since 1990 the European Commission has
substantive competition law concerns. The initial waiting period should be as short as possible because merger transactions are almost always time-sensitive, and completion of merger review in mandatory suspensory regimes such as Brazil is typically a condition to closing. And the more certainty about the length of the required wait the better. As the International Competition Network’s (“ICN”) “Recommended Practices for Merger Notification Procedures” suggest, the initial waiting periods should expire within a fixed time period (a maximum of six weeks) following notification and any extended waiting periods should similarly expire within a set number of days or weeks.²

Under the new, suspensory merger regime in Brazil, a deal cannot close without clearance and CADE by statute need not grant such clearance sooner than 240 days from filing, with the possibility of an extension of 90 days if requested by CADE or 60 days if requested by the parties. The statutory waiting period under the new law, in other words, is 240 days and can reach up to 330 days. Neither the law nor the regulations establishes an intermediate deadline for the review of transactions that raise no substantive issues.

To address this serious timing problem—a problem compounded by the fact that many multi-national deals, even with relatively limited nexus to Brazil, will need to clear waiting periods in Brazil before they can close—CADE has proposed a new Fast Track procedure for transactions that are unlikely to raise antitrust concerns. The Sections applaud this effort to fix the timing problem within the confines of the existing statute but are concerned that the proposed solution does not go far enough and accordingly offer the following suggestions.

Under the draft Fast Track procedure, CADE is not required to confirm completeness within a set period of time. The Sections respectfully submit that use of the Fast Track procedure will in practice be effective only if CADE commits to confirm quickly the applicability of the Fast Track procedure, for example within 10 days following the submission of a Fast Track notification, and then has a clear deadline to issue its final decision regarding the case. A clear deadline of 30 days for review of fast-tracked deals would bring the new system in line with the other large economies of the world.

The Sections applaud the new Law for moving away from a market-share based notification threshold to objective revenue-based thresholds. In addition to being true to the scope of the Law by carefully adhering to the Law’s definitions of notifiable transactions, CADE could increase legal certainty and reduce its administrative burden by including brightline thresholds for the types of transactions that qualify for the Fast Track procedure.³ Specifically,

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³ See International Competition Network, “Recommended Practices for Merger Notification Procedures,” at 3 (Recommended Practice I.A.1) available at http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf (“Given the increasing incidence of multi-jurisdictional transactions and the growing number of jurisdictions in which notification thresholds must be evaluated, the business community, competition agencies and the efficient operation of capital markets are best (continued…)
Article 4.VI and 4.VII of the draft Fast Track resolutions provide that horizontal and/or vertical transactions involving “low” market shares can benefit from the Fast Track procedure, but do not indicate which levels CADE considers to be “low.” It would be helpful for CADE to state in the Fast Track provisions what is considered a “low” market share.

For example, a simplified procedure is available in the EU when (i) the transaction does not lead to horizontal or vertical “affected markets”, i.e. no horizontal overlaps of 15% or more and/or vertically related markets in which either of the parties or the combined firm has a share of 25% or more; (ii) the acquirer acquires sole control over a company over which it already has joint control; or (iii) in the case of joint ventures, the joint venture has turnover of less than €100 million in the European Economic Area (“EEA”) and the total value of assets transferred to the joint venture is less than €100 million in the EEA.4

Scope of Covered Transactions

Article 90 of Law no.12,529 of November 30, 2011 (“Law”) limits the scope of notifiable transactions to (i) mergers, (ii) direct and indirect acquisitions of control or parts of another company, or tangible or intangible assets of a company, and (iii) joint ventures, consortiums and association agreements. In addition, Article 90 may be construed to imply that “control” includes the power to directly or indirectly determine or influence the competitive behavior of another company.5

Limiting the scope to transactions that lead to a change of control or provide the opportunity to influence competitive behavior is a generally accepted practice in antitrust jurisdictions. For example, in the EU, a notifiable concentration is deemed to occur only where a change of control occurs on a lasting basis, either through (i) a merger or (ii) an acquisition of sole control by one undertaking or joint control by two or more undertakings.6 “Control” is defined as the ability to exercise decisive influence over an undertaking on a de jure or de facto basis, either through the acquisition of the majority of the voting rights or through the acquisition of a blocking minority or unilateral veto rights that would enable the acquirer to block strategic commercial decisions of the company in question, such as the budget, business plan, appointment/removal of senior management and major investments required in the ordinary business course.7

The HSR Act requires notifications for acquisitions of voting securities only when the securities grant the holder a present right to vote for the issuer’s board of directors. Acquisitions

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5 Article 90 does not provide a positive definition of ‘control’, but excludes from the definition of a notifiable concentration transactions in which the companies do not have the power to directly or indirectly determine or even influence the competitive behavior of the company acquired.
of non-voting securities do not require a notification filing. 8 Similarly, intraperson transactions and acquisitions of minority partnership or LLC interests are not reportable under the HSR Act. 9 Under these scenarios, no ability to exert control is changing hands and thus the transactions are highly unlikely to affect competition adversely.

The Sections respectfully recommend that CADE explicitly exclude the following transactions:

- Intra-group restructurings and acquisitions of non-voting securities. 10

- Those minority investments that do not confer some measure of influence or control over the target entity. In that connection, any additional clarification from CADE regarding the level and types of “influence” over the relevant-market related decisions of the target company that are liable to trigger a filing obligation would significantly increase legal certainty.

- Consortiums and/or association agreements (such as supply and distribution agreements, even when establishing an exclusive relationship) that are mere cooperative arrangements, as opposed to joint ventures with an autonomous and independent market presence. The language of Article 90, as it currently stands, is very open ended and could lead to a significant expansion of the concept of concentration to transactions that merely constitute cooperation arrangements without involving any change of control of a company and/or a business. Such cooperation arrangements are not notifiable concentrations in the U.S., the EU or the other jurisdictions of the top 10 economies in the world. Those agreements can, of course, still be reviewed under the antitrust laws.

The Notification Form

General

As noted earlier, a merger control system should start with the recognition that the vast majority of transactions do not present competition concerns. A well-designed system enables the agency to identify, with a minimum of resources, those relatively few transactions that are likely to merit further review and let the rest pass through the system quickly with minimal cost and interruption. To that end, the initial notification form should be tailored to identify whether the transaction raises competitive issues meriting further investigation. 11 According to the ICN’s Recommended Practices on the Information Requirements for Merger,

8 43 Fed. Reg. 33,450, 33,462 (July 31, 1978)
10 In this regard, the Sections are mindful that CADE has rendered decisions under the prior system (i.e., Law # 8,884/94) recognizing that intragroup corporate restructurings did not constitute cases of mandatory notification. For the relevant CADE decisional practice, see Concentration Acts # 08012.010455/2008-71, # 08012.003063/2008-56, # 08012.008946/2008-52, # 08012.010896/2010-98, # 08012.000697/2010-71, and # 08012.000049/2011-04.
Initial notification requirements should be limited to the information needed to verify that the transaction exceeds jurisdictional thresholds, to determine whether the transaction raises competitive issues meriting further investigation, and to take steps necessary to terminate the review of transactions that do not merit further investigation. Initial notification requirements and/or practices should be implemented so as to avoid imposing unnecessary burdens on parties to transactions that do not present material competitive concerns.\footnote{ICN Merger Notification Best Practices, infra. n. 2 at 11 (Recommended Practice black letter V.A and V.B).}

The Sections believe that the notification form here requires more information than necessary to achieve the goal of identifying problematic deals, thereby imposing unnecessary burden and cost on the myriad deals that raise no concerns and requiring CADE to spread its resources too thin. The proposed Notification Form seeks information, even in the case of candidates for Fast Track review, that the U.S. antitrust agencies would request only in a small fraction of cases either in a voluntary access letter in the initial HSR waiting period or in a Request for Additional Information and Documents (“Second Request”): for example, market size estimates in terms of both sales and volume for the past five years and expected growth rates for the following five years; sales and volumes data for both the notifying parties and competitors for the past five years; detailed explanation of distribution channels; detailed information on the level of rivalry and barriers to entry. This concern is heightened by the fact that the Law may require parties to file notification in Brazil even where the target being purchased has only export sales into the country, without providing a clear cut \textit{de minimis} rule.

The Sections recommend that CADE stagger its information requests, instead of requesting all information up front. This system—known as “discretionary supplementation”—has proven benefits. As the ICN has explained:

\begin{quote}
A discretionary supplementation system reduces the notification burden on the merging parties by requiring only basic, objective information, which, in many cases the parties maintain in the ordinary course of business. Agencies with a discretionary supplementation system can tailor any additional information sought to the specific circumstances of each case.\footnote{Information Requirements for Merger Notification, International Competition Network, p. 18 (Presented at the 8th Annual Conference of the ICN, June 2009), available at http://www.internationalcompetitionnetwork.org/uploads/library/doc328.pdf.}
\end{quote}

\textbf{Specific Sections}

We recommend that the following sections be modified:

- \textbf{Sections I.8, V.1, V.2, V.3, V.10, VI.2, VII.1.} These sections require the submission of certain sales and other financial data for a period of five years preceding the transaction. The Sections believe that five years is a burdensome obligation and goes well beyond requirements imposed by other jurisdictions. In the U.S., these types of data are reported only for the most recent year (with limited exception.) Similarly, in the European Union
only three years of information is required. The requirement of five years of data reflects a burden typically called for only in a Second Request or Phase Two investigation. The Sections respectfully suggest that the requirement for five years of information be reduced to no more than three years. In case of transactions subject to the Fast Track procedure, for which the information must be filed in accordance to items I.8, V.1, V.2, V.3, the requirement for information should be reduced to one year.

- **Section III.** This section requires the submission of extensive documentation. The Sections agree that the submission of certain transaction-specific and company-specific information is appropriate in a premerger form. However, the extensive requests outlined in Section III reflect the types of data typically requested only in a Second Request or Phase Two investigation. The Sections respectfully submit that these requests, particularly those detailed in item III.2 (b)-(j), should be removed from the Notification Form.

- **Section V.6.** This section requires the parties to state the nature and level of vertical integration posed by the transaction as compared to their largest competitor in Brazil. The Sections submit that this information may not be available to the parties, especially if they are multinational companies with limited operations in Brazil. Except in rare cases, moreover, the Sections believe that the potential value of this information for purposes of evaluating the competitive effects of the transaction is minimal at best and far outweighed by the burden of obtaining such information. The Sections respectfully suggest that CADE remove this request from the Notification Form.

- **Sections VI.2, VI.3, VI.5-VI.8, VII.3-VII.7, VIII.9, IX.1-13 and X.1.** These sections require a level of detail greater than necessary for the initial review. The Sections suggest that these requests be deferred unless and until CADE concludes that a more-detailed investigation is appropriate.

The Sections believe that the reduction of the level of information initially required by CADE can ease the strain on CADE’s resources and facilitate its identification of transactions that may be problematic. At the same time, tailoring these information requirements will bring the Notification Form in line with international best practices and reduce the overall burden on the notifying parties.

**Information about Minority Interests**

The Sections are concerned about the notifying parties’ ability to comply with the requirement to provide extensive information about 5% investments and also the practical value of such information. As a practical matter, information about private entities is not usually available to 5% investors, and minority investors in public companies are limited to the issuer’s public filings. In addition, investments of 5% generally are passive interests and do not convey the ability to materially influence the company’s management or operations.

The Section acknowledges that CADE may benefit from having information about certain minority investments of buyers in entities whose operations overlap with those of the target. Indeed, the U.S. antitrust agencies have recently expanded their initial information
request to elicit information regarding certain 5% investments of acquiring persons. The Sections suggest, however, that sections I.6. and I.7. be tailored as in the U.S. to investments in entities engaged in operations that overlap with the target, or as in the EU to investments of greater than 10%.  

Translating documents into Portuguese

The Sections understand that the draft rules of organization and procedure of CADE require parties to translate all documents they are required to produce in the merger review process. Such a requirement if implemented would be out of step with ICN recommended practices, which provide that while “it is appropriate for jurisdictions to require notifications in an official language . . . , they should not require extensive translation of supporting documents, such as transaction materials and annual reports, submitted as part of the notification.” (RP V.D, Comment 1). It could impose an enormous burden on parties given the substantial amount of documentation required to be submitted with the current draft law. Such a translation requirement is also out of step with current actual practice, where some national authorities may require submission of the transaction documents in the national language, but do not require wholesale translations of business documents with initial submissions.

Other Comments on the Proposed Merger Control Regulations

Opportunity to Cure Deficiencies in the Submitted Form

Despite the magnitude of information requested in the Notification Form, CADE proposes that notifying parties have only one opportunity to cure an alleged deficiency in their initial filing. The Sections are concerned that this could result in a significant number of notified transactions being forced to re-file and pay the filing fee again. If the Notification Form is revised as suggested above, this concern largely goes away. If the form remains unaltered, the Sections submit that CADE should reject filings only where material, unjustified deficiencies remain after the parties have been given an opportunity to cure.

Confidential and Privileged Information

Many requests in the Notification call for internal business documents and information containing competitively sensitive information that should not be disclosed to third parties. The Sections recognize that CADE’s Draft Regulations contain rules on confidential treatment of certain types of information and documents that are very similar to those existing under current Brazilian regulations. The Sections also acknowledge CADE’s continuing efforts to protect such information. In this sense, the Section applauds CADE’s initiative to identify which types of information and documents will automatically receive confidential treatment as this provides more certainty and comfort to the notifying parties.

14 HSR Notification and Report Form Instructions to Item 6(c), and Form CO Instructions to Item 4.2.1.
Additionally, following the experience of the U.S., the Sections respectfully suggest that parties should have the right to withhold privileged documents when delivering those required in Section V of the notification form.

**Conditions for Acceptance of Notifications**

Paragraph 1 of article 108 of the Draft Regulations states that “the notifications of the concentration acts should be filed after the signature of the formal document which binds the parties and before the consummation of any act relating to the transaction.” The Sections recognize that the concept of notifying transactions based on the first binding document has been developed over the years by the Brazilian competition authorities as a useful reference given the existence of the fifteen business day notification deadline under the prior merger control system (Law # 8,884/94).

However, the new suspensory system eliminates the deadline for filing and replaces it with a requirement that parties notify CADE and obtain clearance before they complete a transaction for which a notification is required. The Sections respectfully submit that these changes obviate the need to wait for a binding document and suggest that CADE consider accepting notifications based on non-binding letters of intent or memoranda of understanding, consistent with ICN best practices and U.S. and EU procedure. The change would allow parties to jumpstart the notification process and minimize any delay to completion of the transaction that may result from the notification process.

**The Definition of “Business Segment” in the Regulations on Calculating Fines**

The new law introduces a new base for calculating fines: “the turnover in the fiscal year immediately prior to the opening of the investigation registered by the company, group or conglomerate in the business segment in which the infringement occurred.”

CADE proposed on March 22 that “business segment” be defined according to a list that the government uses to classify economic activity in general. The Sections understand that the so-called *Classificação Nacional de Atividades Econômicas* ("CNAE") is a code-list prepared by a body under Brazil’s Ministry of Planning, Budget and Management setting out the official classifications used by both the National Statistics System and federal bodies in charge of

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15 See ICN Merger Notification Best Practices, infra. n 2, at 5 (Recommended Practice III.A) (Allowing parties to “notify proposed mergers upon certification of a good faith intent to consummate the proposed transaction” would “allow parties to make filings at the time they deem most efficient and facilitate coordination of multi-jurisdictional filings” and thereby promote “greater efficiency in the coordination of the multi-jurisdictional review process.”) Jurisdictions permitting such filings “have found that this practice has not resulted in a significant incidence of speculative notifications” because “the cost (including filing fees), information gathering burdens and potential for public disclosure associated with the notification process also have a natural tendency to inhibit parties from notifying merely speculative transactions.” [hereinafter ICN Merger Notification Best Practices”]; see also 16 C.F.R. Parts 801-803, Appendix “Antitrust Improvements Act Notification and Report Form for Certain Mergers and Acquisitions - Instructions,” available at http://www.ftc.gov/bc/hsr/hsrform-instructions1_0_0.pdf, at p. IV; see also Article 4(1), second subparagraph of Council Regulation 139/2004 of January 2004 on the control of concentrations between undertakings (“EUMR”) as well as para. 155 of the Commission’s Consolidated Jurisdictional Notice under the EUMR (2008/C95/01).
managing administrative registries. The CNAE aims to create standard identification codes for productive units in the database and registries of the Public Administration so as to achieve greater efficiency in the management of information. Given that CNAE was created for purposes not related to CADE’s proposed regulation, it does not appear to be suited for antitrust enforcement. In fact, the Sections believe that the use of such a code system as proposed by the draft regulation may, under certain circumstances, result in fines being calculated on the basis of the total turnover in a substantial number of antitrust investigations under the new law.

For example, according to the proposed rule, the Sections understand that the applicable “business segment” for an investigation into the market for soft drinks would be defined as “beverages”. One of the defendants in such an investigation could be a beverage company whose core business is beer (80% turnover) but also offers soft drinks (20% turnover). Applying the rule proposed by the draft regulation to this hypothetical, any fine imposed by CADE would take into account turnover in “beverages”. In the case of our hypothetic defendant, this would include the turnover generated in both soft drinks and beer, or, in practice, “total turnover”.

Therefore, CADE’s proposed regulation seems to go beyond the spirit of the new law, which proposed a base for fine calculation narrower than “total turnover”. The Sections suggest that CADE review this concept in order to apply a definition that would be closer to the concept of relevant market—an approach compatible with the wording of the statute and more in line with the approach taken by other jurisdictions.

Relatedly, the Sections recommend that CADE clarify the circumstances under which it would take group or conglomerate revenues into account when setting fines. The Sections believe it is inappropriate to consider revenues unrelated to the infringement under investigation.
### Exhibit A -- Premerger Waiting Periods in the World’s Ten Largest Economies and the E.U. (excluding Brazil)

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Initial Waiting Period (Phase I)</th>
<th>“Fast Track” Waiting Period</th>
<th>Secondary Review Period (Phase II)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Canada</td>
<td>30 days</td>
<td>N/A</td>
<td>30 days after substantial compliance</td>
</tr>
<tr>
<td>China</td>
<td>30 days</td>
<td>N/A</td>
<td>90 days from start of Phase II (possible 60-day extension)</td>
</tr>
<tr>
<td>European Union</td>
<td>25 working days (possible 10 working day extension if the parties submit remedies)</td>
<td>25 working days</td>
<td>90 working days from start of Phase II (possible extension up to 105 working days if remedies offered after the 55th working day; the parties may request an additional 20 working day extension within 15 working days into Phase II; the Commission can also initiate a 20 working day extension at any point with the parties’ consent)</td>
</tr>
<tr>
<td>France</td>
<td>25 working days (possible 15 working day extension if the parties submit remedies; the parties may request an additional 15 working days to finalize proposed remedies)</td>
<td>N/A</td>
<td>65 working days from start of Phase II. If the parties fail to submit proposed remedies within the first 45 days of Phase II, the waiting period is extended 20 working days. The parties may request an additional 20 working day extension to finalize proposed remedies. The Competition Authority may also suspend Phase II for an unlimited period of time.</td>
</tr>
<tr>
<td>Germany</td>
<td>30 days</td>
<td>N/A</td>
<td>90 days from start of Phase II (possible extension with parties’ consent)</td>
</tr>
<tr>
<td>India</td>
<td>30 days</td>
<td>N/A</td>
<td>180 days from start of Phase II</td>
</tr>
<tr>
<td>Italy</td>
<td>30 days/15 days for takeover bids</td>
<td>N/A</td>
<td>45 days from start of Phase II (possible 30-day extension)</td>
</tr>
<tr>
<td>Japan</td>
<td>30 days</td>
<td>N/A</td>
<td>Up to 120 days from receipt of complete notification form or 90 days from receipt of parties’ additional information, whichever is later</td>
</tr>
<tr>
<td>Russia</td>
<td>30 days</td>
<td>N/A</td>
<td>60 days from start of Phase II; clearance may be delayed after 60 days until the parties perform certain actions, which may not exceed 9 months</td>
</tr>
<tr>
<td>United Kingdom</td>
<td>20 working days (possible extension of additional 10 or 20 working days)</td>
<td>24 weeks</td>
<td>24 weeks from the start of Phase II (possible extension of up to 8 weeks)</td>
</tr>
<tr>
<td>United States</td>
<td>30 days / 15 days for tender offers or bankruptcy</td>
<td>N/A</td>
<td>30 days after substantial compliance / 10 days after substantial compliance for tender offers or bankruptcy</td>
</tr>
</tbody>
</table>