Legal Bulletin
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New Brazilian Competition Law enters into force in May 2012

Approved by the Brazilian Congress in October 2011, the new competition law was signed by President Dilma on November 30th and published in the Official Gazette on December 2. Law n. 12.529/2011 will enter into force on May 29, 2012 and will significantly change the landscape of competition enforcement in Brazil.

Creation of a single competition agency. The new law consolidates the investigative, prosecutorial, and adjudicative functions of the current 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 specialists in antitrust regulation but rather the new staff would be drawn from other specialties in the federal civil service.

Merger control. The new law introduces a mandatory pre-merger notification system. Although deadlines or a recommended period for filing was not set out, it is expected that CADE will accept notifications based on a non-binding agreement, provided the parties intend in good faith to enter into a final agreement.

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 — 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 and President Dilma vetoed the provision that stated that the transaction would be automatically approved if CADE failed to adjudicate it within the review period. In complex cases, the law allows the Reporting Commissioner to authorize the parties to close the transaction before receiving CADE's clearance, subject to conditions such as the limitations on the freedom of the acquirer to liquidate assets, integrate activities, dismiss workers, close stores or plants, terminate brands or product lines, and alter marketing plans. The BRL 45,000 notification fee is retained and is allocated entirely to CADE.

The new law provides for minimum size thresholds, expressed in total revenues derived in Brazil by each of at least two parties to the transaction. 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. Such amounts may be reduced or increased by the Ministers of Finance and Justice, jointly. The 20 percent market share test in the current law is eliminated in the new law. The law also introduces a claw back provision that will allow CADE to review transactions that fall outside the merger thresholds within one year of its closing.

Although changes had also been expected regarding the types of transactions subject to mandatory filing, the wording of the new provisions define "concentration acts" very broadly as when (i) two or more companies merge, (ii) one company acquires sole or joint control of the stock or assets of another, or even a minority shareholding, (iii) an incorporation of other companies take place, or (iv) a joint venture, an association or a consortium is formed. The new provisions will not apply to consortia that are formed in connection with public bids. Whether it will still cover agreements that refer to licensing, distribution, supply, and other commercial arrangements that are not typical mergers will become clear only through new case law and regulations issued by CADE.

Anticompetitive behavior. The most relevant change relates to the fines applicable to

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anticompetitive behavior. Pursuant to the new provisions, fines will range from 0.1 percent to 20 percent of a company's (group of companies' or conglomerate's) gross revenues generated from the relevant "sector of activity" in the year prior to the initiation of the investigation. CADE may resort to the total turnover, whenever information on revenue derived from the relevant "sector of activity" is unavailable. Case law and/or infra-legal regulation is expected to define the concept of "sector of activity" and also to set forth the criteria that will be applied to distinguish when fines will be imposed against the company, the group of companies, or the conglomerate. Finally, as is true under the current law, the fine may be no less than the amount of harm resulting from the conduct.

Directors and other executives found responsible for anticompetitive behavior may be sanctioned from 1 percent to 20 percent of the fine imposed against the company. Individual liability for executives is dependent on proof of guilt or negligence in management.

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, a grant of leniency currently extends 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.

The new law also 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.

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