

CLIENT ALERT

Merger Control in the Americas: Increased Convergence or Increased Scrutiny?

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On July 17, the New York State Bar Association hosted a panel of top officials from the Antitrust Division of the U.S. Department of Justice, Brazil's Administrative Council for Economic Defense (CADE), Mexico's Federal Competition Commission, and Canada's Competition Bureau. This panel commented on recent reforms aiming to simplify the merger control process, current best practices, and what to expect of future merger control policy and enforcement in the Americas.

Brazil

CADE Superintendent Carlos Ragazzo made several key remarks on the implementation of the new Brazilian antitrust law, which became effective May 2012. The new Brazilian law created a suspensory merger control regime where approval must be obtained prior to closing. Mr. Ragazzo gave a preview of what to expect of CADE's future process:

- *Pre-notification Meetings:* CADE plans to implement a "triage process" to assess transactions quickly, and prioritize the clearance of transactions raising no antitrust concerns. To assist such triage, CADE welcomes pre-notification meetings with the merging parties to discuss the transaction before the merger control "clock" starts.
- *Notification Threshold:* The new notification thresholds are based on the Brazilian revenues of the buyer and seller (not limited to the target) for the past fiscal year. To meet the thresholds, one party (either buyer or seller) must have derived at least R\$750 million (approximately US\$375 million) in Brazil, and the other party must have derived at least R\$75 million (approximately US\$37 million) in Brazil. Since there is no requirement for the target to derive revenues in Brazil, these filing thresholds may require notification of transactions with limited, or even no, nexus with Brazil. CADE is considering further regulations to address such situations.
- *Merger Guidelines on the Horizon?* The Brazilian Horizontal Guidelines need to be updated. CADE will be implementing new horizontal and vertical merger guidelines.
- *Timing of Review:* While the law provides for a 240 day review, "[s]imple cases will be reviewed in less than 30 days, and I don't think a merger will ever get to 240 days." CADE is implementing a system to fast-track transactions that raise no substantive antitrust issues.

While Mr. Ragazzo vowed that CADE will modernize and fast track the review of transactions, he also highlighted that CADE faces significant staffing challenges and that it needs to allocate resources to prosecute cartels and other anticompetitive conduct. It remains to be seen how quickly CADE will process transactions, especially in thriving M&A markets.

Canada

Outgoing Canadian Competition Commissioner Melanie Aitken commented on the 2012 Canadian Competition Bureau Merger Review Process Guidelines, and highlighted the increased collaboration between the Canadian Competition Bureau and the U.S. antitrust agencies. Importantly, Commissioner Aitken noted that the Competition Bureau may be willing to accept the parties' response to a U.S. Second Request in lieu of a separate response to a Supplementary Information Request (SIR) issued by the Canadian Competition Bureau. This would seem particularly helpful in situations where the Canadian Competition Bureau is assessing the same substantive issues under review in the U.S.

Mexico

Mexico's Federal Competition Commissioner Perez Motta commented on the 2011 amendments to the Mexican merger control procedures, which brought Mexico in line with the merger control best practices recommended by the International Competition Network. These amendments exempted from review certain internal reorganizations and financial market transactions that raise no substantive antitrust issues. The Mexican FCC now clears 95% of transactions in less than 14 days.

Global Coordination

The panel explained that these reforms to modernize merger control procedures go hand in hand with the increasing collaboration among agencies in cross-border mergers. The agencies have moved beyond mere front-office statements of collaboration and convergence, to a world in which agency staff work together on a daily basis on pending transactions. Rachel Brandenburger, Special Advisor, International, of the Antitrust Division of the Department of Justice re-affirmed that the DOJ's interactions with its non U.S. counterparts are "deep and multi-faceted" and have turned into "real time, pick-up the phone type relationships."

While these cooperative efforts aim to minimize conflicting reviews and to benefit merging parties, these reforms have also increased both the burdens on, and costs incurred by, merging parties, and also result in longer review times for transactions. For instance:

- The Canadian SIR reform has aligned the Canadian regime with the documentary burden and cost generated by the issuance of a U.S. Second Request for information.
- The European Commission also seems to be following the example set by its U.S. and Canadian counterparts by increasingly issuing requests for documents, especially in Phase 2 investigations.
- In Brazil, the recent reforms force parties to obtain approval prior to closing. Although CADE vowed to put such approvals on the fast track, CADE also acknowledges that staffing constraints and the number of transactions under review may create additional delays for merging parties.

While international convergence and collaboration across agencies can bring benefits to merging parties, there is a significant risk they could lead to a "lowest common denominator" approach in which all authorities defer to the country with the most

issues and the longest timeframe. The agencies need to take care that "convergence" does not become a rationale for further scrutiny, delay, and cost in the M&A process.

[Click here to access the panel discussion and its accompanying slide presentations](#) from the New York State Bar Association's website.

[Click here to access Ms. Brandenburger's prepared remarks.](#) [PDF]

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

Olivier N. Antoine

Partner – New York

Phone: +1 212.803.4022

Email: oantoine@crowell.com