The year of 2012 was key for the modernization of the antitrust law and policy in Brazil: after several years in Congress under discussions and amendments, the new Brazilian Competition Law (Law No. 12.529/2011) entered into force on May 29, 2012.

Among the several changes brought by the new Law, the main was the adoption of a pre-merger review system, which incorporated a suspensory obligation prior to closing. This new legal framework changed the dynamics of the antitrust review process not only to the antitrust authority (the Economic Council for Administrative Defence, or CADE), which became bound to a deadline to review merger cases, but also to companies that now have to deal with bar on closing obligations during the merger review process.

i. Pre-merger review

Since May 29, 2012, parties to notifiable transactions in Brazil are not allowed to close or implement agreements, or, in merger cases, to integrate their businesses, before CADE issues its final decision regarding the competitive effects of the transaction. The parties cannot align their behavior in the marketplace either, and they should maintain their business operations as fully independent as possible until CADE's final decision is issued. In a nutshell, by adopting a pre-merger review system, Brazil aligned its practice to the one existing in the mature jurisdictions, such as the United States of America and Europe.

The Brazilian antitrust authority expects parties involved in a notifiable transaction to hold their respective activities (including, for instance, facilities, plants business and commercial practices) separate until CADE's final authorization is given. As such, during CADE's review, the parties are not allowed to (i) transferring assets, (ii) exchanging competitive sensitive information that is not reasonably necessary to the negotiation of the agreement or transaction, and (iii) exercising any type of decisive influence over another's business and commercial decisions. The definition of competitive 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, but examples of competitive sensitive information generally include information regarding prices, quantities, profitability, costs, payment terms and conditions, intellectual properties rights, current or prospective clients and suppliers, research and development projects, current or future marketing and strategic plans, product development plans or trade secrets. As a consequence, parties should be especially cautious as to competitively sensitive information that is to be exchanged for purposes of planning the business integration, including in the course of the due diligence process, in order to avoid these risks during preliminary negotiations and during the transition period between signing and closing.

If the parties do not comply with the suspensory obligations, incurring in the so-called gun-jumping prior to closing, the transaction will be considered void the parties shall be subject to fines ranging from BRL 60 thousand to BRL 60 million, in addition to possible cartel investigations.

ii. Timing of the review

With respect to the timing of the antitrust merger review, CADE has a maximum deadline of 240 days, which can be extended by CADE in complex mergers to up to 330 days (11 months), to review the notified transactions. Even though the new Law does not explicitly set forth that the transaction is
automatically cleared if the review period is exceeded, CADE's General Attorney has issued Opinion No. 17/2012 stating that such deadline is final.

The practice so far has shown that CADE has approved fast track cases in less than 30 days as of the moment of the filing, provided that the notification form is considered complete. After clearance, parties shall wait additional 15 days for a possible appeal prior to closing. Therefore, closing schedules should allow for 30 to 45 days for clearance of the so-called fast track transactions. The review period of more complex cases (transactions that involve concentrations of more than 20% market share) cannot be precisely estimated and depend of a case by case analysis.

In the context of a pre-merger review, it is important to have in mind that the more complete the notification form, the larger the chances of having the case cleared quickly. Under the old system, parties normally provided limited information and waited the authority to request any additional data it deemed necessary. Since the enactment of the new Law, the companies have to take extra care in the completeness of all information that is being provided because each request for additional information from the authority can result in delay in the review process and thus in the consummation 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 strictly as possible to have the deal cleared in a reasonable timing. One additional difference is that the parties must now present any side documents prepared with the purpose of approving the transaction, including those with market data and assessment of the target company, among others. This requires additional care in the preparation of the documents.

Finally, one should also note that there is no longer a deadline to submit the transactions to CADE; notifiable transactions must be submitted for review prior to closing and preferably after signing of a binding document, even though CADE has been accepting to review non binding documents, provided that some agreement has been executed between the parties.

The New Competition Law also changed the thresholds of notifiable transactions. According to the new Law, a deal has to be submitted to CADE’s review when (i) at least one of the groups involved registered an annual gross revenues (turnover) or a business volume above BRL 750 million in the year preceding the proposed transaction, and (ii) another group involved registered gross revenues (turnover) or a business volume above BRL 75 million in the year preceding the proposed transaction.

Article 90 of Law No. 12.529/2011 provides that a concentration shall be deemed to occur when (i) two or more previously independent companies merge; (ii) one or more companies acquire, directly or indirectly, by any means, control or parts of one or more other companies; or (iii) two or more companies enter into an association agreement, or form a consortium or joint venture.

Given the broad wording of Article 54 of the former Brazilian antitrust law (Law No. 8.884/1994), the attempt of Article 90 of the new law was to give a better guidance of the types of transactions that need to 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 in item (ii) above) has already been further clarified by CADE’s Resolution No. 2/2012 which states what types of acquisitions triggers mandatory antitrust filing. This regulation improves the clarity of a significant number of transactions that needs to be notified to CADE. One should note, however, that this regulation is still not enough to contemplate companies’ concerns and doubts when assessing whether or not to submit certain transaction to CADE. In this context, the authorities are yet to issue additional clarifications with respect to the scope of the specific provision regarding “joint ventures” and “association agreements” (as stated in item (iii) above) given the broad language of article 90 and in view of CADE’s over inclusive decisions regarding the need to notify those kind of agreements under the old Law No. 8.884/1994.

The new law also brought changes in relation to the administrative proceedings related to anticompetitive conducts (i.e. cartels) with the aim to improve the enforcement of those wrongdoings.
An important change concerns the fines imposed on companies convicted for anticompetitive conducts. While the old law established a fine of 1 to 30% of the gross revenues less taxes of the company in the year prior to the beginning of the investigation, the new law changed the range of the fines to 0.1 to 20% of the company's gross revenues of the company, economic group or conglomerate in the year prior to the beginning of the investigation, and limited the basis for the calculation of the fines to the *business segment* in which the wrongdoing occurred. This means that under the new Brazilian Competition Law the fines are no longer calculated based on the total gross revenues of the company, but on the revenues of the business segment in which the conduct occurred. It is still uncertain whether this change of the law will result in more limited fines to the companies since CADE has still not issued any decision under the basis of the new Law; the reasonableness of the fine would mostly depend on the geographic scope of the business segment involved in the wrongdoing.

For individuals, the range of the fines also changed from 10 to 50% of the amount applied to the company (according to the old antitrust law) to 1 to 20%. The new law also expanded the list of alternative penalties to individuals including the possibility of debarment from practicing trade on their own behalf or as a representative of a legal entity for a period of up to five years.

It is worth highlighting that cartel is both an administrative infringement, as well as a crime under Brazilian law; and that there was an important change in the criminal provision of this anticompetitive practice. Prior to the enactment of the new law, Article 4 of Law No. 8.137/1990 provided that the penalty for crimes against the economic order was imprisonment from 2 to 5 years or the payment of a fine. The new Law eliminates the possibility of alternative penalties. Individuals now investigated for cartel crimes are subject to 2 to 5 years’ imprisonment and the payment of a fine. As a consequence, individuals investigated for crimes against the economic order (such as cartel) no longer have the possibility to terminate the criminal proceedings by paying an administrative fine to CADE.

The New Competition Law did not bring significant changes to the procedures for signing leniency and settlement agreements and these two subject are still subject to further discussions and regulations by the authorities in order to improve the reliability, certainty and clearness of those tools in the enforcement of cartels investigations in the country.

v. Conclusion

The new Brazilian Competition Law introduced relevant changes, which shall affect the business environment for companies doing business in Brazil. CADE shall be praised for being able to review fast cases in short periods even with considerably limited resources. Although there is still room for improvement, the enactment of the new Brazilian Competition Law was a relevant step in the development and enforcement of the antitrust policy in the country.

Footnotes

1 The concept of 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 the old law (Law No. 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 purposes of merger control.

*The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.*