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CADE, Brazil

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I. INTRODUCTION

The new Brazilian Competition Law (Law no. 12,529/11) brought two major changes from the previous statute (Law no. 8,884/94): (i) it changed the enforcement structure by merging the functions previously performed by different governmental bodies² into one called the General Superintendence, which is now responsible for merger review and anticompetitive conduct investigation; and (ii) it initiated a pre-notification system through which CADE's approval is required before the closing.

Even though the new enforcement structure was widely regarded as an improvement, the implementation of a pre-merger system has generated some level of anxiety throughout the business community, especially on account of the review period established by the statute (which allows the Brazilian Competition Authority a 240-day period for merger review, with the possibility of either 60- or 90-day extensions³). The increasing number of transactions notified in Brazil, as well as the lack of staff, has created an overall apprehension as to the likely performance of the new Brazilian Competition Agencies in reviewing mergers under a pre-notification system.

Therefore, not only does CADE face the natural challenges that a transition from a post- to pre-merger system entails, but it also has had to develop an outreach strategy to communicate the transition efforts and its likely results to the business community. This article describes the transition process that CADE has undergone towards a pre-merger review, which encompassed a massive communication strategy not yet finished.

II. TRANSITION PLANNING: FIRST STEPS TOWARDS A PRE-MERGER REVIEW

Roughly one year before the enactment of the new Competition Law, the former three Brazilian Antitrust agencies started planning the transition to the pre-merger notification system. Right at the beginning of the planning, several meetings were held with both Brazilian and international lawyers in order to identify the main concerns regarding the change in the merger

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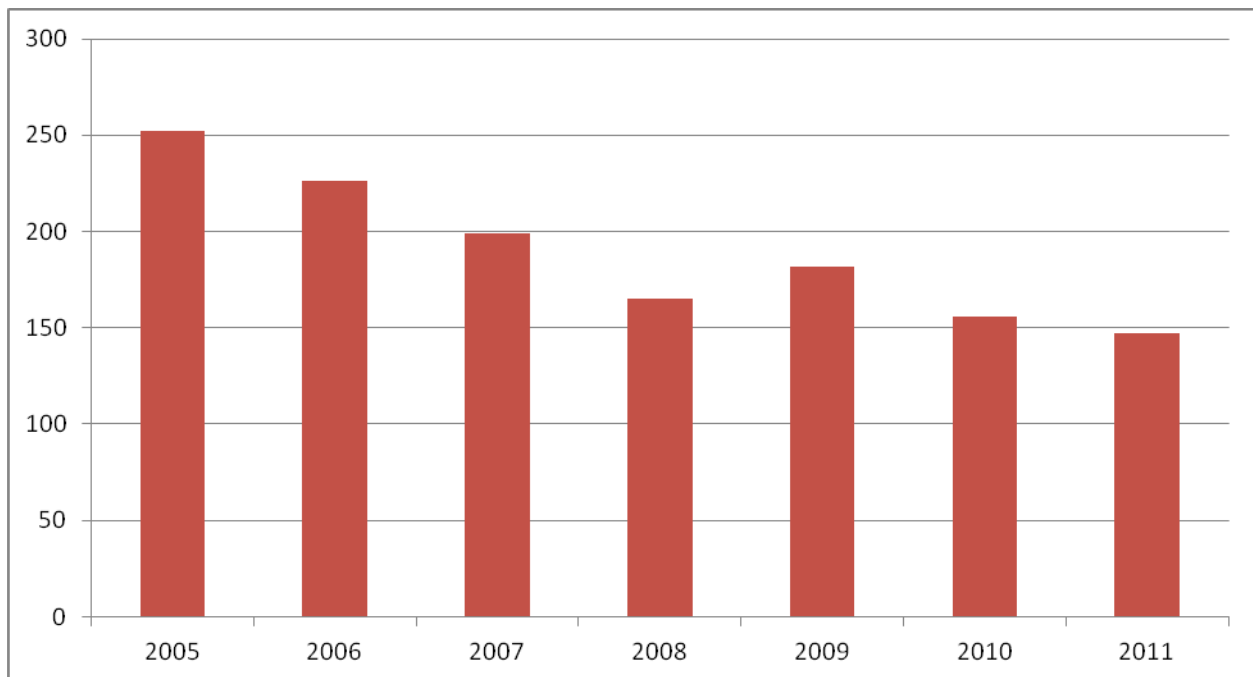
² CADE and the Secretariat of Economic Law ("SDE") merged under the new Law. The new body is comprised of the General Superintendence, responsible for investigating anticompetitive conducts and reviewing mergers, and a Tribunal, formed by six commissioners and a president, responsible for deciding on antitrust cases and on mergers challenged by the General Superintendence.

³ The deadline for merger review can be extended for 60 days by request of the parties or 90 days, by request of the General Superintendence to the Tribunal.

notification process. A major part of the concern related to the possibility of delays in the review of the simple cases, for they could take the whole of the 240-day review period set forth, thus delaying many transactions.

About 75 percent of the roughly 700 cases notified in Brazil each year are simple cases and more than 90 percent are cleared. Thus, the review period averages are largely influenced by the great amount of simple cases reviewed by CADE. Over the years, the average review period in Brazil has decreased from 252 days in 2005 to 147 days in 2011. This represents a reduction of more than 40 percent of the time a merger is reviewed by the Brazilian competition authorities. However, such performance is well below what would be necessary under a pre-merger notification system.

Graph 1 - Total Average of merger review period in Brazil (days)



If only complex cases are taken into account the scenario would be worse. These are cases that require a thorough investigation, and usually take much longer than the averages shown above. In 2011, for example, about 13 percent of the mergers reviewed by CADE would not meet the deadline imposed by the new law. Cases that ended with a remedy settlement, in which the analysis is usually more complete (and consequently longer), can provide a good idea of how long it takes to review a complex merger in Brazil. For these types of mergers, the average review period was 724 days, which is more than twice the amount of days of the new period established. Since 2004, out of the 31 cases with remedy commitments, only 3 would meet the new deadline.

During the planning process, CADE's working group for the pre-notification system diagnosed the reasons for the delays. The previous law provided incentives for the merged parties not to be as cooperative as they could have been if time was more pressing (since transactions could be closed before CADE's approval). This permission to close the transaction before CADE's clearance gave little incentive for parties to provide information needed for an appropriate analysis early rather than later. The longer it took for CADE to review the merger,

the harder it would be to implement remedies or to completely block the merger. It was very common for parties to ask for deadline extensions of many days or often weeks when CADE requested information. For example, in a very important merger of two major food companies in Brazil, which was settled with a remedies commitment, the merged parties requested a total of more than seven months of deadline extensions.

On the other hand, the previous law also generated perverse incentives within CADE's staff. Since the parties were already implementing the merger, there was also not much pressure for CADE to finish its review. And CADE could stop the clock whenever it requested information from anyone, be it the parties involved in the merger, third parties, or other government authorities. This had several consequences in the way merger reviews were conducted by CADE. The frequent requests for deadline extensions were almost always granted. Also, to gather information from third parties, instead of sending an extensive and complete request of information to each one, CADE would send several information requests subsequently, each regarding one step of the analysis (relevant market definition, barriers to entry, etc). Thus CADE could extend the review period almost indefinitely, taking as long as it needed to build the case, despite previous decisions.

These aspects of the previous law shaped the interaction between the Brazilian Competition authorities and the parties in a way to make merger review periods very long for both moderate and complex cases, creating much inefficiency for both sides.

III. TRANSITION PLANNING: BENCHMARKING AND MANAGEMENT RESEARCH

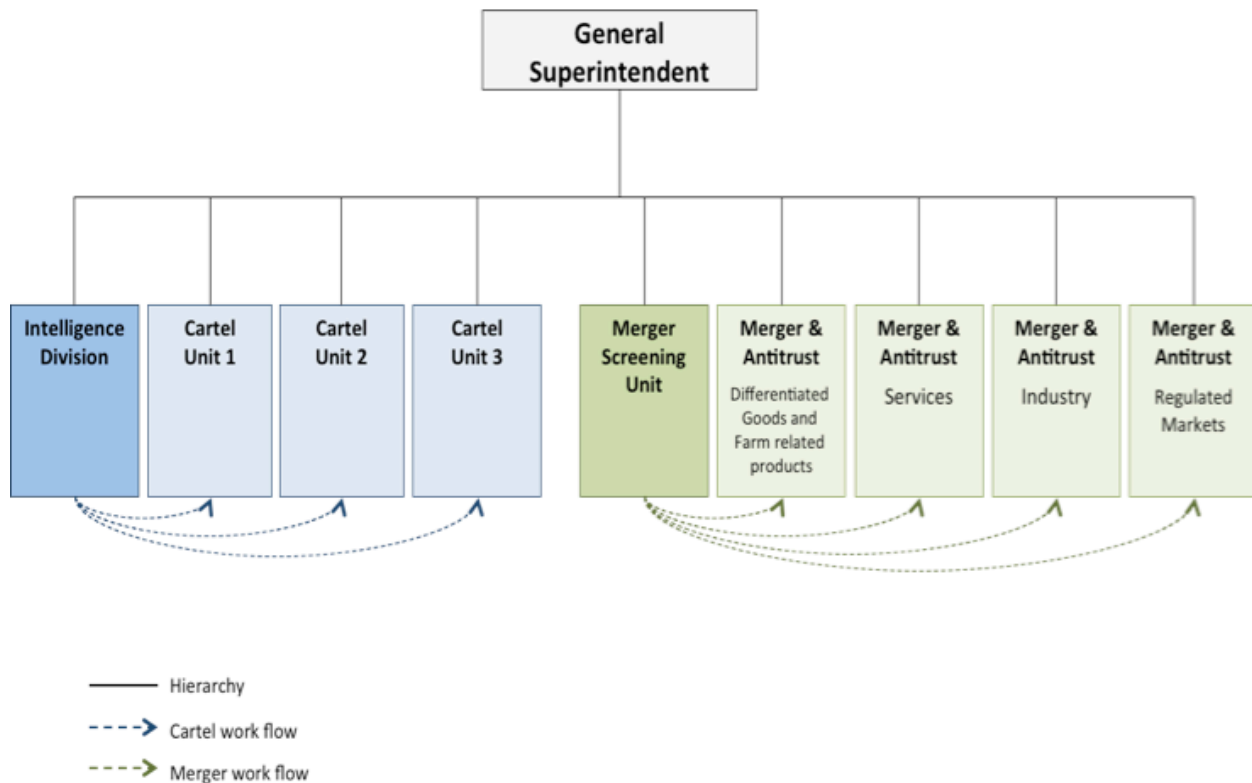
The first phase of the transition planning identified that the incentives, both from the Competition Agency's staff and from the requesting parties, would have to change in order to reduce the merger review period. Part of the answer to this challenge was already given by the new Competition Law, since the requesting parties to a transaction can no longer close a transaction before CADE's clearance, and CADE can no longer suspend the review period due to the lack of "stop the clock" provisions.

A fast review process is only possible if the competition authority has, very early on, all the information needed for its merger analysis. Under a pre-merger regime, the new law provides incentives for that, since it allows CADE to amend filings that are lacking information, thereby preventing the parties from closing in case of defective filings. (Should CADE decide to amend a filing, then the 240-day period only begins at the day of the presentation of the amendment by the requesting parties.) It actually allows CADE to reject the filing should the amendment not be satisfactory. And the lack of stop-the-clock mechanisms also shifts the incentives for CADE's staff. Under a pre-notification regime, CADE now has a declared commitment to review mergers in much less than the 240-day period for the vast majority of the cases in order to avoid delaying transactions that do not pose competition concerns. Simple cases are to be reviewed in less than 30 days.

Benchmarking and management research ensued after the first phase to identify best practices that would make the merger review process more efficient. Surveys were sent to several international competition authorities with questions related to the management of their pre-merger review system. And some of these countries were visited right after receipt of the answers to clarify a few of the management choices. Such visits and their results were widely publicized

though seminars and meetings with lawyers, as they were paramount to the organizational structure chosen.

Benchmarking produced several changes in the previously foreseen structure of the new competition agency in Brazil. The law had already established a Tribunal (composed of six commissioners and a president) and an investigatory body, the General Superintendence. It did not, however, specify how the Superintendence should be divided. Taking into account the studies carried on and CADE's own past experience, it was decided to separate cartels from mergers and unilateral conducts. For this initial division, it was realized that cartels require a completely different type of investigation, in which different techniques are used and hard evidence is prioritized. Mergers and unilateral conducts, although different in many respects, have a more similar kind of investigation, with more emphasis on economic analysis.



In the mergers and unilateral conducts' branch of the Superintendence, one unit is responsible solely for the screening of mergers. This triage unit is also very important for the interaction with the parties, since it is the first and main contact they have with the competition authority. Since Brazil has a very large number of merger notifications,⁴ this unit was also created to rapidly identify the mergers that pose no threat to competition and clear them in a very short period. This fast track procedure is aimed at improving CADE's efficiency on analyzing simple mergers. The other four units of the mergers and unilateral conducts' branch were divided into

⁴ This number tends to drop with the new Law that sets a second threshold, but is still expected to be well above the average of other countries. The threshold of the previous law, set in 1994, was a turnover of R\$400 million (\$200 million) of any party involved in the transaction. The new threshold is a turnover of R\$750 million (\$370 million) for one of the parties and R\$75 million (\$37 million) for any other party involved in the transaction.

broad economic sectors, in which non-simple cases are reviewed. The aim again is efficiency. When a specific unit is responsible for certain markets, it gains sector expertise, thus making the review period of mergers and the investigation of conducts increasingly shorter and more complete. The division by sectors essentially gives each unit, in terms of knowledge accumulation, economies of scale and scope to handle the cases.

CADE has also designed new filing forms and regulations on rules for notification. The previous notification form was somewhat incomplete and did not provide enough information to begin the assessment of the effects of the merger. Also, two notification forms were created: a complete form and a short version. The short form contains all the necessary information to clearly identify the merger as qualifying for the fast track procedure, but without creating a burden to the parties as to the amount of information that has to be provided. CADE also issued new regulations to clarify certain aspects of the new procedure, such as the criteria for the fast track analysis (kinds of transactions that qualify for fast track) and rules for notification.

The final versions of these documents were only issued after carefully considering all of the various contributions received, as a result of a formal public consultation, from bar associations, law firms, industries associations, companies, and other entities of the public and the private sector. Many of them were incorporated in the new regulations and they provided a clear perspective of how the private sector was acknowledging the reform and its impacts on business. Basically, after the public consultation process the short form was redesigned taking into account the contributions presented, thus becoming less burdensome and more accurate in several terms necessary to the filing. Also, the complete form was altered to clarify certain aspects of the information required.

IV. OUTREACH: CULTURAL CHANGES AND CHALLENGES AHEAD

Both actors involved in a merger (CADE and the requesting parties) will have to deal with the change in the incentives related to merger review. The incentives for CADE's staff when dealing with a merger review will shift under the new law. One important change is regarding the gathering of information. Each request for information to the merged parties or to third parties will have to be complete and cover all the aspects and steps of a merger analysis. Moreover, the information needed must be obtained as quickly as possible. This means that requests for deadline extensions will have to be carefully analyzed and granted only to those that are actually necessary.

The change from a post- to pre-merger procedure has developed the need for CADE to take several communication actions reaching out to the business community (lawyers and companies) relating: (i) how the new law has changed the incentives, (ii) how CADE has shaped the procedures to reflect that change, and (iii) what behavior is expected from both sides. So the interaction with the private sector is as important in implementing the new rules as it was in designing them. For these first months, CADE has received and answered many informal consultations and held several meetings, regarding specific cases as well as general questions. The main concerns are being systematized in order to give opportunity for the Tribunal to answer them in a later stage. Also, the most common mistakes seen in the new filings presented under the pre-merger regime are being gathered to give future guidance to lawyers, either through seminars, meetings, or guidelines.

The outreach endeavors were also important to convey to the business community the first results reached by CADE regarding its performance under the new law and, consequently, under the pre-merger regime. CADE's first challenge in this regard, however, was to deal with the last notifications filed under the post-merger regime, which were received during the implementation of the reform and already handled under the structure of the new body. The authority received, in a period of only two weeks, 140 notifications under the previous law. By mid August, less than three months afterwards, almost 60 percent of them were already cleared by the authority. And, among those, all of the fast track cases were cleared in less than 30 days, thus meeting the target established.

Moreover, all of the fast track transactions presented under the pre-merger regime have been cleared in less than 30 days of their notification. Lawyers have confirmed this positive view, affirming that "deals are flowing smoothly."⁵ It is too early into the new regime to really assess the effects of CADE's new structure and procedures. However, the first few months have gone well enough to be able to predict even better results for the future.

V. PRE-MERGER REVIEW IN BRAZIL: THE MESSAGE

The Brazilian antitrust authorities have come a long way since the beginning of the country's experience with merger review. The authorities have accumulated knowledge and experience throughout the eighteen years that the first competition law had been in effect. A reform was nonetheless necessary and it materialized in the new competition law that came into effect in May 29, 2012. For merger review, the law brought a pre-merger notification system and a fixed review period. Whereas before the parties could implement a merger and only then notify CADE, now they have to wait for the authority's decision. And whereas CADE could almost indefinitely extend the deadline for a merger review, now it has a fixed review period of a maximum of 330 days.

CADE has done its homework to prepare for these new rules, has extensively studied the processes in more experienced jurisdictions, has constantly interacted with the private sector, and has carefully crafted the new procedures and its new structure for the merger analysis. However, a lot of work is yet to be done. CADE is still working on other regulations and guidelines to better clarify its new regime and on improving the direct interplay with the private sector. This is essential to build a new relationship with lawyers and companies, so as to rid the Brazilian merger review of old vices.

However, as mentioned before, not only does the regulation need to change to adapt to the new law and to improve CADE's merger procedure, but the relationship between the authority and the parties of a merger also needs to shift. This is not a simple task. It means changing an organizational culture that has been in force for almost twenty years.

Although the implementation of the new regime posed a great challenge to the Brazilian competition authority, the way it has been implemented, with thorough study, transparency, and a constant dialogue with the private sector, has proven to be fruitful. CADE was able to design

⁵ According to an article in the *Financial Times* entitled "Cade approves 10 M&A deals under new Brazilian law; processes flowing smoothly, lawyers say." Brazil's weekly magazine *Veja* also confirms this view on a note published in its website: <http://veja.abril.com.br/blog/radar-on-line/economia/o-cade-esta-mais-rapido/>.

procedures and a new structure to make its merger review more efficient. The apprehension felt by the private sector of the authority's ability to deal with the new deadline and procedure has nearly vanished, providing a productive environment to continue the improvement of Brazil's antitrust policy.