ISSN 1900-6381

NEW LANDSCAPE IN THE BRAZILIAN ANTITRUST ENFORCEMENT

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Abstract

This article summarizes the most significant changes in three main fronts affected by the new Brazilian Antitrust Law: (i) the administrative structure of the Brazilian Antitrust Authorities; (ii) the new premerger control review; and (iii) the investigation of anticompetitive conducts.

Key words: *Brazil, CADE, Reform in the Antitrust Law, Institutional design, Merger Controls, Cartels.*

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RESUMEN

Este artículo resume cuáles son los cambios más significativos en las tres áreas que se afectan por la nueva ley de competencia de Brasil: (i) la estructura administrativa de las autoridades de competencia de Brasil, (ii) el nuevo control previo de las integraciones empresariales y (iii) la investigación de conductas anticompetitivas.

Palabras clave: Brasil, CADE, Reforma de la ley de competencia, Diseño institucional, Control de las integraciones empresariales, Carteles.

After more than 7 years under analysis, on the 1st December 2011, the new *Brazilian Antitrust Law* (Law # 12.529) was published in the Official Gazette. This new law replaced the old *Antitrust Law* (Law # 8.884), leading to major changes in the *Brazilian antitrust* policy legal framework. The new *Antitrust* Law entered into force on the 29th May 2012.

In order to give an overview of the main changes in the *antitrust* policy, the most significant changes are summarized in the three main fronts affected by the new *Antitrust* Law: (i) the administrative structure of the *Brazilian Antitrust Authorities*; (ii) the merger control review; and (iii) the investigation of anticompetitive conducts.

ADMINISTRATIVE RATIONALIZATION OF THE BRAZILIAN ANTITRUST AUTHORITIES

Under the old *Antitrust Law*, there were three agencies responsible for the *antitrust* enforcement in Brazil:

a. the Secretariat of Economic Surveillance (*Secretaria de Acompanhamento Econômico* - SEAE) of the Ministry of Finance;
b. the Secretariat of Economic Law (*Secretaria de Direito Econômico* - SDE) of the Ministry of Justice; and
c. the Administrative Council for Economic Defense (*Conselho Administrativo de Defesa Econômica* - CADE) of the Ministry of Justice.

Needless to say that such an organization was overly bureaucratic and subject to inefficiencies. The three agencies used to perform successive tasks in the *antitrust* investigation, which often overlapped. The structure was criticized by academics and even the government. It came as no surprise that the OECD concluded in its 2010 Peer Review that:

> "This lack of premerger notification has important ramifications for both the procedure and substance of merger review in Brazil. A procedural effect is to lengthen the review process. The Brazilian Antitrust Authorities are subject to no formal deadline by which its decision must be made. Also, because the merging parties are permitted to consummate their transaction before the review is completed (absent a preliminary order, discussed below), they lack incentive to speed the process."

The new *Antitrust Law* addresses these concerns and reorganizes the administrative structure in order to cut unnecessary red-tape. The *Antitrust* Authorities will consist of just two agencies (the CADE and the SEAE), but the procedures and decision-making related to *antitrust* investigations and merger control review will be concentrated only by the CADE.

The SDE was merged into the CADE, consolidating the roles of investigation and decision-making of the *Antitrust* Authorities into a single independent agency. The CADE, which was been unofficially called the "*Super-CADE*" due to the great deal of power recently acquired, continues to be subject to judicial review but

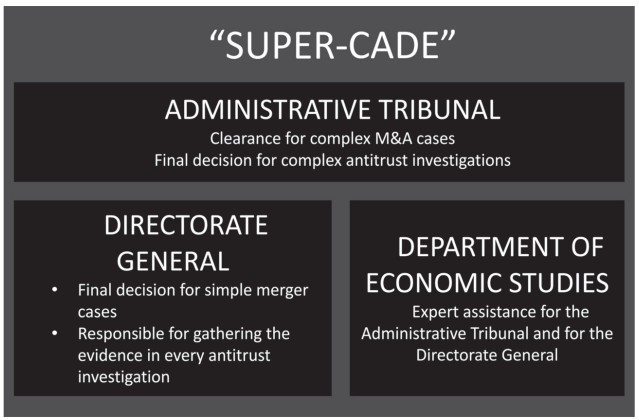
its members are assured with technical, financial independence. The reinvigorated CADE consists of the following departments:

a. **The Administrative Tribunal** It will be composed by a president and six commissioners, who will serve a single successive four-year term. The Administrative Tribunal is responsible for the decision-making process. This includes the final word on complex merger cases which were challenged by the Directorate General. Moreover, the Administrative Tribunal is also responsible for decisions if one of the commissioners disagrees with the decision issued by the Directorate General or if a third party challenges the Directorate General's decision. The Administrative Tribunal will also issue the final decision about *antitrust* violations.
b. **The Directorate General:** Headed by the Director General with a two-year term, extendable for another term, the Directorate General is empowered (i) to investigate *antitrust* violations; (ii) to clear simple merger or those which are not requested by any of the commissioners; and (iii) to render non-binding opinions on merger notifications that should be cleared with conditions in cases which will be ultimately decided by the Administrative Tribunal.
c. **The Department of Economic Studies:** Headed by CADE's Chief Economist, it will be responsible for issuing non-binding economic opinions and drafting economic studies to subsidy the *antitrust* policy.

The SEAE will have an even minor role when it comes to *antitrust* enforcement. The CADE may inform the SEAE about the commencement of an investigation and the SEAE may or may not issue an opinion according to its evaluation about the importance of the case. On the other hand, the SEAE will play a strong role in the competition advocacy. It may voice its opinion on normative

change and bills, evaluate the competitive situation of specific industries and suggest to the responsible regulatory agency the adoption of the appropriate legal measures, whenever any anti-competitive rule is identified.

The chart below summarizes the new administrative structure of the "*Super-CADE*".



Merger review control: clearance as a condition to close the deal

The most radical change in the *Brazilian antitrust* policy regards the merger review control. Under the old *Antitrust* Law, Brazil was one of the few jurisdictions to have an ex post assessment system for the merger review. Under this system, the parties to the merger or acquisition notified the transaction after the closing, since they did not have to wait for the clearance. There was a clear informational asymmetry against the CADE's enforcement: as the implementation of the transaction was not conditioned to the *antitrust* clearance, the parties could take measures to undermine the effectiveness of CADE's decision to impose restrictions on the anticompetitive deal.

The new *Antitrust Law* establishes a mandatory pre-merger notification system and the closing of the transactions will now require the previous approval by the CADE. It also provides for two significant changes in the notification thresholds: (i) the elimination of the market share notification threshold; and (ii) the introduction of a secondary turnover notification threshold ("locking mechanism").

Under the new *Antitrust Law*, for a transaction to be referable to the CADE, there must be the occurrence of effects in the Brazilian territory (effects test). The occurrence of effects is determined by the existence of sales or assets in Brazil.

Besides the effects test, the parties' groups to the M&A have to meet two minimum turnovers simultaneously: R$ 750 million and R$ 75 million (turnover test). The legislation does not mention whether the turnover of the groups is those of the acquirer, seller or target.

In reality, the target's turnover is necessary to assess whether the effects test is met: if there are sales in Brazil, the transaction meets the effects test. The flaw in the new regime is exactly the fact that there is no *de minimis* criterion to be met. In other words, as long as there are some sales made by the target company or business in Brazil, the *antitrust* filing will be mandatory in Brazil. Take the following scenario. Two economic groups are parties to a global transaction and after reviewing the turnover test in Brazil, they conclude that a filing may be mandatory because the turnover exceeds the thresholds above. The next step is to decide whether there were effects in Brazil: in theory, the target may not have any asset in Brazil, but it may have very limited sales through exports into Brazil. Under this scenario, the transaction will have to be submitted to the merger review controls in Brazil.

The new *Brazilian Antitrust Law* sets out statutory time periods for the review of the transactions, establishing a maximum term for the issuance of a final administrative decision of 240 days from the date of the filing, which may be extended for up to

90 days under certain circumstances. However, the new *Antitrust* Law lacks a rule to determine what happens if the CADE does not comply with the new time period: as a matter of fact, one of the presidential vetoes to the bill excluded the automatic clearance if the CADE takes longer than established in the law. After three months under the new regime, the average time for any transaction to be cleared was below 20 days.

A new breath for the anti-cartel enforcement?

Most of the rules on abuse of dominance position did not change, but there are some intriguing pieces of news in the anti-cartel enforcement, especially in relation with the imposition of fines and to the leniency agreement. Generally speaking, it is unclear whether the changes will lead to a tougher or laxer enforcement.

Regarding the fines for any *antitrust* violation, they may range from 0.1% to 20% of the turnover of the company, group or conglomerate in the last financial year before the commencement of the investigation in the business activity of the market involved in the investigation instead of the defendant's turnover. The fines applicable to individuals may range from 1% to 20% of that imposed on the company.

When it comes to the absolute maximum fine, both the percentages applicable for companies and individuals have been reduced in relation to the old *Antitrust Law*. However, it is still early to consider such measures as a setback: indeed, the fine will calculated based on the turnover of the company in the business activity of the market under investigation, which may even increase the calculation basis in some cases. The question is what is "the business activity of the market under investigation", which seems to be something different of the traditional idea of relevant market. As the CADE has been vehemently arguing that such a change will not adversely impact on the level of the *antitrust*

enforcement, one should not expect lower fines. The CADE issued regulations which use the tax regime to define what is "the business activity of the market under investigation" – whether this will mean an increase or a decrease in the level of enforcement, only a real case will allow to conclude.

Other controversial issue refers to the negotiation of leniency agreements with the "*Super CADE*" which seems to have become more feasible. Contrarily to old *Antitrust Law*, now the ring leader in the cartel may apply for leniency and may be granted with full immunity, if the CADE has no prior knowledge of the *antitrust* violation.

The stick of the *antitrust* policy got bigger in the criminal sphere. As regards the prosecution of individuals, the new *Antitrust* Law changes the criminal legislation and it increases the term of imprisonment to five years. Besides that, the new law also increases the likelihood that cartelists will have to serve some time, even though jail terms will still depend on the circumstances. Such an amendment to the Criminal Code will prevent violators from applying for a conditional suspension of the criminal sentence - under the old *Antitrust Law*, the imprisonment could be converted into a fine and most offenders would not go to jail.