



Shaping the Future of Brazil's Anti-Cartel Program: Relevant Changes Introduced by Law No. 12,529/2011

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Law No. 12,529 of November 30, 2011 (“Law No. 12,529/2011” or “the new Law”) took effect on May 29, 2012 and is expected to change the landscape of competition law and policy in Brazil during the coming years.

With respect to the prosecution of cartels,² the relevant changes are related to (i) applicable sanctions; (ii) investigative tools, including the Leniency Program, and inspections; and (iii) a new institutional framework, with the creation of a single independent authority—the Administrative Council for Economic Defense (“CADE”)—which may impact the enforcement agenda and cooperation with the criminal authorities on the anti-cartel front.

I. APPLICABLE SANCTIONS

Under the new Law, fines range between 0.1 and 20 percent of the company’s or group of companies’ pre-tax turnover in the economic sector affected by the conduct in the year prior to the beginning of the investigation. CADE’s Resolution No. 3/2012 broadly defines 144 “sectors of activity,” which includes, among others, beverages and agriculture. CADE may resort to the total turnover, whenever information on revenue derived from the relevant “sector of activity” is unavailable. Moreover, as under the previous Law, the fine may be no less than the amount of harm resulting from the conduct. However, due to challenges associated with quantifying damages, CADE has never calculated the harm caused by an anticompetitive conduct to determine the applicable fine and we do not expect the agency to start doing so in the short run.

The wording of the new provision lacks clarity and creates legal uncertainty regarding the scope of its application. Infra-legal regulation was expected to define the criteria that would be applied to distinguish when fines would be imposed against the company, the group of companies, or the conglomerate, but this issue was not

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² The new Law gathers all types of cartel behavior under two provisions: Article 36, I, (a), (b), (c), and (d) lists hard-core cartel conduct while Article 36, II refers to other cartel conducts, such as facilitating practices and information exchange among competitors.

addressed in the regulations published to date. Under the previous law, sanctions could only be calculated based on the turnover of the actual defendants included in the proceedings. Therefore, although the range from 0.1 to 20 percent of the sector of activity turnover provided for in the new Law is narrower than the 1 to 30 percent of the total turnover set forth by the previous statute, it is unclear whether its scope will be constricted or expanded, since CADE could consider parent companies' turnover when determining the amount of the fine.

Law No. 12,529/2011 provides that directors and other executives found liable for anticompetitive behavior may be sanctioned with a fine calculated as 1 to 20 percent of the fine imposed against the company. Although, on the one hand, the level of fines that may be imposed on the individual has been reduced when compared with the previous statute,³ on the other hand, it is now more reasonable to expect individuals to be personally liable for paying the fine. The new Law also provides that individual liability for executives is dependent on proof of guilt or negligence (the provision recalls the “dishonesty” requirement of the U.K. law). We expect this to reduce the number of defendants and consequently to increase the speed of cartel investigations in Brazil, especially in connection with investigations involving foreign defendants.

The new Law introduces a new type of sanction: CADE could prohibit an individual from exercising market activities on its behalf or representing companies for five years. The idea behind this provision was to deal with situations in which CADE prohibited the wrongdoer from participating in public procurement procedures and obtaining funds from public financial institutions for up to five years. To skirt this penalty, the parties simply set up a new company and resumed activities in the same sector without being subject to the restrictions imposed by CADE's decision. The new sanction prevents the parties from doing so. The law has also included a broad provision allowing CADE to impose any “*sanctions necessary to end harmful anti-competitive effects.*” Given the quasi-criminal nature of the sanctions available to the antitrust authorities, CADE's wide-ranging enforcement of such provision may prompt judicial appeals.

Law No. 12,529/2011 also modifies the criminal sanctions applicable to anticompetitive conduct. The previous provision of the Economic Crimes Law sets forth jail terms of two to five years or the payment of a criminal fine. The new Law establishes that anticompetitive behavior may be punished with a jail term of two to five 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, which may result in an increasing number of criminal investigations affected by the statute of limitations.

³ Under the previous law, directors and officers of companies in violation could be fined between 10 and 50 percent of their company's fine.

II. INVESTIGATIVE TOOLS

Changes were also introduced into Brazil's Leniency Program. The rule that leniency is not available to a "leader" of the cartel was eliminated. The elimination of the disqualification of the "leader" as a leniency applicant does not necessarily mean that the authority will disregard the roles played by each cartel participant in its leniency determination—Article 86 of Law No. 12,529/2011 provides that the authority *may* grant leniency if the program requirements are fulfilled. Therefore, from now on the authority will not be required to address arguments that a leniency applicant must be disqualified for having been a leader in a conspiracy, but this will most likely not be followed by policy changes resulting in immunity from sanctions independent of the role played by each party.

Further, a grant of leniency under the previous Law extended to criminal liability under the 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, enhancing legal certainty with respect to criminal immunity, thereby increasing incentives for leniency.

The new Law also increases the incentives for settling the investigation, which could also turn out to be a useful investigative tool for the authority through cooperation. CADE is now authorized to simultaneously negotiate and settle with multiple defendants in connection with the same investigation. Also, the new investigative agency ("DG") may proactively invite defendants to apply for settlements.

As for on-site inspections to obtain evidence of illegal conduct, the previous statute allowed the investigative agency to either obtain a judicial warrant to conduct a surprise inspection or to conduct an inspection without judicial warrant. In the latter scenario, it was mandatory to give 24-hour prior notice to the company or individual. The new Law now allows the authority to either obtain a judicial warrant to conduct the search or to do it with no judicial warrant without the need to give 24-hour prior notice. In this case, CADE's Internal Rules provide that the inspection shall take place between 6am and 8pm and the authority can only take copies of paper or digital documents (as opposed to the original documents). Such provision introduces in Brazil a system similar to those in jurisdictions like the European Union and Colombia, where the head of the administrative authority has sufficient powers to order searches, subject to judicial review.

III. NEW INSTITUTIONAL FRAMEWORK

The new Law consolidates the investigative, prosecutorial, and adjudicative functions of the Brazilian competition authorities into one independent agency. CADE was restructured to include (i) a Tribunal composed of six Commissioners and a

President; (ii) a Directorate General for Competition and (iii) an Economics Department. The new DG is responsible for the former functions of SDE's Antitrust Division and SEAE,⁴ and is in charge of investigating anticompetitive conduct that could eventually be sanctioned by CADE.

The new institutional design is in line with international best practices and is an improvement to the previous one. It eliminates redundancies and the available human and financial resources tend to be better allocated. Still, the new DG will have to bridge the gap that naturally exists as part of an independent agency, so as to make sure that Brazil's dual criminal and administrative anti-cartel system remains integrated going forward.

During the first years of Brazil's anti-cartel program, the close cooperative relationship developed between Brazil's former investigative agency ("SDE") and the criminal authorities has been significantly facilitated by the fact that the SDE was within the Ministry of Justice. For practical purposes, the fact that the Federal Police and the SDE were sister agencies and that other agencies under the Ministry of Justice, such as the National Secretary of Justice (in charge of implementing the anti-money laundering policy, among other functions) and the National Public Security Office (articulating the security policies in the different states of the country), had already established strong ties with the prosecutors and the state police forces when the SDE launched the anti-cartel program contributed to the program's success. The expanding numbers of actors that share responsibilities over cartels in Brazil (federal and state-level prosecutors and police, public procurement officials and CADE) invite careful and creative thoughts about how to manage the multiplicity of voices and the different perspectives on effective anti-cartel enforcement, especially now that the investigative agency is no longer part of government. As the highly decentralized criminal prosecution system in Brazil becomes increasingly involved in the anti-cartel enforcement, some co-evolution might lead to a hybrid system in which each enforcement entity investigates, without overlap, the type of case it is best fit to pursue, i.e., public prosecutors go after establishing individual liability while administrative agencies try primarily to establish corporate liability and assess the respective fines.

Last but not least, until now, the most serious problem confronting the Brazilian authorities has been their lack of resources, compounded by a high rate of employee turnover, which has led to a backlog of investigations. The introduction of a pre-merger system for which the DG is in charge could magnify this problem, especially during the first years of the new regime (under the previous regime, the SDE was primarily in charge of conducting investigations of anticompetitive conduct). How would anti-cartel enforcement remain a priority in practice given the limited

⁴ SEAE continues to exist but now deals exclusively with "competition advocacy" before the Brazilian regulatory agencies and other governmental bodies.

staff⁵ and the increased attributions of CADE's investigative arm? Nevertheless, Brazil has made important progress with respect to anti-cartel enforcement under much less promising conditions; the challenges ahead are great but far from insurmountable.

⁵ A central element in the new Law is the provision for 200 permanent positions in CADE, but there is no perspective for the fulfillment of such positions.