

## New Merger Control Regime Now in Force in Brazil

### Revised Thresholds May Lead to Fewer Notified Transactions, but Prior Approval is Now Required

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On May 29, 2012, the new Brazilian Competition Act (Law 12,529/11) (the “**Brazil Competition Act**” or the “**Act**”) went into effect. Included within the Act are substantial revisions to the merger notification and review process. Most significantly, the Act now requires that parties to a merger or other acquisition which amounts to a “concentration” *must obtain approval prior to consummating the transaction* from the newly consolidated Brazilian antitrust authority (“**CADE**”). The previous competition law in Brazil did not require clearance prior to closing, but only that transactions within the jurisdiction of the applicable authorities be notified to those authorities within 15 business days after executing a binding agreement. On the other hand, revenue thresholds requiring a notification (and now also approval) have increased significantly, which should result in fewer transactions requiring notification.

The most significant provisions of the Brazil Competition Act and its implementing regulations, as they pertain to merger control, are summarized below.

#### Potentially Covered Transactions

Transactions that are considered “concentrations,” and that therefore must be notified if the revenue thresholds are met, include (i) mergers, (ii) direct and indirect acquisitions of control of or a minority interest in an entity, or of tangible or intangible assets, and (iii) joint ventures and other “association agreements.”

Specifically, acquisitions of minority interests can trigger a filing and pre-closing approval obligation when:

- the acquirer becomes the major investor in the target; or
- there is overlap (horizontal or a vertical – upstream or downstream – relationship) between the acquirer and the target company, *and* the acquiring group either (i) acquires 5% or more of the target’s shares; or (ii) after already holding at least 5% of the target, increases, through incremental acquisitions, its interest in the target by 5% or more; or
- there is no overlap between the parties involved, but the acquirer (i) would hold 20% or more of the target’s shares as a result of the acquisition; or (ii) already holds 20% or more of the target and acquires, directly or indirectly, 20% or more of the remaining shares it does not own from a single seller; or
- there is overlap between the acquirer and the target company, and the acquirer already controls the target and acquires, directly or indirectly, 20% or more of the remaining shares it does not own from a single seller.

#### Notification Thresholds

A “concentration” is subject to mandatory notification and approval from CADE prior to closing when:

- at least one of the “economic groups” involved in the transaction achieved gross revenue exceeding **R\$750 million** (approx. US\$367 million) in the last fiscal year in Brazil; *and*
- at least one other economic group involved in the transaction achieved gross revenue exceeding **R\$75 million** (approx. US\$37 million) in the last fiscal year in Brazil.

The Act eliminates the alternative market share threshold of 20% as a trigger for filing.

An “economic group” includes all companies under common control and any other companies in which 20% or more of the voting stock or equity is held.

For private equity funds, an “economic group” includes: (i) all funds under common management; (ii) the fund managers; (iii) investors holding 20% or more of any of the involved funds; and (iv) portfolio companies in which the funds hold 20% or more of the voting stock or equity.

It is important to note that the thresholds apply to the entire economic group to which the target belongs, including the seller and other retained businesses not part of the transaction. They also apply equally to domestic and foreign-to-foreign transactions.

## Review Periods

The Act and regulations allow CADE up to 240 days from the date of the filing to issue a decision, which period may be further extended by 60 or 90 days. If no decision is reached by the end of this review period, the transaction is deemed approved.

While there are no specific provisions yet in place establishing deadlines for a “fast-track” procedure, CADE has indicated that simple transactions that do not raise antitrust concerns may be expected to be cleared in 40 to 60 days. “Simple” transactions include:

- certain “greenfield” joint ventures where the new company will not operate in a market horizontally or vertically related to the contributing parties;
- further consolidation by an acquirer already controlling the target; and
- transactions in which the acquirer and target have a combined market share in Brazil below 20%.

The parties may also propose remedies at the time of filing, or at any point during the review process.

All final decisions of CADE may be challenged before the courts of Brazil.

## Penalties and Derogations From Pre-Closing Approval Requirement

Parties closing a concentration prior to obtaining approval from CADE may be subject to fines ranging from R\$60,000 to R\$60,000,000 (approx. US\$29,000 to US\$29,000,000) and administrative proceedings investigating the transaction, which may result in divestiture or other remedies.

Upon the parties’ request, CADE may authorize the consummation of a notified transaction prior to approval in certain limited circumstances in which the target company would face substantial financial hardship as a result of a delay in closing.

Finally, public takeover bids are not subject to preapproval, but voting rights to a target’s shares acquired in a hostile offer may not be exercised prior to approval, except as authorized by CADE to protect the acquirer’s investment.

## Confidentiality

Once a filing is made, a notice is published, stating the names of the parties and the industry(ies) involved. The parties may request confidential treatment of the filing itself.



The Brazil Competition Act brings the merger control regime governing this important economy in line with those of many of the world's leading merger control jurisdictions, and the revised thresholds will allow many transactions previously notifiable in Brazil to proceed without the need to file there. However, the new preapproval requirement will undoubtedly increase the timeline to closing for deals with any significant Brazilian impact. Whether CADE will be positioned to expedite review of "simple" transactions in a fashion commensurate with leading merger control regimes remains to be seen.

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If you have any questions regarding the matters covered in this publication, please contact any of the lawyers listed below or your regular Davis Polk contact.

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