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Brazil Adjusts Merger Notification Thresholds

Brazilian merger notification requirements, traditionally a major hurdle for multinational mergers, have just become less burdensome. In an unexpected development last Wednesday, the Brazilian antitrust authority ("CADE") announced a new interpretation of the Brazilian merger notification thresholds that may reduce foreign merger filings in Brazil by more than 90%. CADE reversed 10 years of precedent by declaring that, in line with the approach of many other jurisdictions worldwide, the Brazil notification threshold of 400 million Reales should henceforth be assessed in terms of Brazilian turnover rather than worldwide turnover. (ADC Telecommunications Inc. / Krone International Holding Inc., announced January 19, 2005.)

Historically, Brazil's CADE has asserted the most aggressive jurisdictional reach of any competition authority in the world. Historically, if either party to a transaction had at least 400 milllion Reales (only about $148 million) in turnover anywhere in the world, and both parties had any Brazilian revenues at all, no matter how trivial, a premerger notification was required. This approach has forced numerous multinational corporations to make Brazilian filings in recent years for virtually every acquisition of a target company that ever made a single sale in Brazil.

Under the approach used in ADC/Krone, a transaction will be henceforth be notifiable in Brazil if (i) either party has 400 million Reales in annual turnover in Brazil, or (ii) if the parties will have a combined market share of 20% or more in any Brazilian market. (The market share threshold has always been part of Brazilian competition law, but rarely was relevant to the filing decision under the older rule.)

Decisions of CADE are not legally binding on future CADE actions, and a single CADE decision is generally not a safe guide to future practice. However, some Brazilian lawyers are already expressing a willingness to rely on the ADC / Krone case in advising clients not to notify mergers in Brazil. Last week at an ABA Antitrust Section International Conference in Miami, Daniel K. Goldberg[1], the head of the antitrust office ("SDE") of Brazil's Ministry of Justice, announced that this case was the outcome of intense and protracted negotiations between CADE and the SDE regarding merger notification reform. Goldberg also announced that a CADE Resolution formalizing and confirming the interpretation of ADC/Krone has already been drafted and will be issued in the near future.

The proposed CADE resolution will bring Brazil more closely in line with the

1. Before being appointed to head the SDE, Dan Goldberg was in the WCPHD International Lawyers' Program, resident in our DC office, from August 20, 2001 to February 15, 2002.

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recommendations of the International Competition Network ("ICN"), which has been issuing general guidelines for best practices by national merger competition authorities.

In his two-year tenure as head of the SDE, Goldberg has instituted a number of reforms that have lightened the filing burden on international clients. Under his guidance, the competition agencies have instituted an "expedited" review track for transactions with only a minimal nexus to the Brazil economy. Goldberg has also encouraged the SDE to work in parallel with SEAE, the office of the Ministry of Finance that must also review merger notifications, to reduce the duplication of effort and time delays associated with multiple agency reviews.

Unfortunately, the average timetable for clearance in Brazil is still several months for even a completely unproblematic merger, so reform still has a long way to go. Goldberg announced in Miami that an extensive package of merger reform legislation will be submitted to the Brazil Congress in the next two weeks. Under the proposed legislation, multiple agency would be eliminated, strict review deadlines would be imposed, and Brazil would become a preclosing merger notification jurisdiction, which means that the parties could not close their transactions until the Brazil review process was complete. That last provision could spell trouble in a jurisdiction that has found it impossible to keep within a 120-day review period in the past. But the legislation is only in its infancy. We will be watching its progress with keen interest and keeping you up to date if and when it passes.

Please contact any of us if you have any questions about these developments in Brazil.

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