

# The Brazilian Senate Approves the Text of the New Competition Act

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On the 2<sup>nd</sup> of December 2010 the Brazilian Senate approved the text of a new competition act. The draft legislation has been pending in the Brazilian Parliament since 2005, when it was proposed by the Government. After a long parliamentary debate, in December 2009 the draft law was passed by the Chamber of Representatives. The text passed by the Senate last December contains some amendments in comparison to the original text passed by the Chamber of Representatives in December 2009. Therefore, the Chamber of Representatives will have to review the draft legislation on a second reading during the next months. Nevertheless, the amendments introduced by the Senate are of minor importance, and they do not modify the key innovations brought by the new legislation.

In particular, the main innovations included in the draft law concern the institutional setting and the functioning of the system of merger control.

The current competition law in the country dates back to 1994. The Law 8884/94 introduced a “triangular” institutional system of competition law enforcement. The Law 8884/94, in fact, established an independent national competition authority (NCA), the “Conselho Administrativo de Defesa Econômica” (CADE), and two advisory bodies, the “Secretaria de Direito Econômico” (SDE) and the “Secretaria de Acompanhamento Econômico” (SEAE). While SDE is placed under the Ministry of Justice, SEAE is part of the Ministry of Economy. SDE and SEAE are advisory bodies, which review the notified concentrations, and which start investigations on anticompetitive practices. However, the final decision whether to clear a notified concentration and whether to sanction an alleged anticompetitive practice is taken by CADE, which acts like a quasi-judicial body. During the 1990s the lack of human resources and the overlaps among the functions of the three institutions have undermined the quality of enforcement of the competition law in the country. However, during the last years the three institutions have strengthened their cooperation, and important results on the fight against cartels have been achieved in the country.

The draft competition law streamlines the enforcement process through a unification of the three institutions. In particular, under the draft bill the new CADE would be composed by two bodies: the “Tribunal Administrativo de Defesa Econômica” (Administrative Tribunal of Economic Defence) with adjudication tasks similar to those exercised by CADE today, and the “Superintendência-Geral” (Directorate General), in charge of conducting investigations on anti-competitive practices and reviewing the notified concentrations. SDE would be abolished and its staff would probably be moved to the Superintendência-Geral. On the other hand, the SEAE would not disappear. Following its specialization in competition advocacy achieved over the last few years, SEAE would continue to carry out this function vis-a-vis other State agencies.

Another important institutional innovation of the draft law concerns the mandate of CADE Commissioners. The current mandate of two years with possibility of reappointment would be extended to four renewable years. This modification strengthens the independence of CADE from the executive branch, and it safeguards the long term enforcement priorities of this institution.

During the 1990s the complex institutional structure described above caused a number of delays in the process of merger review. Due to the overlaps between the functions of the different institutions, the large number of notifications and the lack of human resources, in complex cases the Brazilian NCAs exceeded the maximum time of review of 120 days provided by Art. 54 by stopping the time of merger review by asking for additional information to the merging parties. In addition, Art. 54 of the Law 8884/94 provides for an ex-post system of notification, whereby a concentration has to be notified to the Brazilian NCAs by fifteen days after its implementation. The ex-post system of review undermined the effectiveness of the remedies imposed by CADE. The latter, in fact, has usually opted for behavioural, rather than structural remedies, due to the reluctance of the merging parties to divest part of the acquired assets once the concentration had been implemented.

The draft bill clearly states that the new system of merger control would work ex-ante, and that merging parties would not be able to implement the transaction before receiving CADE’s authorization. The introduction of the ex-ante system of review has always been criticized by the Brazilian business community, concerned that the long time of merger review could become an obstacle for M&A in the country. The draft bill tries to find a compromise by allowing CADE Commissioner in charge of the case to authorize the merging parties to take some steps towards the implementation of the concentration, subject to a number of conditions to ensure the concentration’s reversibility. As a consequence, the Brazilian system of merger control provided by the draft bill would work as ex-ante, with the possibility of being ex- post for the less complex cases subject to CADE’s authorization.

Other important innovations in the system of merger control brought by the draft bill concern the elimination of the previous market share threshold, and the introduction of a clear time-frame for merger review. In particular, the first phase concentrations which do not raise competition concerns could be directly authorized by the new Superintendência-Geral by fifty days from the moment of the notification. However, the Superintendência-Geral should bring the case to the new CADE in order to impose remedies. Unlike the current competition act, the new draft law identifies the maximum length of each stage of the process of merger review.

The innovations mentioned above are worth to be mentioned; they aim at making more efficient the system of enforcement of the Brazilian competition law by reducing the time of merger review, simplifying the institutional setting, and making more effective the enforcement of the remedies of the system of merger control. In spite of the long parliamentary debate on the new draft law, there is a shared consensus in the country that Brazil needs a new competition act today. During the last years, the improvements in the quality of the enforcement by the Brazilian NCAs have convinced the Brazilian business community to accept an ex-ante system of review. In the light of the growing importance of Brazil in world trade and the growing in-flow of FDIs in the country, Brazil is expected to become one of the most important competition law jurisdictions in the global stage of competition law enforcement in the coming years.