LOGITECH AMR SALES & MARKETING TEAM MEETING
Wednesday, October 17: Legal Breakout Session

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A. Brazil

1. Antitrust Considerations and Price Issues

The new Antitrust Law[1] took effect at the end of May 2012: replaces odd law where companies had to merge first and the regulators asked questions later, when the Finance Ministry, then Justice Ministry, then CADE [Conselho Administrativo de Defesa Econômica], the competition regulator, could object to the completed merger. New law copies US law by establishing pre-merger notification, with review only by Super CADE (3 regulators rolled into 1), which has 240 days to review the merger and object or approve (which can be extended by CADE to 330 days), instead of 30 days in US. So it's too slow, but an improvement. There is no automatic approval if no response is received from CADE within statutory period. If in the previous year one firm had sales over 400M Reais, and the other sales above 30M Reais, the regulator's approval required. [Nestle acquisition of Garoto inspired the new law.]

Anticompetitive behavior: penalties reduced: from 0.1% to 20% of the gross turnover (revenue) registered either by the individual company in the relevant market, or by the group or conglomerate, in the financial year prior to the investigation, in at least the amount of the advantage obtained by the anticompetitive behavior. If revenue/turnover cannot be measured, the penalty ranges from R$50,000 to R$2,000,000,000.

The new Law also applies fines to members of management who have engaged in anticompetitive behavior, of from 1% to 20% of the penalties imposed on the company/group that committed the infraction.

Anticompetitive behavior now includes certain practices not in the old Law: such as abusive exercise or exploitation of rights registered as industrial or intellectual property, such as copyright, patent or trademark.

Anticompetitive conduct no longer includes exclusivity and excessive pricing.

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[1] Lei No. 12,529/11. http://www.planalto.gov.br/CCIVIL_03/_aTO2011-2014/2011/Lei/L12529.htm.

Managers guilty of market/price rigging more likely to go to jail, because sanctions are tougher: the maximum term of imprisonment increases from 2 to 5 years and establishes that violators will be subject to both fines AND imprisonment.

Whistle-blowers can obtain plea bargains now, so companies have to behave more carefully.

2. Advertising Issues and Misrepresentations

Brazil has a host of restrictions on advertising, such as in relation to elections, or a gift used to buy votes (such as a T-shirt), many restrictions on use of ads in relation to alcoholic beverages and cigarettes, billboard advertisements in certain cities, like São Paulo [Cidade Limpa], medical advertisements, and no advertisement of prostitution or sex services on public communication vehicles.

The main source of regulation of advertising in Brazil is through the Consumer Protection and Defense Code,[2] the Industrial Property Law and the Copyright Law.

The Consumer Law states in Art. 6(III) that the consumer is entitled to adequate and clear information about products and services and their features and price, and in Art. 6(IV) to protection against deceptive and abusive publicity, unfair or coercive trade practices, as well as abusive practices and clauses or taxes in the furnishing of goods and services. Keep in mind that in Brazil, a consumer is any natural or legal person (entity) who acquires any product or service for end use. So all of Logitech's purchasers are consumers under the Code.

Chapter V, Art. 30 of the Consumer Law states that any precise information or publicity relating to products and services offered or made available forms part of the contract with the consumer. Art. 31 says the offer and availability of products or services must guarantee correct, clear, precise information in Portuguese about features, price and quantity of goods and services.

Chapter V of the Consumer Law also expressly regulates publicity, and states in Art. 36 that the consumer should be able to identify publicity about products, and it must be supported by the necessary data. Art. 37 prohibits all deceptive or abusive publicity [publicidade enganosa ou abusiva]. An omission can be deceptive. Chapter VII lists administrative sanctions, and Title II lists criminal penalties.

Brazil also has a "Brazilian Advertising Self-Regulation Code" since 1978, to find a reasonable compromise between too much government regulation, as under the dictatorship, and none. To enforce this, Brazil created CONAR, the Brazilian Advertising Self-Regulating Council, in 1980. CONAR, a non-governmental

[2] Lei No. 8,078/90.

organization, has decided over 4,000 cases, and handles conciliation among members/associates.

Comparative advertising is acceptable provided that it conforms to: providing clarification, or protection of the consumer, objectiveness of the comparison, comparison is supported by evidence, there can be no confusion between the product or service advertised and the competitor's brands, no unfair competition, denigration of a product or service of a competitor or its image, if products having different pricing are compared, this must be made clear.[3] Most CONAR disputes involve charges of dishonest or false presentation. CONAR can issue warnings, recommendations to change or correct the ad, recommendation to the media to suspend publication, disclosure to the media of CONAR's position re: advertiser, agency and the media for noncompliance.

A major difference between Brazil and the US: in Brazil, denigration is prohibited, but in the US, denigration is permitted so long as it is truthful and not deceptive.

It is generally believed that Art. 131 and 132 of the Industrial Property Law permit use of trademarks on papers, printed matter, advertising and documents relating to the owner's activity, and the owner may not prevent reference to a trademark provided that it is done without commercial connotation or detriment to the distinctive character of the trademark. But Brazil has been quite contradictory, witness the Duracell-Rayovac case.

3. **Distribution and Resale Issues**

In Brazil, the law governing agency contracts, which would apply to a commercial or sales agent or representative who sells on commission and does not purchase inventory, includes extensive provisions on indemnification in the event of termination. Previously, the law governing distribution agreements limited indemnification either to what is agreed by contract or to damages actually incurred. But now under the Civil Code, Sections 710 et seq., the distinction has been blurred.

If an agency contract is fixed-term, and it expires, neither party is entitled to compensation upon expiration. An agent can be terminated for cause without compensation, in the event that the sales agent is negligent, the sales agent discredits the principal, the sales agent fails to comply with agency obligations, the sales agent is guilty of a crime which adversely affects the principal's reputation, or if the principal and agent agree to termination. Where the principal terminates the contact without cause, the agent will be entitled to compensation equal to his

[3] Art. 32 of CONAR

average monthly commission multiplied by 50% of the number of months of the contract, per Law No. 8420/92, plus payment for any orders in process. If an agency contract with an indefinite term is terminated by the principal without cause, the agent must be paid at least one-twelfth (1/12) of the total amount earned during the time he acted on behalf of the principal. Brazil also requires payment to an agent of one-third of all commissions earned over the last three months if the required 30-day notice of termination is not given. In addition, a principal may only terminate a sales agency without cause after the agent has recouped its own investment in the agency relationship (such as marketing or advertising costs), which can limit the ability of a foreign company to change agents in Brazil.

It was long assumed that distribution contracts in Brazil were unregulated, unlike agency contracts, but the chapter XII of the Civil Code now refers to "Agency and Distributorship" and Art. 710 states that a distributor is an agent who has at his disposal the products to be negotiated, but acts on behalf of a third party. So distributors may be included. It is best to ensure that the distributor purchases products from the supplier and then resells them to end users or sub-distributors. In this scenario, the distributor should be considered an independent merchant, not an agent. As with many legal issues in Brazil, however, this is still uncertain.

Upon termination of a distributor, the supplier is still liable for the provision to the consumer of spare parts and replacements.

The Brazil Consumer Code imposes strict liability on all those who are involved in the chain of sale, i.e., the producer, importer, distributor and vendor (but not a mere agent).

In addition, distributors have the right to establish prices offered to customers; the principal/supplier should not try to control the price.

4. **Contract Between Supplier and Distributor Using Marks**

With foreign suppliers, where the distributor will use the supplier's trademarks, a trademark license should be registered with the National Institute of Industrial Property (INPI), to protect the supplier's rights in the trademark and to protect the trademark from being infringed by a third party.

B. Mexico

1. Antitrust Considerations and Price Issues

A new decree published in May 2011 modified the Federal Competition Law (Ley Federal de Competencia Económica[4]) and the Federal Penal and Tax Codes, intended to lead to much more robust antitrust enforcement, especially against cartels.

The reforms expand the practices that are prohibited by law. The law bans two types of abuse of dominance: absolute monopolistic practices, and relative monopolistic practices.

Absolute monopolistic practices involve contracts, agreements and arrangements among competitors that have the intent or effect of fixing prices for the sale of goods or services, setting the supply or demand for goods or services, dividing current or potential markets, or coordinating bids for public procurement contracts. Forming cartels and price fixing fall within these practices.

Relative monopolistic practices include imposing or setting vertical restrictions or prices, selling tied goods, refusing to sell or purchase goods if they are available to competitors, offering loyalty discounts, price discrimination, boycotts, predatory pricing, and increasing a competitor's price or hindering their access to the market.

The law now prohibits two or more firms who act "in concert" and participate in abuse of dominance practices (previously, the law only punished abuses of dominance by one firm with market power).

Simplified Notification: re: notifications of market concentration with the Federal Competition Commission (Cofeco)[Comisión Federal de Competencia]: new simplified criteria for determining when a concentration is not for the purpose or effect of impeding competition or restraining trade, in which case Cofeco must act upon it within 15 days of receipt.

Certain Concentrations Do Not Require Notification: e.g., corporate restructuring where no third party is involved; increase in the equity stake of a holder with a controlling interest; legal acts effected outside Mexico affecting entities which are not tax residents of Mexico; foreign entities so long as they do not acquire control of Mexican entities; certain transactions involving investment funds.

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[4] Decreto de la Ley Federal de Competencia Económica, del Código Penal Federal y del Código Fiscal de la Federación, Diario Oficial de la Federación, 10 de mayo de 2011.

Resale Price Maintenance: fixing resale prices may be considered a relative vertical monopolistic practice, under Art. 10 of the Competition Law, to be viewed under the rule of reason.

Unfair trade practices such as price-fixing arrangements with competitors or suppliers, piracy of intellectual property rights, can be pursued under both the Competition Law and the Intellectual Property Law, if an intellectual property violation is implicated. In addition, amendments to the Commercial Code address other unfair trade practices, such as creating confusion for consumers, discrediting, through false statements, the goods or services of other suppliers or traders, and inducing the public at large to an error about the manufacturing process, characteristics, merchantability or quantity of products.

Cofeco Authority: The Federal Competition Commission ("Cofeco") can carry out onsite investigations without court order, and order suspension of monopolistic practice or prohibited market concentration for a period of one year.

Cofeco fines have been increased, generally between 8 and 10% of violator's revenue, with fines doubling for second offenses. For absolute monopolistic practices, 10% of the violator's annual sales or of the value of its assets. For relative monopolistic practices, fine increased to 8% of the entity's annual sales or value of its assets. Criminal penalties of 3 to 10 years in prison for persons who enter into, arrange or carry out agreements to engage in absolute monopolistic practices.

The reforms also permit out-of-court settlement of antitrust cases, formerly impossible. Plus injunctive relief for conduct that may result in "irreversible damage" to the competitive process.

The Decree creates new administrative trials in the area of competition law for a formal review process initiated by parties subject to Cofeco's final resolutions, before Federal District Courts specializing in antitrust matters.

2. Advertising Issues and Misrepresentations

A variety of laws, regulations and official standards (NOMs) regulate advertising in Mexico.

The most important source of law is Federal Law for the Protection of Consumers; Art. 32 says that advertising a product or service must be truthful, verifiable, and must not contain any text, sounds, images, marks or geographical indications that could induce consumers to error or confusion.

However, Art. 47 of this Law establishes the general rule that Mexican law does not require advertising to be licensed/cleared by any administrative authority (except for certain categories of products, such as alcohol, tobacco and prescription drugs).

Comparative advertising is permitted by the Consumer Law provided that the information about the products or services being compared is not "deceptive" or "abusive," that is, which induces consumers to errors or confusion.

Risk in comparative advertising if it is deceptive or abusive of infringing the trademark of the product or service being compared, which is actionable under the Art. 213, Paragraph X of the Industrial Property Law, and can lead to injunction and a fine.

Infringement resulting from comparative advertising can be sanctioned by a fine of up to 20,000 days of the minimum wage in Mexico, DF [62.33 pesos, about US $4.88 per day, or about US $97,600], which can be increased by 500 days for each day that the advertisement continues, plus a temporary business shutdown of up to 90 days, final shutdown or even imprisonment for up to 36 hours.

Members of CONAR, The Council of Self Regulation and Public Relations Ethics, is a forum for advertising and PR disputes of its members, and is an autonomous organ created by the private sector. But its decisions are not binding. CONAR is the acronym for Consejo de Autorregulación y Ética Publicitaria CONAR A.C., created in México more than 10 years ago by advertisers, PR agencies, and media companies, with the goal of conciliating disputes within the advertising industry, and issuing resolutions based on the Public Relations Ethics Code [Código de Ética Publicitario].

3. Distribution and Resale Issues

In many countries, termination of certain categories of resellers, especially sales agents or representatives, are strictly regulated by law, and indemnities payable to the terminated representative are often prescribed by law. In Mexico, no specific indemnification is prescribed for distributor termination, even if it is not based on just cause. Freedom of contract prevails in this context. However, wrongful or premature termination of a sales agent generates liability for damages, especially damages or expenses incurred by untimely termination. Damages include injuries or losses incurred as a direct result of failure to comply with contractual obligations, whereas lost profits are those certain and lawful earnings or profits that would have been received but for the default; both must be an immediate and direct result of the default.

Contracts Between Supplier and Distributor Using Marks

It is advisable for the foreign trademark owner to register a brief trademark license with any Mexican distributor entitled by contract to use the owner's marks, under Art. 136 of the Industrial Property Law. The registration of the license is effective against all third parties, and any use by the licensee/distributor inures to the benefit of the trademark owner. Although NAFTA and TRIPS technically make this registration optional, the trademark owner will be in a much stronger evidentiary position in any Mexican court or administrative hearing should any dispute arise.

C. Argentina

1. Antitrust Considerations and Price Issues

Argentina's Antitrust Law[5] passed in 1999 prohibits acts relating to the production and distribution of goods and services if they restrict, falsify or distort competition, or if they constitute an abuse of dominant position, and provided in either case that they cause or may cause harm to the general economic interest. It is sufficient if the conduct potentially would cause harm to the general economic interest. The Law is enforced by the National Commission for the Defense of Competition, which performs a technical review, under the ultimate authority of the Ministry of Economy. It was supposed to be under the authority of the National Tribunal for the Defense of Competition, which never has been created.

Most of the effort of the NCDC over the last decade has been dedicated to merger control (that is, reviewing and ultimately approving (in most cases) mergers with effects in Argentina), with very little attention going to anticompetitive practices.

New Argentine Law eliminated per se prohibitions, adopting case-by-case "rule of reason" approach.

In recent years, the Antitrust Commission has issued some preventive orders (injunctions) against alleged anticompetitive conduct under Art. 35 of the Antitrust Law. Several of these orders have been struck down by the courts as being beyond the powers of the Commission.

2. Advertising Issues and Misrepresentations

Advertising was never subject to a specific law in Argentina until the Law on Audiovisual Communication Services was published in 2009, subject to regulations by decree in 2010.[6] Chapter VIII of the Law specifically regulates advertising

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[5] Ley No. 25,156

[6] Ley No. 26,522 [Democracy Media Law]; regulated by Decree 1225/2010.

activities. Art. 81 establishes requirements that advertisements shall be "nationally produced" when broadcast by open radio broadcasting services or by channels or signals owned by subscription services or included in national signals." The regulation said that the dissemination of advertisements other than those nationally produced shall be subject to the existence of reciprocity conditions with the country of origin concerning broadcasting of audiovisual content. As the United States no doubt would allow broadcast of advertisements of Argentine origin, it is likely that regional advertising that Logitech wants to use in Argentina, even if not produced in Argentina, should be permitted.

There is no legal provision in any Argentine law or decree that directly addresses comparative advertising. Until 1991, Argentina case law considered comparative advertisement illegal. Then several cases moved away from that position, and in one case ruled that the Trademark Law prohibits the use of someone else's mark as if it were the advertiser's own, but does not prohibit the use of another's mark if the comparison between the goods and services is truthful and done without denigrating the other's mark. Now comparative advertisements are permitted, subject to the foregoing standard, and also provided that the comparisons refer to substantial and verifiable qualities of the compared products or services, without causing consumer confusion.

3. <u>Distribution and Resale Issues</u>

Argentina imposes the same regime on termination of distributors and agents. Termination must be covered in the contract explicitly, otherwise the termination will be treated as termination of an agent. Wrongful termination is a recognized cause of action, and the compensation that will be due to a terminated distributor may be equal to 25% of lost earnings. In general, it is better to include a liquidated damages clause specifying a payment in the event of termination without cause. Local courts may choose not to apply a foreign choice of law.