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I. INTRODUCTION

On November 30, 2011, Law n. 12.529 —the New Brazilian Competition Law ("New Law")—was formally enacted by President Dilma Roussef, after more than 7 years of discussions within the Brazilian National Congress. Such Law will become effective on May 29, 2012, when it will supersede Law 8.884, enacted in 1994 (the current Competition Law).

The New Law represents a significant change in the institutional, procedural, and material rules structuring competition policy in Brazil, and it is seen as a major improvement. According to the 2010 peer review by the OECD, the New Law is a "comprehensive legislation that would overhaul the BCPS [Brazilian Competition Policy System] and remedy many of the problems that have plagued it for so long."[2]

Probably the most difficult problem that the New Law aims to tackle concerns the merger review regime. Law 8884, of 1994, established a non-suspensory regime in Brazil: i.e. parties are allowed to close the transaction *before* the decision of the competition authority. Besides being odd compared to most jurisdictions, this brought significant difficulties to the authorities and many uncertainties to merging parties, especially in complex transactions.

The New Law sets up a *pre-merger* review system, together with a significant change in the institutional design of the authorities in charge of such review. This article aims at presenting the main aspects and issues concerning the merger review process under the New Brazilian Competition Law . It will do so by: (i) presenting the new institutional structure of the BCPS; (ii) explaining which transactions will have to be reported, according to the new thresholds; (iii) describing the main phases of the review process; (iv) pointing to some changes in the substantive assessment test; and, finally (v) evaluating the possible effects of such important changes.

II. INSTITUTIONAL ASPECTS: THE "THREE TO TWO" MERGER IN THE BCPS

Law 8.884, of 1994, assigned authority to three bodies of the Federal Administration: Secretariat of Economic Law, under the Ministry of Justice ("SDE"); Secretariat of Economic Monitoring, under the Ministry of Finance ("SEAE"); and the Council for Economic Defence

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[2] OECD, COMPETITION LAW AND POLICY IN BRAZIL: A PEER REVIEW, p. 56 (2010).

("CADE"), a federal bureau linked to the Ministry of Justice. These three agencies now compose the Brazilian Competition Policy System ("BCPS").

SDE is in charge of investigating anticompetitive practices and issuing non-binding opinions in merger analysis. SEAE is also entitled to submit non-binding opinions regarding mergers and anticompetitive practices, and develops a key role in competition advocacy. CADE is the administrative tribunal composed of 7 commissioners responsible for the final rulings with regard to both anticompetitive practices and merger review.

After some years of Law 8.884, such an institutional arrangement was found to be too complex and counterproductive. In many merger cases, there were two divergent opinions by the Secretariats, with both of them looking at the same aspects of the case. In order to save scarce resources and better allocate the increasing workflow, the two Secretariats then agreed in the early 2000s to specialize beyond what was required by law. SEAE now carries on merger review analysis, leaving the investigation of anticompetitive conducts to SDE. On the other hand, SDE usually agrees with the merger analysis done by SEAE. This arrangement has led to visible improvements in merger review procedures in terms of speed and quality during the past few years.[3] Still, the system structured with three authorities has kept being perceived as suboptimal.

The New Law tackles the problem directly. Similarly to what happened in other countries—such as France,[4]—the investigative body will be merged with the decision-making body. In the Brazilian case, SDE and the merger review powers of SEAE will be incorporated into a New CADE, which will then be divided into four main internal bodies:

a. the General Superintendence (*Superintendência Geral* – "SG"), which will inherit both SEAE and SDE's role concerning investigations of anticompetitive conducts and opinions in merger review;

b. the Tribunal, composed of the seven Commissioners (as today);

c. the Department of Economic Studies, responsible for preparing economic reports for both merger and conduct cases as requested by either the SG or the Commissioners; and

d. the Attorney's Office, in charge of legally representing CADE in all judicial proceedings and issuing non-binding opinions in merger review cases, among others.

SEAE will continue to exist and be part of the BCPS as a competition advocacy bureau, in order to evaluate the competitive effects of new regulations—especially from regulatory agencies—and of measures related to foreign trade. This is a role it already plays within the government, but it is likely to be increasingly relevant in the future due to an enhanced legal mandate.

A final provision of the New Law to be stressed is that it provides for the creation of 200 new staff positions within the BCPS, to be primarily allocated to the New CADE. This aims at coping with probably the most important problem of the Brazilian competition authorities: their

[3] *See* Caio Mario da Silva Pereira Neto & Paulo Leonardo Casagrande, *Recent Developments in Brazilian Competition Law and Policy*, 7(1) CPI ANTITRUST CHRON. (July 2010).

[4] "Reform of the French competition regulatory system: the Conseil de la concurrence becomes the Autorité de la concurrence (Competition Authority)," *available at* http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=317.

lack of human and financial resources. It is unlikely that the 200 positions will be filled soon, but there are early estimates that, by the end of 2012, the New CADE could have approximately 90 new staff. This will be vital for the authority to properly manage its new powers and to meet its deadlines, especially in the pre-merger notification system.

III. REPORTABLE TRANSACTIONS

Another extremely important reform established by the New Law is the clearer definition of which transactions have to be notified, with the potential result of a smaller number of transactions being evaluated by the New CADE.

Article 54 of Law 8.884/94 states that "any act that is capable of limiting or otherwise restraining competition in the marketplace, or which may result in the control of relevant markets for certain products or services, shall be submitted to CADE for review." Besides this very broad provision, paragraph 3 of the same article sets forth more objective criteria for mergers to be compulsorily notified: all kinds of concentrations whenever (i) one of the parties to the transaction holds a 20 percent market share in a relevant market; or (ii) one of the players involved has gross annual revenues larger than BRL 400,000,000.00 in the preceding fiscal year.

Article 88 of Law 12.529/11 defines both the sorts of transactions that have to be notified, and the applicable turnover thresholds, dismissing any market share threshold. The New Law requires the mandatory notification of "economic concentrations acts," which are, in turn, defined by Art. 90 as transactions where: (i) two or more previously independent companies merge (section I); (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 other company or companies; or (iv) two or more companies execute a joint venture or any other form of association agreement.

Such economic concentration acts are subject to compulsory notification whenever: (i) one of the players involved has gross annual revenues larger than BRL 400,000,000.00 in the preceding fiscal year; **and** (ii) another of the players involved has gross annual revenues larger than BRL 30.000.000,00 in the preceding fiscal year. It is important to stress that these revenues must be acquired solely in Brazil and that both thresholds must be met for the notification to be deemed as mandatory. Moreover, these thresholds can be updated by a joint ordinance from both the Ministry of Finance and the Ministry of Justice, after CADE's proposal (art. 88, paragraph 1 of Law 12.529/11).

There are at least two likely consequences of these new changes. The first is that there will probably be fewer transactions reviewed by the New CADE, with some estimates ranging between a 20 percent to 30 percent decrease. However, the new thresholds do not deal with a perceived problem of the current regime—that the turnover of the seller is also taken into consideration. Thus, it can still catch many completely innocuous transactions.

It is important to point out that Article 88, paragraph 7 of Law 12.529/11, grants CADE the authority to require the submission of any economic concentration act, limited to one year after the act's execution. Therefore, CADE is competent to review any economic concentration acts, even if the official thresholds are not met. This is likely to happen only in cases where the parties involved have substantial market share in the relevant market, but little total turnover in Brazil (e.g. very local geographic markets). In such cases, however, parties are not obliged to wait for the Council's final decision to close the deal.

IV. PRE-MERGER REVIEW PROCEDURE

The new law establishes a pre-merger review procedure, which will prevent the parties from closing the transaction before clearance from CADE. In order to implement such a system, the law provides new detailed procedural rules.

Article 88, paragraph 2 and paragraph 9, of Law 12.529/11, establish a clear and rigid time frame for the merger review procedure. The entire process must be completed within 240 days, counting from the day of the filing of the notification. This period can be extended only once, in 60 days (300 days in total), if formally requested by any of the involved parties, or in 90 days (330 days in total), if CADE justifiably finds the case to be "complex."

The procedure has well-defined intermediary stages. After the notification, the SG must analyze and decide on the completeness of the information presented, requiring the parties to amend them if any key item is missing. Once complete, the SG will evaluate the notification and must decide if it will review the matter or not. If not, the act is officially approved.

If the case is to be reviewed, the SG can require further investigations in case more information is needed. At the end of its review, the SG issues a formal decision, either provisionally approving the act or challenging it before the Tribunal.

In the first case (i.e. provisional approval), an appeal to the Tribunal can be lodged within 15 days by any interested party or the relevant regulatory agency. Also, the Tribunal itself can arrogate the matter. Such appeal will be assigned to a randomly chosen Reporting Commissioner, who can review or file it (therefore approving the transaction). If no appeals are presented within the 15 days period, the transaction is formally approved.

If the SG decides to challenge the transaction, then it must demonstrate that the act will or can produce adverse effects on competition, and recommend the Tribunal either to approve the deal with restrictions or block it (Art. 57). In such case, the parties have 30 days to present a formal defense of the deal, attaching all studies/opinions they deem relevant (Art. 58). Afterwards, the Tribunal's randomly assigned Reporting Commissioner can ask for any extra information it judges relevant, including other opinions by either the Department of Economic Studies or the Attorney's Office (Articles 59 and 60). The final decision will be issued by the New CADE's Tribunal in a formal judgment session by unanimous or majority vote.

The New Law provides for the possibility of parties negotiating with CADE commitments to deal with possible anticompetitive effects identified by the authority. Such commitments will be negotiated with either the SG or the Reporting Commissioner and will have to be approved by CADE's Tribunal.

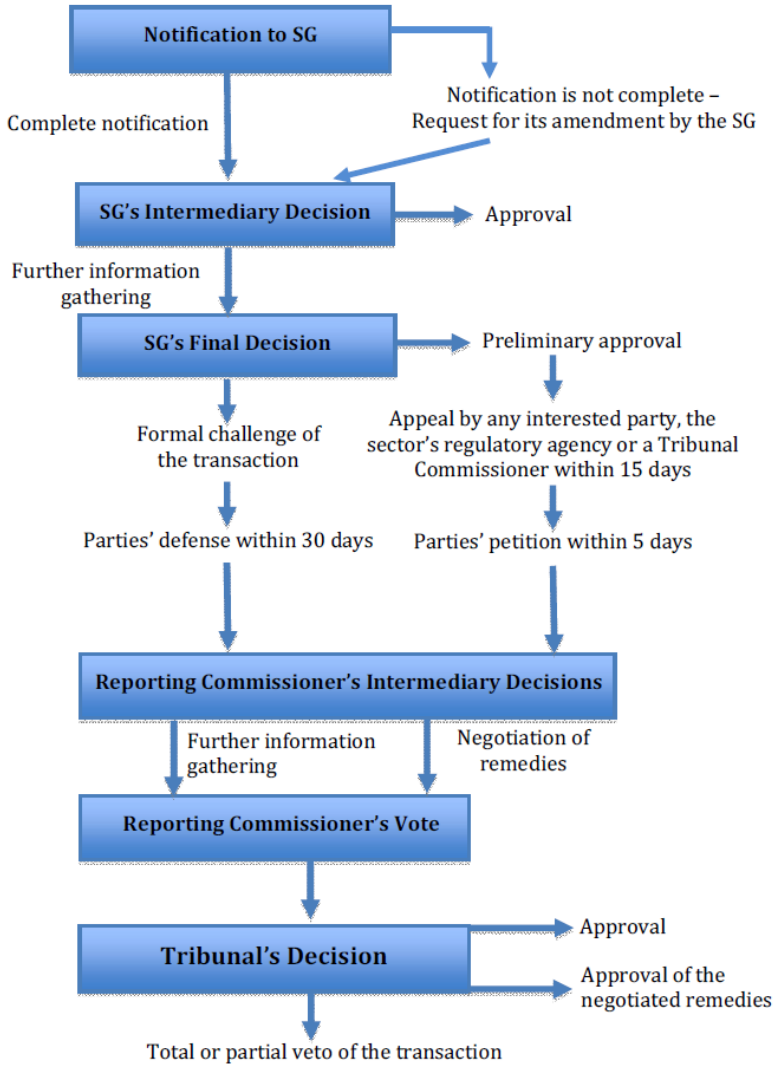

Figure 1: Phases of the merger review procedure under the New Brazilian Competition Law

There is no time limit established by Law 12.529/11 for the presentation of the proposal, or actually for any of the intermediary phases. Therefore, it is expected that CADE will stipulate clearer intermediary deadlines through its own regulations. However, with no intermediary deadlines, it is still unclear what should be the expectation regarding the time frame to clear simple cases.

In view of such profound changes in the way mergers are reviewed in Brazil, at least three possible effects may be expected. The first is that simple mergers will be reviewed by a more simplified procedure than today. Under Law 8884, of 1994, the BCPS has strived to significantly simplify the review of these mergers, with important savings in terms of time and resources. However, every single case has still to formally pass through the two Secretariats and the full Council. With the entry into force of the New Law, the SG alone will be able to approve simple mergers. This, coupled with increased staff, is expected to result in reasonably fast reviews—30 to 40 days—for simple cases.

The second one is that complex cases will in principle no longer take years to be reviewed, as is sometimes the case today. There is a clear time limit for the New CADE to issue its final decision on the case—at most, 330 days.

However, a presidential veto to the New Law raised an important issue concerning such deadline. According to the original wording of the Law, as approved by the Brazilian Congress, if these deadlines were not met, the transaction would be considered to be tacitly approved and parties could then close the deal. President Roussef vetoed art. 64 of the Law with this provision, so now it is not clear what the effects will be if CADE does not meet the legal deadlines. This is a very serious issue, as it may bring significant uncertainty to parties of a transaction subject to merger review in Brazil.

The third effect is that the parties involved in a transaction notified to the New CADE will have stronger incentives to provide all the necessary information to the authority at the beginning of the procedure, as they are not allowed to close the deal until final approval and a complete filling may speed up the analysis. According to recent speeches by CADE's commissioners, a new notification form is being developed and will be made available for comments by February, 2012. This new form will be extremely important, as the SG will be able to dismiss the notification if it is not complete, after requesting the parties to amend it. Such dismissal would certainly cause delays in the analysis, which can be critical to some deals.

Thus, although the New Law establishes a very detailed procedure, some important questions are still open and shall be subject to further regulation, such as: (i) the intermediary deadlines that will be applicable to each phase of the procedure; (ii) whether the authorities will allow pre-notification meetings and understandings; (iii) whether mergers approved in other jurisdictions will be allowed to close with a carve out of the Brazilian assets; and, last but definitely not least, (iv) what will happen to transactions if CADE does not meet the deadlines. These issues and others shall be addressed in the next few months.

V. CHANGES IN THE SUBSTANTIVE ASSESSMENT CRITERIA

The BCPS nowadays consistently employs the 2001 Horizontal Merger Guidelines, approved by the Joint Ordinance SDE-SEAE # 50, that follows standards similar to those of other jurisdictions. The Guidelines establish that a merger shall not be considered harmful to competition when it: (i) does not grant control over a substantial part of the relevant market; (ii) does grant control over a substantial part of the relevant market, but the exercise of market power is unlikely given other structural factors (e.g. low entry barriers); or (iii) does grant control over a substantial part of the market and the exercise of market power is likely, but those negative effects do not surpass the welfare gains generated by the transaction's efficiencies.

The New Law (Article 88, paragraph 5) holds that the New CADE has to block any economic concentration act that: (i) eliminates competition in a significant part of a relevant market; (ii) creates or strengthen a dominant position; or (iii) results in the domination of a relevant market of goods and services. According to the OECD 2010 Peer Review, "the [then] Bill articulates a standard that is based upon that in the European Commission's Merger Regulation" (p. 58).

However, paragraph 6 of the same article stipulates that even if one act has as an outcome the effects provided for above, it can still be completely or partially approved by the New CADE if it is proven that the restrictions caused by the concentration act are strictly limited to obtain: (i)

increased productivity or competitiveness of the parties; (ii) increased quality of the goods or services provided by the parties; or (iii) increased efficiency or enhanced technological and economic development. Another additional requirement is that a relevant part of these benefits must be shared with consumers.

It is not yet clear how the new legal provisions will affect the material assessment of mergers according to the 2001 Horizontal Merger Guidelines. Even before the approval of the New Law, new Horizontal Merger Guidelines and a similar guide for non-horizontal mergers have been discussed within the BCPS.[5] There are indications that they will be submitted to public consultation soon and may be approved by CADE before the entry into force of the new legislation. Just as in the current Merger Guidelines, the new detailed standards are likely to be influenced by the state of the art in mature jurisdictions, such as the United States and Europe.

VI. CONCLUSION

In the past few years, Brazilian Competition policy has evolved substantially, being recognized and praised worldwide for its achievements. However, the marginal gains in policy implementation have arguably reached its limits within the old institutional system. For this reason, key stakeholders (the authorities, the antitrust bar, the central government, etc.) have put substantial energy in discussing institutional changes that led to the New Law.

The approved legal framework will certainly open a new era of the Brazilian competition policy. Regarding the merger review procedure, Law 12.529/11 brings Brazil shoulder-to-shoulder with more mature jurisdictions, implementing the long awaited pre-merger notification system, enhancing the powers of the New CADE. As always, together with new powers comes new responsibilities and the authorities will have a substantial challenge to design a smooth transition, meeting the necessity of timely decisions for an increasingly dynamic economy.

Many issues are yet to be addressed in the next few months, but there is no doubt that the changes implemented by the law will have substantial impact both in local transactions and in multi-jurisdiction filings, requiring lawyers, authorities, and companies to adjust to a new reality.

[5] OECD, Competition Law and Policy in Brazil: a Peer Review, 2010, p. 29.