Introduction

The year 2012 was key for the modernisation of antitrust law and policy in Brazil. After several years of discussion and amendment before Congress, the new Competition Law (12.529/2011) entered into force on May 29 2012.

Among the changes brought about by the new law, the most significant amendment was the adoption of a pre-merger review system, which incorporated a suspensory obligation before closing. This new legal framework changed the dynamics of the antitrust review process not only for the antitrust authority, the Administrative Council for Economic Defence (CADE), which now has a new deadline to review merger cases, but also for companies, which must now deal with a ban on closing obligations during the merger review process.

Pre-merger review

Since May 29 2012 parties to notifiable transactions in Brazil have been unable to close or implement agreements or, in merger cases, integrate their businesses until CADE has issued its final decision regarding the competitive effects of the transaction.

Furthermore, the parties cannot align their behaviour in the marketplace and should keep their business operations fully independent as far as possible until CADE’s final decision has been issued. By adopting a pre-merger review system, Brazil has aligned its practice with that of more mature jurisdictions, such as the United States and Europe.

CADE expects the parties involved in a notifiable transaction to keep their respective activities (eg, facilities, plant business and commercial practices) separate until its final authorisation has been given. As such, during CADE’s review, the parties cannot:

- transfer assets;
- exchange competitively sensitive information that is not reasonably necessary to the negotiation of the agreement or transaction; or
- exercise any type of decisive influence over another party’s business and commercial decisions.

The definition of ‘competitively sensitive information’ may vary from case to case and from industry to industry, and may require a specific assessment in the context of the agreement or transaction under analysis. However, examples of competitive sensitive information generally include information regarding prices, quantities, profitability, costs, payment terms and conditions, IP rights, existing or prospective clients and suppliers, R&D projects, existing or future marketing and strategic plans, product development plans and trade secrets. As a consequence, parties should be especially cautious as to competitively sensitive information that is to be exchanged for the purpose of planning the business integration, including in the course of the due diligence process, in order to avoid such risks during preliminary negotiations and the transition period between signing and closing.

If the parties do not comply with the suspensory obligations, rather ‘jumping the gun’ before closing, the transaction or the acts that infringe the gun-jumping rule will be considered void, and the parties shall be subject to fines ranging from R60,000 to R60,000.
Less than 18 months after the enactment of the law, on August 28 2013 CADE ruled on the first gun-jumping case in Brazil. The case involved the assignment to OGX of the rights and obligations held by Petrobras in a concession agreement for the exploration, development and production of oil and gas in a block located in the Santos Basin. CADE ruled that the parties had engaged in gun jumping. Aiming to resolve the matter and approve the case on the merits, the parties and CADE reached a settlement pursuant to which OGX agreed to acknowledge that it had engaged in gun jumping and pay a pecuniary contribution of approximately $1.2 million (R3 million).

Although it is still too early to have a clear view of how CADE will deal with gun-jumping matters, this ruling clearly indicates that the authority will be rigorous when examining the issue. It provides some guidance as to how the agency intends to interpret the gun-jumping rule – among other things, parties must refrain from exchanging confidential information and the purchaser must prevent any interference in the business of the target (eg, acting as a consultant to the target’s management). In addition, CADE has made clear that acts carried out by the parties in violation of the rule will be considered null and void.

**Timing of review**

With respect to the timing of the antitrust merger review, CADE has 240 days, which in complex mergers can be extended to up to 330 days (11 months), to review the notified transactions. Although the new law does not explicitly state that the transaction is automatically cleared if the review period is exceeded, CADE’s general attorney issued Opinion 17/2012 stating that such deadline is final.

So far, in practice CADE has approved fast-track cases within 30 days of filing, provided that the notification form is complete. After clearance, parties must wait an additional 15 days for a possible appeal before closing. Therefore, closing schedules should allow for between 30 and 45 days for clearance of fast-track transactions. The review period for more complex cases (ie, transactions that involve concentrations of more than a 20% market share) cannot be estimated precisely and will depend on a case-by-case analysis, but have generally been reasonable.

In the context of a pre-merger review, the more complete the notification form, the larger the chance that the case will be cleared quickly. Under the old system, parties usually provided limited information and waited for the authority to request any additional information that it deemed necessary. Since the enactment of the new law, companies must take extra care to ensure that they provide complete information, as each request for additional information from the authority can delay the review process, and thus the closing of the deal. The notification filing forms provided by the new law are more complex in terms of the information requested and it is important to follow the requests therein as closely as possible in order for the deal to be cleared within a reasonable time. Furthermore, the parties must now present any extra documents prepared with the purpose of approving the transaction, including those setting out market data and assessing the target company. This requires additional care in the preparation of the documents.

Finally, there is no longer a deadline to submit transactions to CADE; notifiable transactions must be submitted for review before closing and preferably after the signing of a binding document, although CADE has accepted non-binding documents for review provided that some form of agreement has been executed between the parties.

**Notifiable transactions**

The new Competition Law also changed the thresholds for notifiable transactions. According to the new law, a deal must be submitted to CADE’s review when:

- at least one of the groups involved has registered an annual turnover or business volume of more than R750 million in the year preceding the proposed transaction; and
- another group involved has registered an annual turnover or business volume of more than R75 million in the year preceding the proposed transaction.(1)

Article 90 of Law 12.529/2011 provides that a concentration shall be deemed to occur when:

- two or more previously independent companies merge;
- one or more companies acquires, directly or indirectly, by any means, control or parts of one or more other companies; or
- two or more companies enter into an association agreement, or form a consortium or joint venture.(2)
Given the broad wording of Article 54 of the former Antitrust Law (8.884/1994), Article 90 was intended to provide better guidance regarding the types of transactions that must be submitted to CADE in order to restrict the number of cases reviewed by the authority. With this in mind, the concept of acquisition of control or parts of one or more other companies (as stated above) has already been further clarified by CADE Resolution 2/2012, which states the type of acquisitions that trigger mandatory antitrust filing. This regulation improves the clarity of a significant number of transactions that must be notified to CADE. However, this regulation is still not enough to settle companies’ concerns when assessing whether to submit certain transactions to CADE. In this context, CADE is yet to issue additional clarifications regarding the scope of the specific provision on joint ventures and association agreements (as stated above) given the broad language of Article 90 and in view of CADE’s inclusive decisions regarding the need to notify those kinds of agreements under former Law 8.884/1994.

Other changes

The new law also brought changes to administrative proceedings related to anti-competitive conduct (ie, cartels), with the aim of improving the enforcement of those wrongdoings.

One important change concerns the fines imposed on companies convicted for anti-competitive conduct. While the old law established a fine of between 1% and 30% of gross revenues, minus the taxes paid by the company in the year before the beginning of the investigation, the new law has changed the range of the fines to between 0.1% and 20% of the gross revenues of the company, economic group or conglomerate in the year before the start of the investigation, as well as limiting the basis for the calculation of the fines to the business segment in which the wrongdoing occurred. Therefore, under the new Competition Law, fines may no longer be calculated based on the company's total gross revenues, but rather on the revenues of the business segment in which the conduct occurred (in some cases this may match the turnover). It is still uncertain whether this change will result in more limited fines being imposed on companies, but everything indicates that this will be the trend. In fact, when deciding the Air Cargo case on August 28 2013, CADE applied the new Competition Law, arguing that it was more beneficial for the defendants.

For individuals, the range of fines also changed, from 10% to 50% of the amount applied to the company (according to the former Antitrust Law) to 1% to 20%. The new law also expanded the list of alternative penalties for individuals, including the possibility of a prohibition on trading on his or her own behalf or as a representative of a legal entity for a period of up to five years.

Operating a cartel is both an administrative infringement and a crime under Brazilian law; the new law introduces an important change in the criminal provision of this anti-competitive practice. Before the enactment of the new law, Article 4 of Law 8.137/1990 provided that the penalty for crimes against economic order was imprisonment for two to five years or the payment of a fine. The new law eliminates the possibility of alternative penalties. Individuals investigated for cartel crimes are now subject to two to five years’ imprisonment and the payment of a fine. As a consequence, individuals investigated for crimes against economic order (eg, a cartel) no longer have the possibility to terminate criminal proceedings by paying an administrative fine to CADE.

The new Competition Law did not make significant changes to the procedures for signing leniency and settlement agreements – these are both still subject to further discussions and regulation by CADE in order to improve the reliability, certainty and clearness of these tools in the enforcement of cartel investigations.

Comment

The new Competition Law introduced relevant changes which affect the business environment for companies doing business in Brazil. CADE should be praised for reviewing fast-track cases within short timeframes, even with considerably limited resources. Although there is still room for improvement, the enactment of the new Competition Law was a key step in the development and enforcement of antitrust policy in Brazil.

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Endnotes

(1) The concepts of a group of companies and control are particularly important in this context for the calculation of the applicable turnover thresholds rules. CADE substantially expanded these concepts – in contrast with those adopted by Law 8.884/1994 – with the issuance of new regulations.

(2) Associations created for the purpose of participating in public bids have been
expressly excluded from the concept of concentration for the purposes of merger control.

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