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I. INTRODUCTION

The present article aims to outline the latest developments of Competition Law and Policy in Brazil. The so-called Brazilian Competition Policy System ("BCPS") has become increasingly more active over the past decade. As a result, CADE, one of three Brazilian antitrust authorities, was elected "Agency of the Year in the Americas" in 2011 by the *Global Competition Review*, a leading competition law journal.

Since the beginning of the 2000s, a commodities boom has fueled strong growth and lowered poverty across Latin America. Once hobbled with high inflation and highly susceptible to worldwide crises, Brazil now has wide foreign reserves and a rousing consumer market. Furthermore, Brazil achieved an investment grade status for its sovereign debt in 2008 and 2009.

The BCPS is internationally recognized for creative initiatives to further increment the effectiveness of their enforcement activities, including a strong and creative cartel enforcement program and efforts to streamline merger review procedures.

This article aims to provide a brief perspective and commentary on such developments. In order to do so, it will focus on the following topics: (a) the foundations of competition policy in Brazil; (b) an overview of the current Brazilian Competition Policy System; and (c) the enactment of the new legislation and its main changes.[2]

II. FOUNDATIONS OF COMPETITION POLICY IN BRAZIL

Competition policy has its foundation in the 1988 Brazilian Constitution. Article 170 contemplates that the "economic order" of Brazil shall be "founded on the appreciation of the value of human work and on free enterprise," and shall operate with "due regard" for certain principles, including "free competition," "the social role of property," "consumer protection," and "private property."

A series of reforms began in 1990, featuring an economic liberalization process, deregulation, and price liberalization.[3] In 1994, after several economic plans, in response to a period of hyperinflation, the "Real Plan" was implemented. This plan introduced a new currency, which was then pegged to the U.S. dollar (it is no longer, having been allowed to float

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[2] Please observe that this brief essay reflects a preliminary opinion based on the new law which was just signed on November 30 and published on December 1. However, the new law will not go into effect until May 29, 2012. Before then, adjustments may be required to reflect the implementation of the law and will be made in due time.

[3] It is worth stressing that the government remains active in some sectors, notably in oil and gas (Petrobrás), the dominant firm in that sector, in electricity generation and transmission (Eletrobrás), and in banking (Banco do Brasil and Caixa Econômica Federal).

since 1999), and tight fiscal and credit policies. As a part of the reform, a new competition act was enacted.

In essence, Brazil's modern era in competition policy began with the competition law of 1994, which is coincident with the country's transition to a market-based economy.

III. OVERVIEW OF THE CURRENT BRAZILIAN COMPETITION POLICY SYSTEM

Competition law and practice in Brazil is governed primarily by Law no. 8,884, of 1994, as further amended.[4] The Brazilian Competition Policy System ("BCPS") is composed of three bodies—namely, the Secretariat for Economic Monitoring of the Ministry of Finance ("SEAE"), the Secretariat of Economic Law of the Ministry of Justice ("SDE"), and the Brazilian Competition Tribunal ("CADE").

Briefly, SEAE issues non-binding economic opinions in merger reviews and may also issue non-binding opinions related to anticompetitive practices. SDE is the chief investigative body in matters related to anticompetitive practices, also issuing non-binding opinions in merger cases. CADE is the administrative tribunal that makes the final rulings in connection with anticompetitive practices and merger reviews.

Improvements since 2003 eliminated overlapping functions, with SDE concentrating on anticompetitive agreements and abuse of dominance while SEAE concentrates on merger analysis. The implementation of a "fast track" procedure for certain mergers has constituted an important achievement of the BCPS. In 2002, SEAE and SDE adopted, in an informal way, a streamlined procedure for simple cases. The procedure was formalized in 2003 by means of a joint ordinance,[5] which sets forth criteria for the selection of mergers for the fast track procedure. In 2004 the two agencies began considering a procedure for notifying mergers simultaneously and sending a joint report to CADE. For its part, CADE streamlined its procedures; more frequently it adopted the SEAE/SDE report as its own instead of creating a new one. In 2006 SEAE and SDE issued another ordinance,[6] which further institutionalized the cooperation between the two agencies and shifted more of the investigative work to SEAE.[7]

More recently, in March 2009 the BCPS formally made further refinements to its fast track procedures. Nowadays, the fast track system applies to as many as 70 percent of the mergers notified to the BCPS. It is not uncommon for fast track mergers to be approved in 30 days.

Although the system gained a reputation as hard-working and qualified, decisions occasionally reflected an understanding of competition analysis, producing several challenges. These included the lack of coordination among the three agencies, the laggard process of investigations, excessive rates of staff turnover, and inadequate resources.

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[4] The law has been amended three times: in 1999, imposing a merger notification fee; in 2000, giving the BCPS important new powers in conducting investigations (notably powers to conduct dawn raids and to institute a leniency program); and in 2007, clarifying the procedures for settling conduct cases and authorizing settlement in cartel cases.

[5] *See* SEAE/SDE Joint Ordinance No. 1.

[6] *See* SEAE/SDE Joint Ordinance No. 33.

[7] For further analyzes in English, *e.g.*, Organisation for Economic Co-operation and Development Inter-American Development Bank, *Competition Law and Policy in Brazil – A Peer Review*, pp. 29-30 (2010).

IV. MERGERS

Brazil's economy has reported a remarkable growth during these last years. As a result, the number of deals (mergers, acquisitions, joint ventures, and other agreements) notified to BCPS for review has risen. Article 54 of Law 8884/94 established that any acts that may limit or otherwise restrain open competition, or that result in the control of relevant markets for certain products or services, shall be submitted to CADE for review.

Based on this article, therefore, a wide range of transactions are caught by the Brazilian legislation including, but not limited to, any kind of corporate combination of business (mergers, associations, joint ventures) and acquisition of assets and acquisition of shares (even minor interests).

This same article provided an overview of the notification process. There are two thresholds set forth in the Brazilian legislation: (i) the annual gross turnover of the parties; and (ii) the resulting market share.

The transactions that must be notified satisfy either of two tests: any of the parties exceeded R$400 million (approximately US$217 million)[8] on its last exercise gross turnover; and, after the merger, there is a resulting joint market share of at least 20 percent in the relevant market,[9] which is defined as the market where there is an overlap between the parties' businesses or, in the absence of overlap, the market in which the target company acts.[10]

A few years ago some of CADE's precedents would have considered the "annual gross" threshold as referring to the worldwide turnover of the group. Nonetheless, more recently, CADE has switched its position. Nowadays, CADE reckons that the last exercised gross turnover embraces the annual gross income of the companies that belong to the same economic group in Brazil.[11]

There is still required notification of cases for a small acquisition by a firm with revenues already above R$400 million, but these transactions are usually subject to the BCPS' "fast track" procedures,[12] providing celerity in analyses.

The applicability of the market share criterion also has been administratively modified by CADE, which has decreed that the criteria applies only if the transaction causes the share of the resulting firm to exceed 20 percent, or if both parties to a merger operate in the same market and one of them has a 20 percent share of that market.

Another criticism that remains is related to the fact that the market share test is too subjective, but this effect too has been blunted over time. The number of notifications in which the market share test—but not the revenue test—is met, is few. CADE seldom initiates an enforcement action for failure to notify under the market share criterion.[13]

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[8] According to the Currency Exchange Rate of November 21, 2011.

[9] Even if one of the companies already had a market share exceeding 20 percent in a relevant market before the transaction, CADE reckons that it should be also submitted to merger control.

[10] For criticisms of these criteria, *see*, *e.g.*, OECD and IDB, *supra* note 7 at 29-30.

[11] *See* CADE S*úmula* (precedent) No. 01, of 2005, issued pursuant to CADE Resolution No. 39, of 2005.

[12] For further information on this issue, *see* CADE's Annual Reports 2007, 2008, 2009, and 2010.

[13] *See* OECD and IDB, *supra* note 7 at 30.

V. CONDUCTS

Articles 20 and 21 of Law 8884 deal with all types of anticompetitive conduct other than mergers. Unlike the laws of many other jurisdictions, Brazil's law does not contain separate provisions dealing with anticompetitive agreements and single firm abusive conduct.

The article further provides that a dominant position is presumed when "a company or group of companies" controls 20 percent of a relevant market. The article provides that CADE may change that 20 percent threshold "for specific sectors of the economy," but CADE has not formally done so to date.

Regarding the fines applied, it is worthy to stress that according to Article 15 of Law 8,884/94 competition law applies to corporations, associations of corporations, and individuals. Companies are subject to fines of between 1 and 30 percent of their pre-tax total turnover in the year prior to the beginning of the investigation,[14] but no less than the amount of the unlawful gain from the conduct. In addition, managers of companies in violation may be fined between 10 and 50 percent of their company's fine.[15,16]

A very striking goal regarding recent developments on conducts in Brazil is related to cartels. Since 2003, SDE have focused on conducts, mainly on cartels. In that year SDE conducted its first dawn raids and the first leniency agreement was reached. SDE has reconfigured itself to become primarily an anticartel unit. In 2007 it established a special group to concentrate on bid-rigging and to promote competition in public procurement.

Furthermore, in 2009 SDE created its own computer forensics unit in order to analyze electronic information obtained in dawn raids and by other means. Moreover, several agreements with federal and state prosecutors were signed. As a result, the anticartel program has grown steadily.[17]

In addition, Brazil has an active and strong leniency program. Article 35B of Law 8,884/94[18] is the enabling legal authority for leniency agreements. It provides that SDE can enter into agreements with individuals and corporations participating in a cartel that can,

[14] Note that the fine is to be calculated as a percentage of the respondent's total revenues, not just those that it derives from the affected or relevant market.

[15] Other individuals and organizations not engaged in commerce (such as trade associations), and therefore not generating revenues upon which a fine can be calculated, may be fined between approximately BRL 6,000 and 6,000,000 (currently about USD 3,500 – 3,500,000).

[16] Based on Articles 24 and 25 of Law 8,884/94, CADE has other sanctions at its disposal, including powers to prevent a company from participating in public tenders for up to five years, to require the dissolution of a firm or a partial divestiture of assets, and to issue remedial orders for the purpose of preventing recurring violations. Furthermore, it can also impose fines for failure to observe one of its orders and for obstruction of an investigation by various means.

[17] For further information, please *see* official folder on cartels in English, *Fighting Cartels: Brazil's Leniency Program*, *available* at [*http://portal.mj.gov.br/main.asp?Team={DA2BE05D-37BA-4EF3-8B55-1EBF0EB9E143}*].

[18] In addition, this article provides for the so-called "leniency plus" which also is a part of leniency programs in other countries. An applicant who does not qualify for leniency in one cartel but who discloses to SDE the existence of a second is eligible to receive full leniency for the second cartel and a reduction of up to one-third of the applicable penalty in the first. Finally, while SDE, the main investigating body in conduct cases within the BCPS, has authority to enter into a leniency agreement on its own, it is up to CADE to make the final decision on the sanction, either excusing the applicant from all sanctions or reducing the amount of the fine, depending on whether SDE had prior knowledge of the conduct.

depending on the circumstances, either completely excuse the applicant from sanctions or reduce them by one- to two-thirds.

According to the article mentioned above, the applicant must satisfy the following conditions: (i) the applicant is the first to come forward and confesses its participation in the unlawful practice; (ii) the applicant ceases its involvement in the anticompetitive practice; (iii) the applicant is not the leader of the activity being reported; (iv) the applicant agrees to fully co-operate with the investigation; (v) the cooperation results in the identification of other members of the conspiracy and in the obtaining of documents that evidence the anticompetitive practice; and (vi) at the time the company comes forward, the SDE has not received sufficient information about the illegal activity to ensure the condemnation of the applicant.

Full or partial immunity depends on whether SDE was previously aware of the alleged cartel. If the SDE was unaware, the party may be entitled to a waiver from any penalties.

On the other hand, if the SDE was previously aware, the applicable penalty can be reduced by one- to two-thirds, depending on the effectiveness of the cooperation and the "good faith" of the party in complying with the leniency agreement.

In Brazil, a leniency agreement shelters both administratively and criminally the directors and managers of the cooperating firm if those individuals sign the agreement and fulfill the requirements provided in the law.

It is important to highlight that between 2003 and 2010 there were more than 15 leniency agreements, and others were being negotiated. Approximately 60 percent of these agreements were with parties to international cartels, in situations in which the participants had entered into leniency agreements in other countries[19].

VI. THE ENACTMENT OF THE NEW ANTITRUST LEGISLATION AND ITS MAIN CHANGES (BILL NO. 06/09)

In October 2011, the Brazilian National Congress approved a new legislation, establishing a new antitrust milestone in Brazil. On November 30, President Dilma Rouseff's formally approved the legislation.[20] This legislation raises three main changes: (a) the introduction of the premerger notification system; (b) the modification of the notification threshold; and (c) the unification of the three competition authorities.

The long awaited premerger notification system will replace the current post-merger analysis model. This new system requires merging parties to notify CADE of any transaction meeting the minimum thresholds, allowing the parties to receive the decision from CADE prior to the closing of the deal.

Furthermore, the current thresholds mentioned above will be replaced. The new thresholds for notification are revenues of R$400 million for one party and R$30 million for the other. The recently approved bill does not expressly state a mandatory requirement of 20 percent

19 According to the current antitrust legislation, the leader of the cartel is not eligible for leniency program. On the other side, the new law reckons that the leader of the cartel is eligible for this program.

20 The bill was published in the Federal Official Gazette on December 1, 2011, and the new law will enter into force on May 29, 2012. For the merger cases and antitrust investigations that are currently pending CADE s decision, after its entry into force the new law will be applied only (*i*) in respect of procedural issues; (*ii*) if the practice is no longer considered an antitrust violation; or (*iii*) if the applicable penalty is less severe.

market share in the relevant market. These new threshold requirements, and the exclusion of the market share requirement, make the notification process clearer to private parties as well as the antitrust agency. According to the new law, CADE will have 330 days to complete its merger review[21,22]. In addition, the antitrust agency will also be able to review mergers below the threshold within one year of their completion.

From an institutional design perspective, the antitrust department at the Secretariat of Economic Law (DPDE/SDE) and CADE will be merged into one authority. SEAE will remain, although its role in merger reviews will transfer to the new single authority, allowing the new legislation to create 200 new positions at CADE. This measure will guarantee a permanent staff to the agency, which is undoubtedly essential to allowing the proper functioning of the premerger review system. Nowadays, CADE has no more than 30 public servants to handle cases.

Under the new law, CADE will be composed of two main internal bodies, the Administrative Tribunal and the Superintendence General. Moreover, the Department of Economic Studies, which was created in 2009, will be improved. The Tribunal is the decision-making body in charge of final decisions on any merger notifications that are not cleared by the Superintendence General. In turn, the Superintendence General will conduct investigations of anticompetitive practices and is empowered to render final administrative decisions to clear merger notifications.

In addition, the President and commissioners are appointed by the President of the Republic and approved by the National Senate. Their terms at CADE will be for four years (non-renewable), up from two. Their terms are staggered to avoid simultaneous vacancies and the possibility that a quorum could not be convened. By its turn, the Superintendent General, appointed by the President of the Republic and approved by the Senate, serves for a two-year term, with the opportunity for one additional re-appointment.

VII. CONCLUDING REMARKS

The new legislation contributes hugely to the modernization and improvement of Brazil's existing competition law enforcement system, although some additional improvements could have been achieved. The recently passed bill deals with some of the most critical problems of Brazilian antitrust law and policy, such as the inefficiencies stemming from having three different agencies in charge of competition law enforcement and the lack of staff. In line with international best practices, this legislation moves from an intricate three-agencies structure to a single autonomous body in order to accelerate merger review process, reduce overlapping functions, and to fortify legal certainty.

The Brazilian National Congress and the Federal Government share responsibility for this improvement, boosting a more effective institutional design and making a significant contribution to the development of the Brazilian economy and to the enhancement of social

[21] The new law establishes that the final decision must be reached within 240 days of the filing, a deadline that can be deferred for up to 60 days at the Applicants' request, or for up to 90 days based on the Administrative Tribunal's decision.

[22] In this regard, President Dilma Rousseff vetoed Article 64 of the new legislation. The original wording of the mentioned article established that if these deadlines were not met, the deal would be considered to be tacitly approved and parties could then close the deal. Therefore, it it not clear what the effects will be if CADE does not meet the deadlines set in this new law.

welfare. By simplifying the institutional setting, the new Brazilian legislation will clarify the understanding of the regulatory framework of the merger review, improving business environment, mainly from an international perspective, which is able to attract more intensively foreign investment.

Despite these substantial improvements, there is certainly still a lot of work to do, mainly related to the implementation of this new policy. For instance, a fundamental part of this improved institutional change is the establishment of a premerger regime, aiming at making more efficient the system of enforcement of the Brazilian competition law by reducing the time of merger review and making more effective the enforcement of the remedies of the system of merger control. Therefore, this is an important opportunity to discuss relevant aspects of the implementation of this policy.