



# CPI Antitrust Chronicle

November 2011 (2)

## **Brazil's New Competition Law: Promising but Challenging**

Ana Paula Martinez &  
Mariana Tavares de Araujo

Levy & Salomão Advogados

## Brazil's New Competition Law: Promising but Challenging

Ana Paula Martinez & Mariana Tavares de Araujo<sup>1</sup>

### I. INTRODUCTION

The Brazilian Congress approved in October 2011 a new antitrust and unfair competition law that significantly changes the landscape of competition enforcement in Brazil. Law 12.529/2011 was signed by President Dilma on November 30<sup>th</sup> and published in the Official Gazette on December 1<sup>st</sup>. It will take effect on May 29, 2012.

The modern era in competition policy in Brazil began with the antitrust law of 1994 (Law No. 8.884/1994), which coincided with the country's transition to a market-based economy. Law No. 8.884/1994 introduced the current institutional framework of the Brazilian Competition Policy System ("BCPS"), comprised of two investigative and advisory agencies, the Secretary of Economic Monitoring at the Ministry of Finance ("SEAE/MF") and the Antitrust Division of the Secretary of Economic Law at the Ministry of Justice ("SDE/MJ"), and a third component, the Council for Economic Defense ("CADE"), an administrative tribunal that issues final rulings in both merger and conduct cases. The inefficiencies of the current system became apparent fairly quickly, most of them related to its mandatory post-merger review system, the overlapping functions of the three agencies, and the lack of resources. As a result, policy makers began proposing amendments to the antitrust statute beginning in early 2000, but most were not enacted.

Notwithstanding such defects, during the past decade antitrust authorities in Brazil have made significant progress. Improvements since 2003 eliminated overlapping functions, so the SDE concentrated on anticompetitive conduct investigations, with special focus on anticartel enforcement, and the SEAE on merger analysis. Its anticartel program is now widely respected in

---

<sup>1</sup> Ana Paula Martinez is a Partner at Levy & Salomão Advogados, Brazil, practicing primarily in the areas of antitrust, unfair competition, and mergers and acquisitions. Prior to rejoining Levy & Salomão, Ms. Martinez served as head of the Antitrust Division and Deputy Secretary of the Secretariat of Economic Law of Brazil's Ministry of Justice. From 2008 to 2010, she was the co-head of the cartel sub-group of the International Competition Network with the U.S. Department of Justice. Before entering government, Ms. Martinez was an associate with Cleary Gottlieb Steen & Hamilton LLP. She has served as an assistant to Harvard antitrust Professor Einer Elhauge, and as an antitrust advisor to UNCTAD and to the Government of Colombia. *Global Competition Review* named her on its international list of the "Top 100 Women in Antitrust". Ana Paula holds a LL.M. degree from both the Harvard Law School and the University of São Paulo and is a PhD Candidate in Criminal Law. She is licensed to practice law in Brazil and New York.

Mariana Tavares de Araujo is a Partner at Levy & Salomão Advogados, Brazil, practicing primarily in the areas of antitrust, unfair competition, and mergers and acquisitions. She was the Secretary of Economic Law of the Ministry of Justice (2007-2010), and prior to that the head of the Merger Division of the SDE and the head of the Cartel Division of the Secretariat of Economic Monitoring of the Ministry of Finance. While serving in government, she represented the Brazilian government at meetings of the OECD's Committee on Competition. Ms. Tavares de Araujo was a member of the Brazil's Regulatory Board of the Medicine Market, CMED. Ms. Tavares de Araujo has a law degree from the Catholic University of Rio de Janeiro and an LL.M. from Georgetown University Law Center, Washington, DC. *Global Competition Review* named her on its international list of the "Top 100 Women in Antitrust."

Brazil and abroad, and merger review has been improved through infra-legal measures such as (i) the introduction of a “fast track” procedure for simple cases; (ii) consent decrees (*Medida Cautelar*) or agreements with the parties (*Acordo para Preservar a Reversibilidade da Operação* or *APRO*) that prevent complex transactions from being closed prior to CADE adjudicating the case; and (iii) the ability of administrative agencies to issue binding interpretations of law issued by CADE with the purpose of ensuring legal certainty regarding the notification thresholds. Further progress, however, depends on the long expected reform of the current system, recently approved by the Brazilian Congress.

The most relevant changes introduced by the new law are related to: (i) the creation of a single antitrust and unfair competition agency; (ii) pre-merger review and new filing thresholds; (iii) sanctions and other specific provisions addressing anticompetitive conduct investigation; and (iv) enhanced human resources for the new agency.

## II. CREATION OF A SINGLE COMPETITION AGENCY

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) an administrative tribunal composed of six Commissioners and a President; (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. It is particularly relevant that this function will continue to be performed by SEAE, since its position as part of the powerful Ministry of Finance affords it access to many other government bodies. Now that it will be divested of its other attributions and is expected to be adequately staffed, it may be in a better stance to promote competition standards within government.

## III. MERGER CONTROL

The new law introduces a mandatory pre-merger notification system, which is the most relevant change in the Brazilian merger control system. 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<sup>2</sup> 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 also 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

---

<sup>2</sup> As of November 2011, the average merger review time in Brazil was 148 days.

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.

Furthermore, although changes had also been expected regarding the types of transactions subject to mandatory filing, the wording of the new provisions left open for interpretation whether they will apply only to formal mergers or would encompass other agreements as well. The new law provides that “Any acts that may limit or otherwise restrain open competition, or that result in the control of relevant markets for certain products or services” must be submitted to CADE for review, provided that the turnover threshold is met.

Whereas the new provisions specifically refer to “concentration acts,” it defines those 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.

The new law does not set out deadlines or a recommended period for filing. It is expected that, as in other pre-merger jurisdictions and following ICN recommended practices, CADE will accept notifications based on a non-binding agreement, provided the parties intend in good faith to enter into a final agreement.

Regarding the criteria for the substantive merger review, the new law follows along the same lines of Law No. 8.884/94, and the current case law is expected to govern future decisions by Commissioners.

#### **IV. ANTICOMPETITIVE BEHAVIOR**

The most relevant change relates to the fines applicable to 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.

#### **V. INCREASED AGENCY STAFFING**

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. Until now, the most serious problem confronting the BCPS has been its lack of resources, compounded by a high rate of employee turnover. The agencies have been chronically understaffed, leading to a large backlog of investigations.

#### **VI. CONCLUSION**

Most of the changes brought in by the new law are expected to reduce costs of doing business in Brazil and to streamline competition law and policy in the country, consistent with international best practices.

The new law's implementation, however, poses some challenges for regulatory authorities and practitioners alike. Whether CADE will allow and how it will proceed with respect to pre-merger communication reviews; if CADE issues regulations providing that all cooperative agreements that fall under the turnover threshold must be reviewed; how lengthy will be the review of simple cases; which transactions will be subject to CADE's claw back assessment; and how it will enforce the new sanctioning provisions are some of the issues that need to be addressed shortly so as to reduce uncertainty of the business community.

Conversely, practitioners in Brazil will have to adapt to the pre-merger review system, in particular with regard to the scope of the review and new deadlines by which to provide information to CADE in an effort to ensure regulatory approvals are obtained before the anticipated closing date.