

Brazilian Congress Passes New Competition Law

The Brazilian Congress has approved on October 5th, 2011 a new competition law that significantly changes the landscape of competition enforcement in Brazil. President Dilma is expected to sign the bill within the next weeks. The new law will enter into force within 180 days of its publication in the Official Gazette.

Creation of a single competition agency. The Brazilian competition system is currently composed of three agencies: the Secretariat for Economic Monitoring of the Ministry of Finance (SEAE), the Antitrust Division of the Secretariat of Economic Law of the Ministry of Justice (SDE), and the Administrative Council for Economic Defense (CADE). The new law consolidates the investigative, prosecutorial, and adjudicative functions of the Brazilian competition authorities into one autonomous agency. CADE will be restructured to include (i) a Tribunal composed of 7 Commissioners; (ii) a Directorate General for Competition (*Superintendência Geral*) and (iii) an Economics Department. The new DG will perform the former functions of SDE's Antitrust Division and SEAE. SEAE will continue to exist but will deal exclusively with "competition advocacy" before the Brazilian regulatory agencies and other governmental bodies.

An important element in the new law is the provision for 200 permanent positions in CADE. These positions would not require qualifications specific to CADE's mission, however, but rather their occupants would be drawn from other specialties in the federal civil service.

Merger control: Mandatory pre-merger notification system, maximum review period and turnover thresholds. There are significant changes affecting merger review procedures. The new law introduces a mandatory pre-merger notification system. The fines for "gun jumping" will range from BRL 60.000 to BRL 60 million. The maximum period to conduct the merger review is 330 calendar days from the day of filing and the provision applicable to the review period of simple cases (up to 20 calendar days) was excluded from the final version approved by the Congress. During the first year of enforcement of the new law, the merging parties may request CADE to close the transaction while a final decision on the transaction is still pending. The BRL 45,000 notification fee is retained, to be allocated entirely to CADE.

The new law provides for minimum size thresholds, expressed in total revenues derived in Brazil, for two merging parties. One party must have revenues in the last fiscal year of at least BRL 400 million and the other BRL 30 million. Currently there is no minimum size for the second party. The 20% market share test in the current law is eliminated in the new law. The law also introduces a clawback provision that will allow CADE to review transactions that fall outside the merger thresholds within one year of its closing.

Furthermore, whereas the current law applies by its terms to agreements that are not formal mergers, the new law applies only to "mergers," which are defined as transactions in which (i) two companies merge, (ii) one company acquires control of the stock or assets of another, or (iii) a joint venture is undertaken that entails formation of an independent economic entity.

Anticompetitive behavior. The most relevant change relates to the fines applicable to anticompetitive behavior. Pursuant to the new law, fines will range from 0.1% to 20% of a company's (or group of companies) gross revenues obtained in the sector affected by the anticompetitive conduct in the year before the initiation of the investigation. The new reduced sanctions, which are pending confirmation by Congress before going to the presidential approval due to an error in the voting process, shall apply retroactively to pending investigations. However, as is true under the current law, the fine may be no less than the amount of harm resulting from the conduct.

The new law also modifies the leniency program. The current rule that leniency is not available to a "leader" of the cartel is eliminated. Further, grant of leniency currently extends

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to criminal liability under the Federal Economic Crimes Law but not to other possible crimes under other criminal statutes, such as fraud in public procurement. The new law broadens the leniency grant to extend to these crimes as well.

Finally, the new law introduces changes to the criminal sanctions applicable to anticompetitive conduct. The current provision of the Federal Economic Crimes Law sets forth jail terms of 2 to 5 years or the payment of a criminal fine. The new law amends such provision and establishes that anticompetitive behavior may be punished with a jail term of 2 to 5 years plus the payment of a criminal fine. The fact that the criminal fine is no longer an alternative sanction to the jail sentence will prevent individuals from settling the criminal case. The law approved by Congress also establishes federal jurisdiction for some types of criminal anticompetitive conduct. However, President Dilma is expected to veto such provision.

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