

Reforms Achieved, but Challenges Ahead: Brazil's New Competition Law

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On November 30, 2011, the Brazilian President signed a new competition law (“New Law”)¹ that marks the most substantive reform of the country’s antitrust enforcement regime since the current framework was established in 1994.² Draft legislation to reform the country’s competition law was initially introduced by the Government in 2004 and went through multiple reviews and amendments until it was approved by the Brazilian Congress in October 2011. The New Law will enter into force on May 29, 2012.

The legislation introduces the following main changes: (i) institutional reform unifying the three existing competition authorities into a single enforcement agency; (ii) introduction of a mandatory pre-merger notification regime; (iii) amendment of the merger notification thresholds; and (iv) new provisions concerning the enforcement of anticompetitive practices, particularly regarding the setting of fines for anticompetitive conduct and leniency. This article will present a brief overview of these changes and how they modernize the Brazilian Competition Policy System (“BCPS”).

Institutional Reform of the Competition Authorities

One of the most significant changes brought by the New Law is the unification of Brazil’s competition agencies. The New Law reforms BCPS by concentrating the antitrust enforcement functions of the three competition authorities (Secretariat of Economic Law of the Ministry of Justice (“SDE”),³ Secretariat for Economic Monitoring of the Ministry of Finance (“SEAE”),⁴ and Administrative Council for Economic Defense (“CADE”))⁵ into a single agency, the new CADE.⁶

The institutional unification is expected to bring more efficiency to the system by eradicating the overlap in enforcement functions of the current tripartite arrangement, itself a result not of efficient governance but of the political compromise struck to pass Law No. 8,884 in 1994.⁷ The new CADE will consist of three

main bureaus—the Administrative Tribunal, Superintendence General, and Department of Economic Studies.⁸

The Administrative Tribunal will remain the decision-making body in charge of rendering final and binding administrative decisions in both merger and conduct cases. The Tribunal will continue to consist of seven Commissioners; the New Law, however, extends the Commissioners’ mandate from two to four years, without the possibility of reappointment.⁹

The Superintendence General, headed by a Superintendent General appointed for a two-year term with the possibility of reappointment, will be empowered to approve mergers that do not raise competitive concerns; to provide non-binding opinions in merger cases that could not be unconditionally cleared; and to conduct investigations of anticompetitive practices.¹⁰

The Department of Economic Studies, now headed by CADE’s Chief Economist, will be responsible for providing non-binding economic opinions and preparing economic studies.¹¹

In addition, in response to a chronic lack of resources that has often been cited as the source of backlog in antitrust investigations, the New Law authorizes the creation of 200 permanent staff positions for the new CADE.¹² The new staff positions will essentially double the number of professional personnel working in the BCPS.

Introduction of a Pre-merger Notification System and Revision of the Notification Thresholds

Law No. 8,884/94 established a merger notification system in Brazil requiring merging parties to notify a merger to the antitrust authorities no later than 15 days after its “occurrence,”¹³ provided that the merger meets certain notification requirements. Under the current law, mergers have to be notified when (i) the resulting companies or group of companies account for at least 20

percent of the relevant market or (ii) any of the parties to the transaction had annual gross revenues of at least R\$ 400 million (approx. US\$ 214 million) in the fiscal year prior to the transaction.¹⁴

In the current non-suspensive review system, the parties are free to consummate the merger without the antitrust agencies' clearance. From a procedural perspective, the current system has contributed to prolonging the review timetables by not providing incentives for the merging parties to speed up the process. In addition, the system undermined the effectiveness of remedies imposed by CADE. Due to the reluctance of parties to divest part of the acquired assets once the merger has been consummated, CADE usually opted for behavioral rather than structural remedies.¹⁵

Addressing the inefficiencies of the ex-post system, the New Law establishes a mandatory pre-merger notification regime in which notified transactions will require CADE's approval.¹⁶ The New Law also provides for two significant changes regarding the notification thresholds: (i) the elimination of the market share threshold; and (ii) the introduction of a secondary national revenue threshold.

Under the New Law, the application of the revenue threshold will require that at least one of the merging parties has achieved group-wide revenues of at least R\$ 400 million (approx. US\$ 214 million) in Brazil in the fiscal year prior to the transaction, and another party to the transaction has achieved group-wide revenues in Brazil of R\$ 30 million (approx. US\$ 16 million).¹⁷ The threshold amounts may be altered by an ordinance recommended by CADE and issued jointly by the Minister of Finance and Minister of Justice. The New Law authorizes CADE to examine mergers below the threshold within one year of their completion.¹⁸ Failure to notify reportable transactions and consummation of a reportable merger prior to CADE's approval ("gun-jumping") may result in invalidation of the transaction and fines between R\$ 60,000 (approx. US\$ 32,000) and R\$ 60 million (approx. US\$ 32 million).¹⁹ However, the New Law expressly exempts consortia constituted for the purpose of attending public bids from mandatory pre-merger control.²⁰

Timing of the review will be of critical importance under the new notification regime because parties will not be able to consummate a merger until CADE's clearance. The New Law provides more straightforward

statutory time periods for the review of transactions, establishing a maximum term of 240 days from the date of notification for the issuance of a final administrative decision.²¹ In case of complex transactions ("Phase II"), the 240 day-period can be extended by either 60 or 90 days upon request of the parties or the Administrative Tribunal, respectively.²² Therefore, the New Law sets the maximum period for CADE to render final administrative decisions in merger reviews at 330 days from the date of notification.

An important provision (Art. 64) of the New Law approved by Congress stated that the merger would be automatically approved if CADE failed to issue an administrative decision within the statutory time period. The President, however, vetoed this provision, raising uncertainty as to the consequences if CADE extends its review beyond the statutory time period.²³

In response to the Brazilian antitrust community's concerns that the new pre-merger notification system and waiting periods will be an obstacle for M&A activity in the country, the New Law aims to strike a compromise by allowing the reporting Commissioner to authorize the merging parties to take particular steps towards the implementation of the merger, subject to conditions to ensure its reversibility.²⁴ Although a provision applicable to the review of simple cases (up to 20 calendar days) was excluded from the final version approved by the Congress, it is generally expected that in most cases CADE will complete its review in a significantly shorter time period than the maximum time frame allowed by the New Law, to align itself with international practice.²⁵

The New Law remodels merger control in Brazil by establishing a pre-merger notification regime with new notification thresholds and review timetables. However, it does not address some very important and challenging issues, such as: (i) more detailed intermediary deadlines for every stage of the merger review; (ii) time frame for the review of simple cases; (iii) whether pre-notification communication with the authorities will be allowed; (iv) a more streamlined and expedited remedial process; and (v) consequences if CADE does not meet its statutory review deadlines. These issues are expected to be subject to further regulation in the coming months.

Anticompetitive Practices

Regarding the enforcement of anticompetitive practices, the New Law introduces significant changes

related to the criteria for the setting of fines and to the leniency program.

Fines

The New Law provides that violations for anticompetitive practices could subject companies to fines between 0.1 and 20 percent of the company's gross revenues in the last financial year preceding the start of the investigation.²⁶ The new provision expressly notes that the revenues to be considered should be related to the relevant market in which the anticompetitive practices have been carried out. The fines applicable to individuals, upon showing proof of intent, will be calculated based on the fine imposed on the company and can range from 1 to 20 percent of the company's fine.

The New Law amends the non-exhaustive list of anticompetitive conducts that might be considered a violation. It excludes exclusivity and excessive pricing from the list of anticompetitive conducts, but adds the practice of abusive exercise or exploitation of intellectual property rights.²⁷

Leniency

The New Law establishes new rules for the Brazilian leniency program. It eliminates the current rule that leniency is not available to the "leader" of a cartel. A very significant amendment is that criminal immunity granted to a leniency applicant will now be extended to other possible crimes related to the cartel activity, such as fraud in public procurement.²⁸

Regarding criminal prosecution of individuals, the New Law increases the maximum term of imprisonment from two to five years and establishes that violators will be subject to both fines *and* imprisonment.²⁹

Conclusion

The New Law modernizes antitrust enforcement in Brazil and reforms several important areas previously identified by practitioners, scholars, and international organizations for improvement. The reforms substantially change the institutional design of the country's antitrust enforcement system and create a pre-merger notification regime with revised notification thresholds and new timetables for the review. These changes are a result of the evolution of the BCPS and reflect the current stage and maturity of antitrust enforcement in Brazil.³⁰ At the same time, the New Law also provides significant challenges. The institutional

reform tasks BCPS with designing a smooth transition into a single antitrust enforcement agency system over a short period of time. In addition, some very important issues, particularly in the merger control area, call for further regulation in the coming months. The amendments of the New Law are particularly important in light of Brazil's increasing significance in world trade and the increased level of foreign investments in the country, and companies doing business in Brazil and their counsel should carefully consider the impact of these developments as Brazil emerges as a key jurisdiction on the global stage of antitrust enforcement.

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¹ Law No. 12,529/11, available at http://www.planalto.gov.br/CCIVIL_03/_Ato2011-2014/2011/Lei/L12529.htm.

² Brazil's competition enforcement is currently governed by Law No. 8,884/94.

³ Currently, SDE is in charge of investigating anticompetitive practices and it issues non-binding opinions in merger cases.

⁴ In the current system, SEAE's main responsibility is to provide non-binding economic opinions in merger cases, and in some instances, in investigations of anticompetitive practices.

⁵ CADE, an administrative tribunal composed of seven Commissioners, is the decision-making body in both mergers and cases involving anticompetitive practices.

⁶ Over the years, SEAE, as part of the Ministry of Finance, has been very active in carrying out competition advocacy efforts with sectoral regulators and other parts of government, and it will remain responsible for this function. In addition, upon request, SEAE will continue to provide sector-based economic studies. *Supra* note 1, Arts. 3, 19.

⁷ Streamlining competition responsibilities and institutional unification have recently resulted in the creation of a single antitrust enforcement agency in other jurisdictions, such as Spain and France.

⁸ *Supra* note 1, Art. 5.

⁹ *Id.*, Art. 6. This modification strengthens the independence of CADE and safeguards the long-term enforcement priorities of the authority. It is important to note that the New Law also introduces a 120 day-quarantine for Commissioners following the expiration of their term, during which period they cannot represent any person or company, other than themselves, before any agency of the BCPS. *Id.*, Art. 8.

¹⁰ *Id.*, Arts. 12-14.

¹¹ *Id.*, Arts. 17-18.

¹² *Id.*, Art. 121.

¹³ Art. 54 of Law No. 8,884/94. CADE Resolution No. 15 (1998) defined "occurrence" as the execution of the first binding agreement between the parties.

¹⁴ *Id.* CADE Resolution No. 1 (2005), issued pursuant to CADE Resolution No. 39 (2005), amended the 1994 notification rules decreeing that the turnover threshold would apply only to revenues derived in Brazil. Commentaries identified significant shortcomings of the thresholds relating to: (i) the essentially single-party threshold in notifications of small acquisitions by large firms that already met one of the thresholds; and (ii) the market share test, which introduced a subjective element into the notification obligation – the market definition – that is inappropriate for determining whether a transaction is notifiable. See Organisation for Economic Cooperation and Development (“OECD”), *Competition Law and Policy in Brazil: A Peer Review* (2010), at 23, available at <http://www.oecd.org/dataoecd/4/42/45154362.pdf>.

¹⁵ Highlighting the shortcomings of Brazil’s merger control regime, a 2005 comprehensive OECD peer review of the country’s competition law and policy noted that “the present post-merger system is unwieldy and inefficient for both the competition agencies and the business community.” OECD, *Competition Law and Policy in Brazil: A Peer Review* (2005), at 38, available at <http://www.oecd.org/dataoecd/12/45/35445196.pdf>.

¹⁶ *Supra* note 1, Art. 88. It is important to note that CADE’s jurisprudence developed an instrument known as Agreement to Preserve the Reversibility of the Operation (“APRO”). APROs were designed to accomplish the same result as a precautionary order, and in practice, they prevent the economic integration of the firms prior to CADE’s review. See CADE Resolution No. 28 (2002), superseded by CADE Resolution No. 45 (2007). APROs have often been used in complex transactions that involve high market shares and/or raise significant competitive concerns. Between 2005 and 2011, CADE issued 20 APROs, which can be found at <http://cade.gov.br/Default.aspx?a59968ac47c44bde36d547de2bfe051ff71735f1070919>.

¹⁷ *Id.* It is important to note that the revised thresholds do not yet conform to the International Competition Network’s (“ICN”) Recommended Practices for Merger Notification and Review Procedures (“RPs”). The thresholds for both parties apply to the entire group, which goes against the RP recommendation that on the seller side, only the activities of the business being acquired should be relevant. Compare revised thresholds with I.B.3 and I.C.3 of the RPs, available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf>.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*, Art. 90.

²¹ *Id.*, Art. 88.

²² Cases at CADE will be randomly assigned to a Commissioner (the “reporting Commissioner”) who is empowered to request additional information from the parties and issue injunctions during the investigation. The reporting Commissioner will be responsible for scheduling the case for hearing and presenting the case and a recommendation for its outcome to the full Administrative Tribunal. See *id.*, Arts. 10, 59, 60.

²³ See Rouseff Amends New Brazilian Antitrust Bill, Dec. 2, 2011, available at <http://www.globalcompetitionreview.com/news/article/31012/rousseff-amends-new-brazilian-antitrust-bill/>.

²⁴ The reporting Commissioner’s power to authorize mergers prior to the final decision of the Administrative Tribunal is expected to be exercised in line with the fast-track merger procedure, established in

2002 by the SEAE/SDE Joint Ordinances No. 1 and 33. The introduction of this streamlined procedure resulted in significantly shorter review periods for simple cases that do not raise competitive concerns.

²⁵ See ICN Recommended Practice IV, *supra* note 17. Compared to the New Law’s maximum time frame for merger review, the average review period of the Brazilian authorities was 156 days in 2010 and 150 days in the first nine months of 2011, available at <http://cade.gov.br/Default.aspx?8cac6fb17e9c9cbe96b7>.

²⁶ *Supra* note 1, Art. 37.

²⁷ *Id.*, Art. 36.

²⁸ *Id.*, Arts. 86-87.

²⁹ *Id.*, Art. 116.

³⁰ In fact, CADE was recognized by a peer review as the best antitrust enforcement agency of the Americas in 2010. See Global Competition Review 2011 Awards Announced, Feb. 7, 2011, available at <http://www.globalcompetitionreview.com/news/article/29705/gcr-2011-award-winners-announced/>.