

A Fundamental Shift: Brazil's New Merger Control Regime and Its Likely Impact On Cross-Border Transactions

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On May 29, 2012, Brazil joined the growing number of merger control regimes that may drive the timing and potentially the outcome of cross-border mergers and acquisitions. In the most dramatic change to Brazil's competition law since its inception, reportable transactions now must be approved by Brazil's newly consolidated competition authority before they can be consummated.¹ Merging parties now will have to wait up to 330 days to obtain approval from the Administrative Council for Economic Defense (CADE) before they can close their deal. CADE also has issued regulations (Merger Regulations) that clarify which types of transactions are covered by the new law and provide a procedural framework and requirements for notification and review of reportable transactions.²

The modernization of Brazil's competition laws underscores the growing importance and sophistication of its economy and its competition law enforcement activities. There are many positive aspects to Brazil's new merger control regime, which consolidates investigative and decision-making power in one antitrust enforcement agency and introduces a pre-merger control system that covers "economic concentration acts" with an economic nexus to Brazil. These changes are generally consistent with the recommended practices of the International Competition Network (ICN) and the Organization for Economic Co-operation and Development (OECD). Ultimately, these reforms should improve the efficiency and effectiveness of merger control in Brazil as befits one of the world's largest, diversified economies.

As the ICN and the OECD have advocated, competition agencies need to have appropriate tools and resources to successfully enforce their merger review laws.³ Recognizing this, CADE has been authorized to hire 200 new antitrust staff to help fulfill its new responsibilities.⁴ However, few of these positions have been filled due to the lengthy civil service hiring process. This may explain why the Ministries of Justice and Finance decided to further increase the turnover thresholds as soon as the new law went into effect.⁵ Raising the thresholds will reduce the number of expected

¹ Law No. 12,529/11 (Brazil), available at http://www.planalto.gov.br/CCIVIL_03/_Ato2011-2014/2011/Lei/L12529.htm.

² CADE Resolution No. 1/12 (Brazil), available at http://cade.gov.br/upload/Resolu%C3%A7%C3%A3o%201_2012%20-%20RICADE%20%282%29.pdf. An English version is available at <http://www.cade.gov.br/upload/LAW%20N%C2%BA%2012529%202011%20%28English%20version%20from%2018%2005%202012%29.pdf>.

³ INTERNATIONAL COMPETITION NETWORK, RECOMMENDED PRACTICES FOR MERGER NOTIFICATION PROCEDURES § XII.A (Sept. 2002) [hereinafter ICN Recommended Practices], <http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf>; OECD, Recommendation of the Council on Merger Review § 1.C (Mar. 23, 2005) [hereinafter OECD Recommendation], available at <http://acts.oecd.org/Instruments/ShowInstrumentView.aspx?InstrumentID=195&InstrumentPID=191&Lang=en&Book=False>.

⁴ Law No. 12,529/11, *supra* note 1.

⁵ Portaria Interministerial No. 994/12, available in Clipping do IBRAC no. 18/2012, at 14, available at http://www.ibrac.org.br/Uploads/PDF/Clipping2012/Clipping_do_ibrac_18_2012.pdf.

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notifications, but concerns remain about other elements of the new merger control system, which:

- Adopts an expansive concept of “control” that is likely to capture more transactions than the EU or U.S. model;
- Includes turnover of the target’s entire economic group (not just the target itself) to determine whether the jurisdictional thresholds are met;
- Lacks a formal “first phase” or “initial” waiting period that would assure timely approval of the vast majority of transactions that do not pose significant competition concerns; and
- Requires merging parties to provide a voluminous amount of information with their notification form, rather than limiting the information burdens to the minority of transactions that raise potentially significant competition issues.

Companies . . . need to understand the practical impact of these changes and what is required of them to successfully navigate the new merger review system.

Companies contemplating deals that may be reportable in Brazil need to understand the practical impact of these changes and what is required of them to successfully navigate the new merger review system. This article describes the most significant changes, analyzes how the new regime compares to other pre-merger control jurisdictions and international best practices, and highlights areas where additional guidance is needed.

Consolidation of Reviewing Agencies into a Single “Super” Agency

Under the prior merger control regime, three separate government entities in Brazil had overlapping responsibility for reviewing mergers and consolidations: the Secretariat of Economic Law of the Ministry of Justice (SDE), the Secretariat for Economic Monitoring of the Ministry of Finance (SEAE), and CADE. This tripartite institutional structure was cumbersome and inefficient.⁶ The new merger control regime consolidates investigative and decision-making authority within CADE, an independent competition agency analogous in structure to the U.S. Federal Trade Commission. Brazil’s institutional reforms are consistent with recent moves in the UK, Spain, and France to consolidate enforcement powers in a single institution.⁷

The new CADE is composed of three principal sections:

- (i) the Superintendence General, led by an appointed Superintendent General (the Superintendent), reviews all notified transactions and decides whether they should be approved or submitted to the Administrative Tribunal (Tribunal) in complex cases where the Superintendent believes remedies or even a prohibition decision may be warranted;⁸

⁶ ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, COMPETITION LAW AND POLICY IN BRAZIL: A PEER REVIEW 7 (2005), available at <http://www.oecd.org/dataoecd/12/45/35445196.pdf> (pointing to a 2000 OECD report that determined the triangular system to be inefficient and duplicative).

⁷ Autorité de la Concurrence, Reform of the French Competition Regulatory System: the Conseil de la Concurrence Becomes the Autorité de la Concurrence (Competition Authority) (Mar. 2009), available at http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=317; ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, SPAIN: COMPETITION LAW AND POLICY (2001), available at <http://www.oecd.org/dataoecd/33/28/2489091.pdf>; DEPARTMENT FOR BUSINESS, INNOVATION AND SKILLS, GROWTH COMPETITION AND THE COMPETITION REGIME: GOVERNMENT RESPONSE TO CONSULTATION (Mar. 2012), available at <http://www.bis.gov.uk/assets/biscore/consumer-issues/docs/g/12-512-growth-and-competition-regime-government-response.pdf>.

⁸ 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. Law No. 12,529/11, *supra* note 1, art. 65.

(ii) the Tribunal, whose seven Commissioners render final and binding administrative decisions in merger cases referred to them; and

(iii) the Department of Economic Studies,⁹ led by CADE's chief economist, which conducts market studies and provides nonbinding economic opinions in merger and conduct cases as requested by the Superintendent or the Tribunal.

CADE's Superintendent General and Commissioners are political appointments confirmed by the Senate. On May 29, 2012, President Dilma Rousseff nominated Vinícius Marques de Carvalho to be the new president of CADE and Carlos Ragazzo to be the first Superintendent General.¹⁰ Both have since been confirmed by the Senate.

Pre-Merger Review

One of the most significant changes to Brazil's merger review system is the introduction of a pre-merger notification system. Unlike the prior system, in which transactions could be completed before CADE rendered a decision,¹¹ the new regime allows CADE to assess the competitive effects of reportable mergers ex ante and to block a transaction or impose structural remedies to address competition concerns before the transaction is consummated. Merging parties no longer have the option to close their deal prior to CADE's approval. At the same time, they no longer have to live with the legal uncertainty inherent in the prior system, which always held the possibility of post-merger remedial action.

Timing of Notification and Gun-Jumping. Parties can notify CADE of their deal at any time after execution of a binding agreement as long as they do so before the deal has been consummated. There is no longer a deadline by which to notify the deal. The pre-merger notification system also implements new rules for "gun-jumping." Parties that fail to notify reportable transactions before closing may have the deal declared void and may be subject to fines that range from R\$60,000 (US\$30,000) to R\$60 million (US\$30 million).¹² Furthermore, pending CADE 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.¹³ Presumably these prohibitions would not reach integration activities outside of Brazil's borders (such as the merger of two foreign parent companies) as long as their operating companies, assets, and businesses in Brazil continued to be independent. However, there is no clear guidance or precedent yet. If CADE's review process does become a significant impediment to closing international transactions (e.g., because CADE's decision is still pending long after other mandatory clearances have been obtained), it is likely that this thesis will be tested.

Permission to Close Pending Approval. Upon request, CADE may authorize parties to close a notified transaction before clearance if: (a) there would be no irreparable harm to competition,

⁹ The third agency that formerly reviewed mergers, SEAE, will no longer have merger review responsibilities, but will instead focus on competition advocacy.

¹⁰ Fabio Amato, *Dilma Nomeia Novos Presidente e Superintendente do CADE* [Dilma Nominates New President and Superintendent of CADE], G1 (May 29, 2012), available at <http://g1.globo.com/economia/noticia/2012/05/dilma-nomeia-novos-presidente-e-superintendente-do-cade.html>.

¹¹ Law No. 8,884/94 (Brazil), available at <http://www.cade.gov.br/english/internacional/Law-8884-1994b.pdf>.

¹² CADE Resolution No. 1/12, *supra* note 2, art. 112.

¹³ *Id.* art. 108.

(b) the merger would be easily reversible if CADE later concluded that the transaction harmed competition, and (c) the target company would face serious financial losses if it could not proceed more quickly.¹⁴ Like its counterpart provision (“derogation from suspension” in the European Union), we anticipate that CADE will grant such approvals only in exceptional cases.

With respect to public takeover bids, notification may be made on public announcement and the bid may be completed pending CADE’s approval.¹⁵ However, during this time, the acquirer cannot exercise voting rights to stock acquired except with CADE’s permission, where it is necessary to preserve the value of the investment.

Covered Transactions (“Concentration Acts”)

Under the prior law, the types of transactions subject to merger control were very broad and reached certain cooperative agreements as well as traditional mergers and acquisitions, joint ventures, and acquisitions of non-controlling stakes. The breadth of the prior statutory language and its expansive interpretation in CADE decisions meant that a range of cooperative agreements, such as long-term exclusive supply contracts, were routinely notified to CADE.¹⁶ The new law does not retain the very broad language of its predecessor. It defines a “concentration act” as a transaction where: (i) two or more previously independent companies merge; (ii) one or more companies acquire, directly or indirectly, by any means, partially or fully, the control of one or more companies; (iii) one or more companies incorporate another company or companies; or (iv) two or more companies execute a joint venture or any other form of association agreement, with an exception for consortia that are formed in connection with public bids.¹⁷

However, the concept of “control,” which is fundamental to the definition of “concentration act,” appears to be broader than in the United States or the European Union. Article 90 of the new law excludes transactions that do not confer control, defined as those transactions in which the acquirer is unable to influence the behavior of the company being acquired.¹⁸ The Merger Regulations state that a minority acquisition confers “control” where:

- (i) The transaction results in the acquirer holding at least 20 percent of the target company, or increasing its interest by at least 20 percent, where the groups involved are neither competitors nor vertically related; or
- (ii) The transaction results in the acquirer holding at least 5 percent of a target company that is a competitor of, or vertically related to, the purchaser.

By comparison, in the United States, the Hart-Scott-Rodino Act (HSR Act) only requires the notification for acquisitions of voting securities, i.e., those that entitle the holder to vote for the issuer’s board of directors. If the transaction results in the acquisition of non-voting securities, then there is no requirement for notification.¹⁹ Furthermore, foreign-to-foreign transactions generally are

¹⁴ Law No. 12,529/11, *supra* note 1, arts. 56 & 57.

¹⁵ CADE Resolution No. 1/12, *supra* note 2, art. 109.

¹⁶ For an example of how the former law addressed this issue, see Merger Case No. 08012.000182/2010-71 (Parties: Monsanto do Brasil S.A. and Iharabras S.A. Industrias Quimicas), in which CADE thoroughly addresses this phenomenon.

¹⁷ Law No. 12,529/11, *supra* note 1, art. 90.

¹⁸ Control was very broadly defined under the previous regime as the “power to command, direct or indirectly, internally or externally, in fact or legally, individually or by agreement, the social activities and/or the operation of the company.” CADE Resolution No. 15/98 (Brazil), available at <http://www.cade.gov.br/english/internacional/Resolution15b.pdf>.

¹⁹ 15 U.S.C. § 18a; 16 C.F.R. § 802.30; 43 Fed. Reg. 33,450, 33,495 (July 31, 1978).

exempt from the HSR Act except where the acquisition will confer control²⁰ of the foreign issuer and that issuer's business has a sufficient nexus to the United States.²¹ In the European Union, a notifiable concentration is deemed to occur only where a change of control (defined as "decisive influence") occurs on a lasting basis through a joint venture, merger, or acquisition.²²

While the new law does not, on its face, appear to require the notification of cooperative arrangements such as licensing, distribution, supply, and technology transfer agreements, CADE has indicated that it will clarify this through further regulations. It is hoped that CADE's further guidance will not open the door to notification of standalone cooperative agreements (i.e., not ancillary to a reportable merger or full function joint venture), which other jurisdictions have concluded do not belong in a pre-merger control regime.

New Thresholds

The new merger control regime creates a minimum turnover threshold for the second party and eliminates the much-criticized 20 percent market share test. When the new law went into force, the Ministries of Justice and Finance issued a joint decision to increase the turnover thresholds²³ so that a "concentration act" is notifiable if:

(i) The corporate group of one of the parties to the transaction had turnover of at least R\$750 million (approximately US\$375 million) 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 (US\$37.5 million) in Brazil in the last calendar year.

CADE maintains the right to review "concentration acts" that do not meet the thresholds within one year of completion.

Adopting two higher financial thresholds (rather than the single threshold as in the prior regime) based on turnover derived in Brazil is consistent with recommended best practices that focus on "activity within the jurisdiction" by "at least two parties to the transaction."²⁴ However, the new thresholds do not conform to the ICN's recommended best practices because they include the turnover of all of the members of the corporate group of the seller, not just the target.²⁵ The ICN's recommended practice is that thresholds should focus on the sales of the target(s) being acquired, not the sales of entities not being transferred to the buyer.²⁶ This deficiency should be remedied—there is no reason to require the notification of foreign-to-foreign transactions that have no material connection to or effect in Brazil.

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²⁰ For corporate entities, control is defined as holding 50 percent or more of the outstanding voting securities of an issuer or having the contractual power to designate 50 percent or more of the directors of a corporation. For an unincorporated entity that has no voting securities, control is defined as having the right to 50 percent or more of the profits of the entity, or having the right in the event of dissolution to 50 percent or more of the assets of the entity. *See* 16 C.F.R. § 801.1(b).

²¹ The issuer and entities it controls must either hold assets located in the United States having an aggregate total value of over \$68.2 million, or have made aggregate sales in or into the United States of over \$68.2 million in the most recent fiscal year. *Id.* § 802.51(b)–(c).

²² Council Regulation (EC) No. 139/2004 of 20 January 2004, arts. 3(1), 3(2), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:024:0001:0022:en:PDF>.

²³ Originally, the new law stated that a transaction must be notified if (i) the corporate group of one of the parties to the transaction had turnover of at least R\$400 million (US\$200 million) in Brazil in the last calendar year and (ii) the corporate group of another party to the transaction had turnover of at least R\$30 million (US\$15 million) in Brazil in the last calendar year.

²⁴ ICN Recommended Practices, *supra* note 3, § I.C.

²⁵ *Id.* § I.B.3.

²⁶ *Id.*

It is important to note that the definition of corporate group is also broader than in other jurisdictions, encompassing not only entities subject to common control, but also entities in which any company subject to common control holds a direct or indirect share of at least 20 percent. In the context of investment funds, the Merger Regulations provide that “control” includes: (a) funds subject to common control or a common manager or managing entity, (b) investors that hold a direct or indirect share of more than 20 percent of any of the funds, and (c) portfolio companies in which at least one of the funds holds a direct or indirect share of at least 20 percent.

We understand that CADE is preparing further guidance on the practical application of this control group test to investment funds. We hope that this guidance will take into account the potential difficulty of accessing information from companies in which a fund has a minority interest as well as minority investors in the fund, especially when information that is not accessible to merging parties may hold off the completion of the notification and, thus, the commencement of the waiting period. More fundamentally, this expansive view of what constitutes a corporate group may result in the notification of transactions that have little nexus to, or impact, in Brazil. We recognize that vertical or horizontal relationships between the businesses being acquired and other assets under common management may be relevant to the competition assessment of the acquisition. However, a less intrusive way of addressing this issue would be to require additional information to be reported for “associates”²⁷ along the lines of the U.S. amendments to the HSR Form.²⁸ In this way, competitive overlaps with entities that are under common investment or operational management with, but that are not “controlled” by the acquirer, can be identified without unnecessarily expanding the scope of reportable transactions.

Waiting Period and Review Process

The new merger law details the timeframe and procedural rules for the review of mergers.²⁹ There is a maximum statutory time period for the review of a transaction: a final administrative decision must be issued within 240 days from the date of notification.³⁰ This may be extended by sixty days at the request of the merging parties or ninety days if CADE determines the transaction requires further review for a maximum of 330 days.³¹

As described further below, the inclusion of a short-form notification for “non-complex” transactions to streamline the notification of non-complex transactions is to be commended, but it lacks a critical element, namely an intermediate (“first phase” or “initial”) waiting period for the review and approval of non-problematic deals. The OECD recommends that competition jurisdictions provide clearly defined, expedited time frames for these types of transactions to “provide procedures that seek to ensure that mergers that do not raise material competitive concerns are sub-

²⁷ The term “associate” is defined in Section 801.1(d)(2) of the HSR Rules as “an entity that is not an affiliate of such person but: (A) has the right, directly or indirectly, to manage the operations or investment decisions of an acquiring entity (a ‘managing entity’); or (B) has its operations or investment decisions, directly or indirectly, managed by the acquiring person; or (C) directly or indirectly controls, is controlled by, or is under common control with a managing entity; or (D) directly or indirectly manages, is managed by, or is under common operational or investment management with a managing entity.”

²⁸ Premerger Notification Reporting and Waiting Period Requirements, 76 Fed. Reg. 42,472, 42,472–73 (July 19, 2011) (codified at 16 C.F.R. § 801.1).

²⁹ See Law No. 12,529/11, *supra* note 1, tit. VII, ch. I, tit. VI, ch. II.

³⁰ *Id.* art. 88.

³¹ *Id.*

ject to expedited review and clearance.”³² Even though CADE has stated publicly that it expects non-complex transactions to be cleared within thirty days and complex mergers to be reviewed within 240 days, this is not a binding commitment.³³ It is hoped that CADE can continue to meet this self-imposed deadline, but as a matter of law, merging parties still must take into account the almost eleven-month statutory period in developing their deal timetable, closing conditions, and termination date.

Notification Forms

Consistent with international best practice recommendations, the Merger Regulations include two notification forms: the first is for complex transactions (the Non-Summary Procedure), and the second is the Summary Procedure.³⁴ As discussed below, the information requirements differ drastically depending on the category in which the deal falls.

Non-Complex Transactions—Short Form Notification. A short-form notification or Summary Procedure is available for non-complex transactions that CADE has identified have “less potential to harm competition.”³⁵ Although the Superintendent ultimately decides whether a transaction qualifies for the Summary Procedure, the following types of transactions are stated to qualify: (i) transactions involving no or only modest overlaps (horizontal overlap below 20 percent and poses no potential harm to competition; vertical overlap below 20 percent); (ii) greenfield joint ventures or cooperatives; (iii) consolidation of controlling interests; (iv) entry of a new player; and (v) any other deals that the Superintendent believes do not pose a threat to competition.³⁶ The information requests focus on the details of the transaction and the operations of the notifying parties. The Summary Procedure does not require information regarding the demand structure, the conditions of entry, or the competition in the relevant markets affected by the transaction, all of which are required in the long form described below.

The creation of a Summary Procedure is consistent with other established pre-merger control jurisdictions and recommended practices of both the ICN and OECD.³⁷ However, there is still uncertainty for filing parties as to whether their transaction will qualify as a non-complex transaction. There is no formal pre-merger consultation process, which means that filing parties will not know in advance of filing whether the transaction will benefit from the Summary Procedure and the streamlined notification form. Therefore, in appropriate cases, it may be preferable to seek informal guidance from the Superintendent before filing so that the parties can assess before their transaction is notified whether it will be treated as complex rather than risk the notification being rejected or found incomplete. The lack of a formal proceeding and deadline to con-

³² OECD Recommendation, *supra* note 3, § I.A.1.2(iv).

³³ At a New York State Bar Association Antitrust Section program on July 17, 2012, Superintendent Ragazzo stated that “[s]imple cases will be reviewed in less than 30 days, and I don’t think a merger will ever get to 240 days, and if it happens it will be the most complex case ever.” Melissa Lipman, *Brazilian Antitrust Official Vows Quick Merger Reviews*, LAW360 (July 17, 2012), available at http://www.law360.com/competition/articles/361266?nl_pk=226e624a-2fc5-4e38-8115-340ee6f35562&utm_source=newsletter&utm_medium=email&utm_campaign=competition (by subscription).

³⁴ Both notification forms can be found at <http://cade.gov.br/upload/Resolu%C3%A7%C3%A3o%202012%20-%20An%C3%A1lise%20Atos%20Concentra%C3%A7%C3%A3o.pdf>.

³⁵ CADE Resolution No. 2/12 (Brazil) art. 6, available at <http://www.cade.gov.br/upload/Resolu%C3%A7%C3%A3o%202012%20-%20An%C3%A1lise%20Atos%20Concentra%C3%A7%C3%A3o.pdf>.

³⁶ CADE Resolution No. 2/12 (Brazil), *supra* note 35, art. 8.

³⁷ ICN Recommended Practices, *supra* note 3, § V.B; OECD Recommendation, *supra* note 3, § I.A.1.2(iv).

firm the completeness of the notification and trigger the 240 days waiting period also raises some uncertainty.

Complex Transactions—Long Form Notification. If a Summary Procedure form is rejected by CADE or if the transaction is known to be complex *ex ante*, parties must fulfill the requirements of the long form notification or Non-Summary Procedure. The information requested in the long form is voluminous and may be challenging to collect. It includes, among other things:

[I]f the transaction is known to be complex ex ante, parties must fulfill the requirements of the long form notification or Non-Summary Procedure.

- Internal company documents, such as market assessment studies, board and committee minutes, as well as ordinary course strategy and marketing reports and business plans.
- Detailed information on all overlapping products, including five years' worth of sales and other financial data, and detailed information concerning the relevant market(s), including distribution channels, entry conditions, intellectual property (patents, know-how, etc.), infrastructure, brand loyalty, estimates of market production, and pricing strategies.
- Identification and contact details for competitors, customers, and suppliers in all overlapping product areas, information on customer preferences, and a "counterfactual" description, i.e., what competition in the market would look like if the notified transaction was not completed.
- Extensive information about minority interests (5 percent or more) even if they do not overlap with the business of the target company.
- Portuguese translation of all documents submitted.

As it stands, the Superintendent will need to review a significant amount of information and documents in every "long-form" notification, which creates significant burdens for the filing parties and may further strain CADE's already stretched resources. Further, the fact that the new merger regime requires notifying parties to present so much information up front means that much more work will need to go into a merger notification in Brazil than other major jurisdictions, such as the United States, Canada, and the European Union, which use a phased approach to try to limit the burden of notification and provide targeted, follow-up information requests for transactions that merit further investigation.³⁸ Furthermore, the phased approach allows the authority to customize additional information requests to focus on the issues in the particular case.

It is hoped that CADE will prioritize streamlining its information requests once it has gained more experience with the new regime and notification forms. Reducing the burden of completing the current long form would expedite the review process for transactions that do not raise significant competition concerns and allow CADE to tailor additional information requests to the specific issues raised by potentially problematic transactions.³⁹

³⁸ In the United States, the HSR Form requires the parties to report turnover by industries and to identify those industries where the transaction in which the parties' products overlap. Together with annual reports, financial statements, and pre-existing documents analyzing the transaction, this provides an objective initial screen based on readily obtainable data that allows the antitrust agencies to quickly identify which transactions merit further investigation. It is only after this initial screen that the U.S. antitrust agencies may require additional information for those transactions it deems to be potentially problematic, with a Request for Additional Information and Documents, or "Second Request."

Similarly, in the European Union, the concept of "affected" markets (defined by reference to specific minimum market shares held by the merging parties) is used as a screen to determine when detailed information needs to be provided in the Form CO. When completing a Form CO, parties to a transaction must identify information concerning their activities, but detailed requests apply only to "affected markets." See Form CO Relating to the Notification of a Concentration Pursuant to Regulation (EEC) No. 4064/89 (Dec. 31, 1994), available at http://ec.europa.eu/competition/mergers/legislation/co_en.html.

³⁹ INTERNATIONAL COMPETITION NETWORK, INFORMATION REQUIREMENTS FOR MERGER NOTIFICATION 3 (2009), available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc328.pdf>.

Settlement Procedures. Merging parties can negotiate remedies with CADE from the moment of filing until thirty days after the Superintendent has sent the case to the Tribunal for further review.⁴⁰ The parties negotiate with the Superintendent or the Reporting Commissioner, but ultimately the settlement must be approved by the entire Tribunal.

Conclusion

The new merger law significantly overhauls Brazil's merger review system, consolidates investigation and decision-making power into one agency, introduces a pre-merger control requirement with more objective and higher notification thresholds, and provides two tracks for notification of complex and non-complex transactions. All of these changes reflect a commendable effort by Brazil's competition authorities to create a modernized system in line with international recommended practices for merger review.

However, while the new merger control regime is a big step in the right direction, it does have some flaws and areas where further guidance would be useful. These include a turnover threshold based on the target's entire economic group, the lack of a first phase or initial waiting period to facilitate the approval of transactions that pose no competitive concerns, the expansive concept of control, and the onerous notification form that likely will be required for most transactions. The new merger control regime will undoubtedly continue to evolve, just as the European Union has refined its approach, made adjustments, and issued detailed guidance in key areas since its merger control regulation was adopted in 1989.⁴¹ Similarly, we hope that CADE will be open to refining its process and addressing issues of concern through additional regulations and case law.

Of course, just as the Brazilian merger control system has become more robust, it also has become a more significant regulatory hurdle for merging companies. Adding a pre-merger review requirement, consolidating government agency authority, and expanding regulatory resources will likely lead to a more active and effective system for reviewing and sometimes challenging reportable mergers. Acquisitive companies with local operations or revenues derived from Brazil should take steps to prepare for the new pre-merger control regime, as it may significantly affect the course and timetable of their next deal. ●

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⁴⁰ CADE Resolution No. 1/12, *supra* note 2, art. 115. President Rousseff also vetoed the provision that enabled the Superintendence General to negotiate a settlement with the parties before CADE had commenced its review of the transaction. President Rousseff was concerned that the provision was too narrow and might be interpreted to preclude CADE from negotiating settlement agreements at other stages of the investigation. Removing the provision should remove any doubt that settlements can be negotiated throughout the merger review process. The vetoes are available at http://www.planalto.gov.br/CCIVIL_03/_Ato2011-2014/2011/Msg/VEP-536.htm.

⁴¹ Council Regulation (EEC) No 4064/89 of 21 December 1989, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31989R4064:EN:HTML>.