

Mergers & Acquisitions/Antitrust ADVISORY

August 1, 2012

New Brazilian Merger Control Regime Takes Effect

Late last year, Brazil enacted a new competition law that promised to significantly modify its existing competition regime and dramatically change the landscape for companies involved in mergers or acquisitions that satisfy Brazil's new pre-merger notification thresholds. The new Brazilian Competition Act (the "Act" or "law")¹ took effect on May 29, 2012, and ushered in important revisions to Brazil's pre-merger review program. These revisions include the introduction of (1) a suspensory regime, (2) new notification thresholds, (3) a lengthy review period and (4) detailed notification forms. Unlike the previous system that involved multiple agencies, the new pre-merger control law will be administered exclusively by the Administrative Council for Economic Defense (CADE). This advisory briefly summarizes the key changes and explores the practical effects this law will have on transactions that require clearance under Brazil's new law. These changes will be of interest to any company that does or is considering doing business in Brazil, which is now the sixth-largest economy in the world.

Important Changes

- 1. Suspensory Regime.** Under the Act, parties cannot close a reportable transaction until CADE reviews and approves the transaction. Previously, merging parties were not required to observe a waiting period before closing the underlying transaction. Under the new suspensory regime, companies seeking to engage in specified "concentration acts," such as mergers and acquisitions, must notify CADE of their intent and wait for CADE's approval for such transactions to be finalized. The prohibition on closing a reportable transaction until the government has been notified and a waiting period observed is akin to the process in the United States under the Hart-Scott-Rodino Antitrust Improvements Act. The new Brazilian law imposes substantial penalties on parties that close a deal without obtaining clearance, including fines ranging from R\$60,000 to R\$60 million (approximately US\$30,000 to US\$30 million) or even requiring the parties to unwind the transaction.
- 2. Notification Thresholds.** Brazil's new law also contains revised jurisdictional thresholds. There are two tests that determine whether a transaction is reportable under the new Act: (1) the corporate group of one party to the transaction achieved at least R\$750 million (approximately US\$367 million) in gross revenue in Brazil in the last calendar year, and (2) the corporate group of another party to the transaction achieved at least R\$75 million (approximately US\$37 million) in gross revenue in Brazil in the last calendar year. By requiring at least two parties to have substantial financial turnover in Brazil, the new filing thresholds only apply to companies that have significant connections to Brazil. But, the threshold calculations include the revenues of the entire

¹ The new Brazilian Competition Act is Law No. 12,529/2011 and replaced Brazil's previous antitrust law (Law No. 8,884/1994).

economic group (not just the turnover of the target or acquiring company), so parties engaged in a foreign-to-foreign transaction may still meet the thresholds.²

3. **Review Period.** The new law allows CADE up to 240 days to review a proposed transaction. The review period can be extended under certain circumstances, allowing CADE up to 330 days to issue a final administrative decision. If CADE has not made a decision by the end of the relevant review period, a transaction will be deemed approved. Although there is a “fast-track” procedure for transactions that meet certain requirements, there are no guarantees of expedited clearance. CADE has suggested that it expects to clear “fast-track” deals within 40 days of notification.
4. **Detailed Notification Forms.** Finally, under the new Act, CADE will accept two filing forms: a short form for “non-complex” transactions, or a regular form for “complex” transactions, depending on the nature of the proposed deal. Both forms require substantial amounts of information compared to similar forms in other major jurisdictions.

Practical Implications of Brazil’s New Law

Since transactions meeting the new Act’s thresholds must await clearance before closing, companies that do business in Brazil that are contemplating an acquisition need to consider:

- **Is a Filing Required?** At an early stage, companies need to understand whether the transaction satisfies the new threshold. A required Brazilian notification and CADE clearance can have a substantial impact on the timing of a transaction’s closing.
- **Fast-Track Procedures.** The parties need to analyze whether they can take advantage of the new fast-track procedures. The benefits of these procedures are two-fold: (1) they provide for faster review of the transaction, and (2) the parties can make a short form notification, which requires less detailed information than the regular form.
- **Deal Terms.** Ensure the proper covenants and warranties are included in the deal agreement. Parties do not want to negotiate a deal agreement that requires the parties to close in violation of the new Act.
- **Filing Preparations.** Parties should work together to compile the information needed to complete the filing. Normally, the filing should be made only after there is a binding agreement between the parties.
- **Temper Expectations.** The review period does not start until CADE deems a notification completed, and because no regulation or precedent has yet been issued regarding a shorter first-phase review period, there is significant timing uncertainty under the new law. Thus, companies involved in a transaction that requires clearance should be prepared to wait up to 330 days to receive it.
- **Observe CADE’s Actions.** CADE and its officials are continuing to issue interpretations of the new law and its regulations, so additional time will help clarify how the specific details and procedures of the new regime are being implemented.

² An “economic group” includes all companies under common control and any other companies in which 20 percent or more of the voting stock or equity is held. The notification thresholds apply to the entire economic group, including the seller and other retained businesses not parties to the transaction.

If you would like to receive future *Mergers & Acquisitions/Antitrust Advisories* electronically, please forward your contact information including email address to antitrust.advisory@alston.com. Be sure to put “**subscribe**” in the subject line.

If you have any questions or would like additional information, please contact your Alston & Bird attorney or any of the following:

Select Members of Alston & Bird’s Antitrust Group

Randall L. Allen
404.881.7196
randall.allen@alston.com

Peter Kontio
404.881.7172
peter.kontio@alston.com

Adam J. Biegel
404.881.4692
adam.biegel@alston.com

Mark A. McCarty
404.881.7861
mark.mccarty@alston.com

Teresa T. Bonder
404.881.7369
teresa.bonder@alston.com

Jason Rottner
404.881.4527
jason.rottner@alston.com

William H. Jordan
404.881.7850
bill.jordan@alston.com

Valarie C. Williams
404.881.7631
valarie.williams@alston.com

Matthew D. Kent
404.881.7948
matthew.kent@alston.com

Select Members of Alston & Bird’s Mergers & Acquisitions Group

Dennis O. Garris
202.239.3452
dennis.garris@alston.com

Teri Lynn McMahon
404.881.7266
teri.mcmahon@alston.com

Kevin Miller
212.210.9520
kevin.miller@alston.com

ATLANTA

One Atlantic Center
1201 West Peachtree Street
Atlanta, GA 30309-3424
404.881.7000

BRUSSELS

Level 20 Bastion Tower
Place du Champ de Mars
B-1050 Brussels, BE
Phone: +32 2 550 3700

CHARLOTTE

Bank of America Plaza
Suite 4000
101 South Tryon Street
Charlotte, NC 28280-4000
704.444.1000

DALLAS

2828 N. Harwood St.
Suite 1800
Dallas, TX 75201
214.922.3400

LOS ANGELES

333 South Hope Street
16th Floor
Los Angeles, CA 90071-3004
213.576.1000

NEW YORK

90 Park Avenue
New York, NY 10016-1387
212.210.9400

RESEARCH TRIANGLE

4721 Emperor Boulevard
Suite 400
Durham, NC 27703-8580
919.862.2200

SILICON VALLEY

275 Middlefield Road
Suite 150
Menlo Park, CA 94025-4004
650.838.2000

VENTURA COUNTY

Suite 215
2801 Townsgate Road
Westlake Village, CA 91361
805.497.9474

WASHINGTON, D.C.

The Atlantic Building
950 F Street, NW
Washington, DC 20004-1404
202.239.3300

www.alston.com

© Alston & Bird LLP 2012