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Brazil—The New Antitrust Law

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I. INTRODUCTION

The Brazilian antitrust system underwent a modernization with the approval, by the Brazilian Congress, of a new bill of law on October 5, 2011 (“New Law”). The New Law was signed by the President of Brazil on November 30 and will come into force on May 29, 2012.

The main amendments to the current antitrust law comprise: (i) elimination of the current overlaps among three different agencies; (ii) adoption of a pre-merger review regime (as opposed to the current post-merger review); (iii) change in the requirements for submission of transactions to merger review; and (iv) amendment to penalties imposed on participants in cartels and other unilateral conducts.

II. NEW STRUCTURE OF ANTITRUST AGENCY

The new Council for Economic Defense (“CADE”) will be composed of a Tribunal (the former CADE), with its six commissioners and a president, plus a new Superintendency General; which is, in fact, the merger of part of former Secretariat of Economic Law (“SDE”) into CADE. The current Secretary of SDE, Mr. Vinicius Carvalho, is a strong candidate for the position of Superintendent General.

The Superintendent General will conduct merger investigations and decide whether a transaction will be (i) approved without further inquiry within 60 days, or (ii) deemed as complex and be subject to additional investigations. CADE’s commissioners will remain in office for four years (instead of the current two years), and may be appointed for additional four years. The New Law introduced staggered terms for CADE’s commissioners, to avoid simultaneous vacancies and the resulting postponement of hearings. The introduction of staggering terms and longer office terms aim to avoid the current lack of stability of officers and high turnover rate, while enabling the passing of expertise to new commissioners.²

The third agency (besides CADE and former SDE), Secretariat for Economic Monitoring (“SEAE”), no longer has the attribution of advisor in anticompetitive acts (“conducts”) and merger investigations, remaining responsible only for competition advocacy.

These amendments had the purpose of avoiding overlapping procedures by both SDE and SEAE, especially in the gathering of evidence and the preparation of opinions.

Finally, the New Law provides for 200 permanent positions in CADE, as opposed to the 30 officials currently in charge of post-merger reviews.

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² *The New Bill of Law for the Reform of the Brazilian System for Competition Defense*, p. 3 in the text prepared by SEAE, SDE and CADE, presented on September 5, 2005.

III. MERGER REVIEW

The current post-merger review leads to procrastination in the presentation of information requested by the authorities during investigations, and the provision of several legal opinions by the parties to CADE on the eve of the adjudication of the case.

The introduction of pre-merger review by the New Law aims at expediting the merger procedure as well as avoiding judicial battles seeking to reverse suspensions of the transaction or restrictions imposed by CADE. The judicial review relates mainly to mandatory divestments and other restrictions imposed by CADE after the conclusion of a merger, as a result of the current post-merger review.

The pre-merger review has the objective of avoiding the current inefficiencies to the authorities, unnecessary costs, and uncertainty to the parties generated by the current post-merger review system.³

CADE may also request additional investigations, subject to an overall duration term of 240 days, plus an extension of 60 to 90 days upon request of the parties or of CADE. The establishment of a maximum period of time until adjudication is a major improvement in relation to the current law, which permits the suspension of the proceeding every time there is a request of documents. In practice, there is today and indefinite procrastination of decisions by requesting new documents and information, especially in respect of complex cases.

The New Law also amended the thresholds for mandatory filing of transactions, adding to the current threshold of a turnover of R\$400 million derived in Brazil (approximately US\$320 million) by one of the parties, the requirement of a turnover of R\$30 million (approximately US\$24.6 million) derived in Brazil by the other party.

The New Law eliminated the requirement of a market share equivalent or higher than 20 percent in the relevant market held by any of the parties. This rule had already been softened by case law, which established that the 20 percent market share test would be applicable only when generated by the transaction.

A formal mechanism for settling was introduced by the New Law—the Superintendency General has powers to negotiate a settlement agreement in respect of a notified merger at any time, even after the investigation phase is concluded and the case goes to the Tribunal.

The New Law's introduction of pre-merger reviews, threshold amendments, and straightforward settlement mechanisms reduces both the inefficiency in the merger review procedure and the number of unnecessary reviews, while enabling the antitrust authorities to concentrate their efforts in the prevention and sanction of anticompetitive practices (conducts) such as cartels, which are the most damaging anticompetitive practices to the society as a whole.

IV. CONDUCTS (INCLUDING HARD-CORE CARTELS)

The investigation procedure in respect of conducts was considerably improved by the New Law. Now there is a clear distinction among three different phases: (i) a new “preparatory proceeding” to filter groundless accusations, which today causes unnecessary burdens to the authorities, (ii) an administrative inquiry as investigative phase, and (iii) an administrative proceeding during which there is an adversary proceeding.

³ *Id.* at 3.

The current law provides for appeals seeking to reverse the dismissal of preliminary investigations; the New Law provides that the Superintendent General is empowered to dismiss preparatory proceedings and administrative inquiries.

The New Law provides the Superintendency General with powers to carry out dawn raids and obtain copies of any documents electronic data without a prior judicial order or a 24-hour prior notice to the relevant company.

These broad powers have raised severe criticism and the authorities have already stated that, notwithstanding their powers to do so, they will not carry out any dawn raids without giving a prior 24-hour notice. In 2010 the National Industry Syndicate (CNI) brought an action before the Supreme Court alleging that the dawn raids violate the Brazilian Federal Constitution, as no prior Court order is required by law. The decision by the Supreme Court is still pending.

The Secretary of SDE has repeatedly stated to the press that, despite the new broad powers granted by the New Law, dawn raids and inspections will continue to be carried out as provided under the current law: making copies instead of seizure of documents, 24-prior notice, and observance of business hours.⁴

The first inspection carried out by the Brazilian competition authorities was in the facilities of brewery company AMBEV, for the purposes of gathering of evidence in connection with exclusivity agreements. The seized evidence enabled CADE to impose the highest penalty of its history: R\$ 352 million (approximately US\$ 190,400,000).

In 2010 several new cartel investigations were launched. International cartel investigations were initiated based on Plead Agreements signed in the United States and Leniency Agreements executed both in the United States and Europe, in markets such as high voltage power cables, DRAM chips, LCD panels, freight forwarding services, air and gas insulated switchgears (AIS and GIS).

Dawn raids were conducted also in recent investigations, such as the investigations concerning the international vitamins cartel and international freight forward services.

The Superintendency General also has powers to request to a Court order, through the General Attorney's Office, the seizure of evidence at the head offices of the company.

In regard to penalties applicable to participants in cartels and unilateral conducts, the penalties provided under the current law are within the range of 1 percent to 30 percent of the turnover of the party or its economic group, as well as cease-and-desist orders.

The New Law reduced this percentage, setting out a penalty in the range of less than 1 percent to 20 percent of the party's turnover. Although this percentage change (originating in the Senate) had the objective of reducing the penalty, it inadvertently increased the resulting penalty by broadening its reach from "relevant market" to "the industry where the antitrust violations occurred."

Therefore, CADE will have the task of defining the meaning of "the industry where the antitrust violations occurred" to bring clarity as to the possible penalty amounts to be imposed by the authorities.

⁴ *O Estado de São Paulo*, October 7, 2011 and October 8, 2011.

The New Law further provides further that whenever the estimate of the advantage deriving from the conduct is feasible, the amount of the penalty may not be lower than such advantage to the party.

Whenever no turnover amount is available in relation to the relevant industry, as defined by CADE, or whenever the turnover is provided in an incomplete or incorrect form and/or it is not evidenced, the basis for the assessment of the penalty will be equal to the overall turnover of the company or of its economic group.

The New Law provides that the penalty will be duplicated in the event of a repeated violation.

Regarding the penalties which may be imposed on *individuals* for cartel violations, the New Law provides the sanction of imprisonment for two to five years **and** a fine, instead of the current sanction of imprisonment of two to five years **or** a fine.

Moreover, a bill of law is under discussion whereby the current term of imprisonment to be imposed on individuals may be further raised from two to five years to two to eight years.

In the case of officers directly or indirectly responsible for the violation, whenever his/her guilt or willful misconduct is evidenced, the penalty will range from 1 percent to 20 percent (instead of the current 10 percent to 50 percent) over the penalty **actually applied** to the company, and therefore no longer over the **applicable** penalty. Again, the objective of reducing the penalty was clearly jeopardized by a lack of technicality.

Finally, CADE and the Public Attorney's Office are discussing the fostering of lawsuits seeking indemnification from companies that participated in cartels, to be brought by consumers by means of civil lawsuits or class actions.

The trend of applying greater fines and increasing prison time for individuals is clear in the new New Law, notwithstanding the amendments introduced by the Senate (the attempts of which were not very successful at reducing fines, due to lack of technicality in the edits to the New Law).

V. LENIENCY PROGRAM

The leniency program was amended by the New Law to include bid-rigging among the violations that may be the subject matter of a leniency agreement.

The leniency program was further amended to extend to all employees of a lenient beneficiary company, without requiring their signature.

Moreover, the ringleader is no longer excluded as beneficiary of a leniency agreement.

VI. TRENDS

Cartel prosecution remains the focus of the Brazilian competition authorities.

In addition to international cartels, the bid-rigging conduct is high in the agenda. The New Law introduced this specific conduct in the list of anticompetitive conducts, due to the upcoming Olympic Games and Football World Cup. During 2011 new investigations were launched in connection with bid-rigging in the infrastructure sector, and recent bid rules have been requiring a statement to be executed by the bidding parties that there has been no bid-rigging.

The current SDE's head, who may be assigned as the first Superintendent of the Superintendency General, has long stated that essential services (utilities) will be a priority target, besides international hard-core cartels and bid-rigging. However, investigations in the essential services market remain yet to be seen.

Foreign companies must become aware of Brazilian competition authorities' priorities, especially in respect of international cartels. Brazilian authorities have been asserting their competence even in respect of conducts entirely carried out abroad, whenever they **may** have effects in Brazil. The New Law has not changed the applicable provisions in this respect—the Brazilian authorities may impose penalties on foreign participants in international cartels, without the requirement of providing evidence of actual effects in Brazil, in face of the mere possibility of generation of effects in Brazil.

In view of the Brazilian authorities' powers to impose penalties on international cartels which may generate effects in Brazil (with basis solely on the authorities' opinion, not hard evidence), 2011 has seen a wave of leniency agreements executed in Brazil, following leniency and plead agreements executed in Europe and in the United States.

This trend will probably escalate during 2012, due to an increased perception of accountability resulting from the new leniency agreements entered into on 2010 and 2011 with Brazilian authorities.