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I. INTRODUCTION

On May 29, 2012, Law n. 12,529/11—the New Brazilian Competition Law ("New Law")—entered into force, after being enacted as a result of more than seven years of discussions within the Brazilian National Congress. The New Law superseded the first effective competition statute of the country, Law 8,884/94 ("Previous Law"), enacted in 1994 concurrently with significant liberalization reforms.[2]

The most important changes established by the New Law concern merger review and the institutional structure of the authorities. The Previous Law had established a non-suspensory merger control regime in Brazil, under which parties were allowed to close transactions before the final decision of the competition authority. Besides being at odds with international experience, this resulted in difficulties to the authorities and many uncertainties to merging parties, especially in complex transactions. The New Law set up a pre-merger review system, consistent with the reality of most countries.

The New Law also consolidated the investigatory and the decision-making authorities into one single agency, in order to increase efficiency and support the new pre-merger review system. Such institutional reform also mirrors those adopted elsewhere in the world.[3]

What to say two years after the New Law entered into force? The present article aims at providing a brief overview of recent developments in the Brazilian competition law and policy as a result of the implementation of the new statute. It is organized in three sections: the first describes the institutional changes; the second explains the new pre-merger control regime, with some aspects of its enforcement in the last two years; and the third provides details of anticompetitive practices investigations, with a focus on cartels. A brief conclusion follows.

II. INSTITUTIONAL ASPECTS: THREE-TO-TWO MERGER OF THE COMPETITION AUTHORITIES

Under the Previous Law, three agencies composed the so called *Brazilian Competition Policy System—BCPS*: the Secretariat of Economic Law, within the Ministry of Justice (known by its Portuguese acronym, "SDE"); the Secretariat of Economic Monitoring, within the Ministry of Finance ("SEAE"); and the Council for Economic Defense ("CADE"), an independent

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[2] Brazil had a fairly comprehensive competition law since 1962 (Law 4,137), which, however, was not complemented by a consistent competition policy and effective enforcement by the government.

[3] *See*, for example, the integration of the investigative and the decision-making bodies implemented in France in 2008 (http://www.autoritedelaconcurrence.fr/doc/25years_uk.pdf) and in the United Kingdom in 2013/2014 (https://www.gov.uk/government/organisations/competition-and-markets-authority/about).

commission composed of seven members chosen by the President of the Republic and approved by the Federal Senate. The Secretariats were responsible for investigating mergers and behavioral matters, providing non-binding reports about them to CADE. After some rationalization measures taken by the Secretariats, SDE was primarily responsible for conduct cases—focusing its resources in anticartel efforts—while SEAE reviewed concentrations. CADE, by its turn, issued final administrative decisions, subject only to judicial review.

The New Law modified the structure of BCPS, with the aim of rationalizing its operations and avoiding overlapping functions. Under the New Law, the SDE and the investigative functions of SEAE were moved from their respective Ministries and merged with CADE, so that all functions were now centralized under a restructured "New CADE." The New CADE is now divided into four main internal bodies:

1. the *General Superintendence* ("Superintendência Geral" – SG), which inherited both SEAE and SDE's powers concerning investigation of anticompetitive conducts and mergers, and acquired additional responsibilities;
2. the *Administrative Tribunal*, composed of the seven Commissioners (as before);
3. the *Department of Economic Studies*, responsible for preparing economic reports as requested by either the SG or the Commissioners; and
4. the *Attorney's Office*, in charge of representing CADE in all judicial proceedings and providing internal legal assistance to the other bodies.

SEAE continues to exist and is still part of the BCPS, working as a competition advocacy bureau. It constantly evaluates the competitive effects of new regulations and trade measures, a role it had played under the old regime but that is now further emphasized with an enhanced legal mandate.

Another important provision of the New Law was the creation of 200 new permanent positions for the New CADE, a much-needed measure considering the well-known lack of human resources of Brazilian competition authorities.[4] Such positions have to be filled by means of competitive recruitment procedures organized by the Ministry of Planning and Budget (similar to the *concours* of the European Commission), the first of which is currently stalled due to an interim judicial order. Therefore, CADE is still short of the manpower necessary to accomplish its important institutional missions.

III. PRE-MERGER REVIEW PROCEDURE: MAIN ASPECTS AND RECENT DEVELOPMENTS

The New Law establishes a pre-merger review regime applicable to "economic concentration acts," which are defined by Art. 90 as transactions where (i) two or more previously independent companies merge; (ii) one or more companies partially or fully acquire control of one or more companies; (iii) one or more companies incorporate another company or

[4] "The most serious problem confronting the BCPS continues to be its lack of resources, which is compounded by a high rate of employee turnover. CADE had no permanent professional staff. SDE is also chronically understaffed, leading to a large backlog of investigations." OECD; IDB, *Competition Law and Policy in Brazil – A Peer Review*, 7 (2010).

companies; or (iv) two or more companies execute a consortium, a joint venture, or any other form of association agreement.

An exhaustive list of transactions subject to pre-merger control certainly increases legal certainty. Although typical merger transactions are caught under these hypotheses, it is not yet clear which sort of cooperative arrangements are caught, especially considering the very open ended "association agreement" concept. In view of that, in February 2014 CADE submitted to public comment a proposed regulation defining both vertical and horizontal arrangements which would be considered "association agreements" for merger control purposes, in an effort to further clarify the issue.[5] After receiving contributions from companies, trade associations, and the bar—many of which argued the proposal to be over inclusive[6]—CADE is expected to issue the regulation by the end of the year.

An "economic concentration act" is only notifiable if certain turnover thresholds of the parties' economic groups are met: (i) gross annual revenues in Brazil larger than BRL 750 million in the preceding fiscal year for one of the groups, and (ii) BRL 75 million for the other.[7] CADE issued Regulation 2/2012 in May 2012 in order to provide better guidance on how to calculate group turnover. The rules concerning investment funds were deemed too broad by the bar and financial institutions and, after two years, CADE also submitted to public consultation proposed changes aiming at better specifying such aspects of Regulation 2/2012.[8]

The appropriate definition of "economic concentration act" is extremely important in a pre-merger control regime, since transactions that are not notified, or that are closed before final approval by the authority ("gun jumping"), can be nullified, with the parties subject to a fine of up to BRL 60 million, according to Art. 88, §3 of the New Law. CADE has already applied the gun jumping fine at least four times.[9]

As per the procedure to review merger transactions, the New Law establishes a very clear and strict timeframe. The entire process must be completed within 240 days, counting from the day of the filing of a complete notification. This period can be extended only once, for the period of 60 days (300 days in total) if formally requested by any of the involved parties, or for 90 days (330 days in total) if CADE justifiably declares the case to be "complex."

Moreover, there are well-defined phases, provided by the New Law and further specified by CADE Internal Regulations (*Regimento Interno*), also approved in May 2012. After receiving a notification, the SG must analyze and decide on the completeness of the application, requiring

[5] *Consulta Pública 3/2014*, *available at* http://cade.gov.br/Default.aspx?94a7768392879d65b19eae81dd64.

[6] *See*, for example, the contribution by the Sections of Antitrust Law and International Law of the American Bar Association at http://www.americanbar.org/content/dam/aba/administrative/antitrust_law/at_comments_2014amendbrazil_en.authcheckdam.pdf.

[7] The new turnover thresholds led to a significant decrease in the number of merger notifications to CADE: according to public figures, there were 684 transactions notified in 2011 and only 377 in 2013, the first full calendar year with the New Law in force.

[8] *Consulta Pública 1/2014*, *available at* http://cade.gov.br/Default.aspx?e75bab7d94899f63b784d46ac488.

[9] Concentration Acts 08700.005775/2013-19 (OGX/Petrobras); 08700.008289/2013-52 (UTC/Aurizônia Petróleo); 08700.008292/2013-76 (Potióleo/UTC); and 08700.002285/2014-41 (Fiat/Chrysler).

the parties to amend them if any key information is missing. Once complete, the SG publishes a notice in the *Official Gazette* and starts evaluating the notification. If the transaction is uncomplicated and raises no competition concerns, it is approved by a simplified decision by the General Superintendent within 30 days from the notification—a timeframe consistent with most foreign jurisdictions for analogous cases. According to recent figures released by CADE, 90 percent of the merger filings have been approved under this expedited procedure.[10]

More complex cases may demand some investigation by the SG, which then requires further information from the parties, competitors, customers, and/or other government agencies. At the end of its deeper review, the SG issues a formal decision, either approving the transaction or challenging it before the Tribunal.

An approval decision by the SG—either under the simplified procedure or after some more detailed inquiry—can be appealed to the Tribunal within 15 days by any interested party or the relevant regulatory agency. Moreover, the Tribunal itself can request to review the matter within the same deadline.[11] If the SG's decision is not affected by these incidents within 15 days, it becomes final and the transaction, duly approved.

Whenever the SG decides to challenge a transaction, it must demonstrate the details of its concerns and recommend the Tribunal either approve the deal with restrictions or block it. In such case, the parties have 30 days to present a formal defense to the Tribunal. Afterwards, the Tribunal's randomly assigned Reporting Commissioner can ask for any extra information she deems relevant, including non-binding opinions by the Department of Economic Studies or the Attorney's Office. The final decision will be issued by the Administrative Tribunal in a formal and public judgment session by unanimous or majority vote.

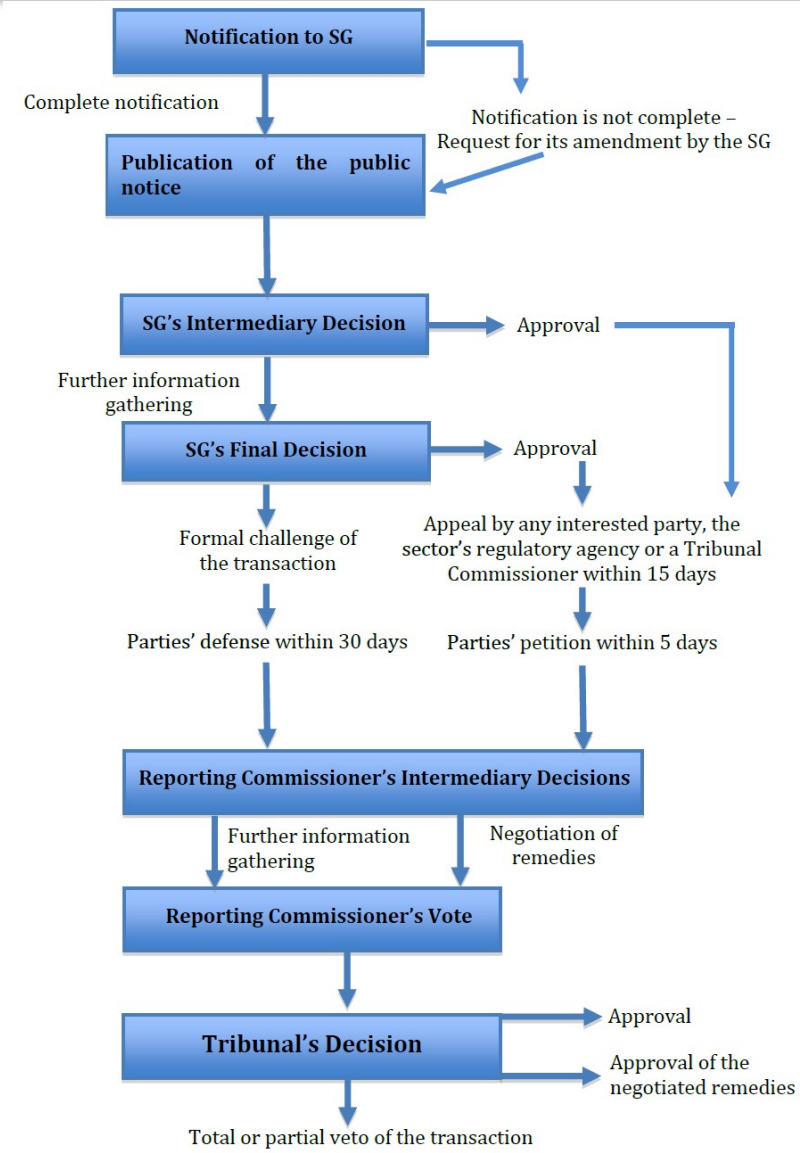
Parties are able to negotiate commitments with CADE to deal with possible competition concerns raised by the authority. Such commitments will be negotiated with either the SG or the Reporting Commissioner and must be approved by CADE's Tribunal. To date, all cases formally declared to be "complex" and judged by CADE have been approved with negotiated commitments,[12] which indicates the willingness of the authority to discuss and find with the parties reasonable remedies for potential competition concerns.

Figure 1 below provides an overview of the main phases of the merger review procedure under the New Law:

[10] CADE, *Balanço do biênio da Lei 12.529/11 e perspectivas da defesa da concorrência no Brasil*, May 2014, *available at* http://cade.gov.br/upload/Balan%C3%A7o%202%20anos%20nova%20lei.pdf (in Portuguese).

[11] CADE also published in February 2014 a third public consultation to better clarify some procedural aspects of these incidents (*Consulta Pública 2/2014, available at* http://www.cade.gov.br/Default.aspx?1a2dfd0b1a0fe52df9471936084d).

[12] Concentration Acts 08700.009882/2012-35 (Ahlstrom/Munksjö); 08700.009198/2013-34 (Estacio/UNISEB); 08700.005447/2013-12 (Kroton/Anhanguera).



IV. INVESTIGATION OF ANTICOMPETITIVE PRACTICES

The New Law brought some changes with regards to the administrative proceedings related to anticompetitive practices (e.g., cartels, concerted practices, exclusionary practices by dominant companies, etc.). However, these changes are minor in comparison to those involving merger control as described above.

Cartels are considered to be the most serious anticompetitive practice by CADE, an approach similar to other competition authorities around the world.[13] According to the New Law, a cartel is any sort of agreement among competitors to fix prices and/or quantities, allocate

[13] The tough approach by CADE concerning cartels can be exemplified by the significant fines it imposed to cement companies in May 2014, close to BRL 3.1 billion (Administrative Proceeding 08012.011142/2006-79), its largest ever penalty.

customers, and rig public bids (art. 36, §3, I). Cartels can also be characterized as a criminal offense, either under the Economic Crimes Law (Law 8,137/90) or the Public Procurement Law (Law 8,666/93), with prison sentences of up to five years. There is increasing criminal persecution of cartels in Brazil by Federal and State Public Prosecutor's Offices (*Ministério Público*), usually in cooperation with CADE.

Other horizontal practices can also be deemed anticompetitive, with CADE lately paying special attention to trade associations' suggestions of prices to member companies.[14] As per unilateral practices (or abuse of dominance by large firms), the law sets up a list of potentially anticompetitive conducts that have been construed by CADE similarly to its counterparts in other countries. Therefore, there have been a number of investigations and decisions involving predatory pricing, exclusive dealing, conditional discounts, refusals to deal, and other alleged abusive practices.

As indicated above, the General Superintendence is now responsible for all investigations of anticompetitive practices. The New Law provides a more detailed description of procedural rules concerning some aspects of the investigation, with a clearer distinction among three different sorts of proceedings: a *preparatory proceeding* to filter unsupported or frivolous accusations, an investigative phase in the form of an *administrative inquiry*, and *formal administrative proceedings* during which there is an adversary proceeding with all formal defense guarantees.

As per the investigative tools—usually employed more intensely in the administrative inquiry phase—the SG has inherited the SDE's power to carry out dawn raids to obtain evidence within the premises of investigated companies, after obtaining an injunction by a Federal Court. Since the enactment of the New Law, the SG has carried on eight dawn raids in several parts of the country, mostly concerning alleged local cartels. The requests for such injunctions are usually based on documents provided by one of the participants of an investigated cartel, under the most important investigative tool available to the SG: the *Leniency Program*.

The Brazilian Leniency Program offers companies and individuals who have infringed competition rules full or partial immunity from administrative penalties and full immunity from criminal penalties, in exchange for cooperation with the authorities in the investigation of cartels. The SG has the authority to negotiate and execute leniency agreements with applicants that meet the following conditions:

- be the first to come forward and inform CADE of an anticompetitive practice,
- confess participation in such practice,
- provide information of which SG is not yet aware on the practice itself and the co-participants, and
- immediately cease involvement in the anticompetitive practice and fully cooperate with the investigation conducted by the SG.

[14] *See* the decisions of the Tribunal concerning Administrative Proceeding 08012.009834/2006-57 (SDE v. Associação Paranaense dos Produtores de Cal-APPC); and 08012.006923/2002-18 (SDE v. Associação Brasileira de Agências de Viagens-Rio de Janeiro-ABAV-RJ), both published on 26.02.2013.

The New Law has excluded the prohibition of executing a leniency agreement with the leader of the investigated conspiracy. Moreover, the New Law has made it clearer that a duly fulfilled leniency agreement provides immunity from criminal liability related to several criminal statutes, including the Public Procurement Law and the Criminal Code.

After investigating the practice, the SG can only issue an opinion to CADE recommending the condemnation of a company or individual after formal proceedings where important due process guarantees are applicable, including those regarding publicity, opportunity to submit motions and evidence, access to files, and mandatory written reasonings of intermediary and final decisions. If, after concluding such proceedings, the SG still considers that there are grounds for a condemnation, it has to formally recommend it to the Administrative Tribunal in a reasoned opinion.

The case is then allocated by draft to a Reporting Commissioner, who has the duty to review the case and submit a written vote before the other commissioners. He or she can request additional information from the defendants and is obliged to offer them a final opportunity to submit their defense arguments. The decision is taken in a public and open session, during which the defendants' representatives are able to make oral arguments. A final decision is taken by majority of the Tribunal.

Under the New Law, fines can range between 0.1 percent and 20 percent of the company's gross turnover in the financial year preceding the beginning of formal proceedings in the "business segment" in which the conduct occurred. The previous law provided for a fining range of 1 percent to 30 percent of the company's gross revenue. CADE has been interpreting such change to imply smaller fines to companies.[15]

Individuals acting as managers can also be fined, with the amount ranging from 1 percent to 20 percent of the fine imposed to the respective company. The New Law expanded the list of alternative penalties applicable to individuals, including the possibility of exclusion from practicing trade on their own behalf or as a representative of a legal entity for a period of up to five years. Finally, employees as well as trade associations can also be fined if involved in the anticompetitive practice being sanctioned, with fines ranging from BRL 50,000 to BRL 2 billion—a much increased range compared to that provided by the Previous Law.

Before CADE reaches a final infringement decision, defendants can negotiate and execute with CADE a settlement agreement concerning the investigation, when there is usually the definition of a "pecuniary contribution" to be paid by the defendant (instead of a "fine").

Probably the most important development concerning behavioral cases are the new rules approved by CADE in March 2013 concerning the negotiation of such agreements when they involve cartel investigations (Resolution 5/2013). According to these new rules, if the settlement proposal is presented while the case is still at the SG, there are four predefined discounts for pecuniary contributions. The first defendant in a cartel investigation to execute a settlement agreement will have a discount from 30 percent to 50 percent of the applicable fine; the second

[15] *See* the decisions on Administrative Proceeding 08012.011027/2006-02 (SDE v. KLM, AirFrance, Lufthansa and others-Air Cargo Cartel), judged on 28.08.2013; and Administrative Proceeding 08012.006923/2002-18 (SDE v. Associação Brasileira de Agências de Viagens-Rio de Janeiro-ABAV-RJ), 26.02.2013.

one, from 25 percent to 40 percent; from the third onwards, the discount shall not be higher than 25 percent of the applicable fine.

The exact degree of discount depends on a number of factors, especially the degree of collaboration of the defendant with the investigation in terms of evidence and information. If the proposal is made before the Tribunal, the maximum discount is 15 percent. The defendant has to necessarily admit its participation in the investigated practice in order to execute the agreement—a requirement that was not established by the New Law and that has been criticized by professors and practitioners.

V. CONCLUSION

The enactment of the New Law represented a significant step for the improvement of Brazilian competition law and policy, as it provided the legal foundations for a more effective merger control regime and a leaner institutional structure.

CADE, with its now integrated configuration, has succeeded in implementing the new statute, especially when it comes to the modernized merger control regime. There have been visible joint efforts of the SG and the Tribunal to streamline the evaluation of simple cases, with very positive results. Moreover, the agency is paying attention to possible improvements suggested by the private sector, such as the need for a clearer definition of "associative agreements" and for adjustments concerning the calculation of group turnover in the case of investment funds.

However, some important challenges remain. The final wording of the upcoming regulation concerning "associative agreements" should avoid being too broad lest many irrelevant transactions be notified, further stretching the already insufficient human resources at CADE. It is also very important that at least part of the 200 positions are filled in the near future so that the agency can better manage and implement its enforcement functions. Finally, many of the decisions imposing substantial fines on cartel cases are being reviewed by the Judiciary, which will probably result in relevant guidance from the courts concerning the applicability of constitutional guarantees in anticompetitive practices investigations.

To sum up, the experience with the first two years of the New Law has been extremely interesting, with CADE adopting new rules and precedents applying the new statute and an important dialogue going on between the private sector and the authorities for possible improvements of the Brazilian competition law and policy.