The new Brazilian Antitrust Law: beyond the basics

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I – Introduction

This article aims at exploring features commonly neglected by specialists in their analysis of the brand new Competition Law enacted in Brazil this December 2011. After a brief presentation of the history of Brazilian antitrust evolution, we will move on to explore those upsides and downsides of the new legal text. We start by quickly overviewing the most remarkable changes brought out by the new law – and thus thoroughly commented in the recent literature.

We then move on to a more in-depth analysis of subtle changes in the law with high impacts on antitrust enforcement in Brazil. These have been neglected by most literature on the topic. This article tries to fill such gap. These crucial aspects usually left aside – both positive and negative, as we shall see - reside in the details of the new legislation, precisely where the devil lies.

II – Some Background on Brazilian Competition Policy

The modern era in Competition Policy in Brazil started in 1994 with the enactment of Law 8884, which established – among others – the obligation of merger notification and control, tough fines to anticompetitive conduct and turned the Competition Authority (CADE) into an autarky with its own autonomous budget and freedom of thought and decisions provided my counselors holding fixed-term mandates.

Some important progress has been made since 1994 legislation was introduced. The overlapping of competences between the two governmental bodies in charge of instructing the procedures has been minimized, the side effects of post merger control have been minimized by the use of preliminary injunctions aimed at preserving merger

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reversibility, fast-track procedures have been successfully introduced in merger review, leniency programs have been introduced and widely used in cartel bustling and so on. However, there was still need for a whole reformulation of the Brazilian Competition Policy System, since major changes going beyond simple rearrangements and procedural improvements and a deeper change in institutional design were necessary.


Brazil is now entering a new era in its Antitrust enforcement, inaugurated by the enactment of its brand new Competition legal diploma. After seven years in Congress, Law n. 12.529 was finally published on December 1st. After a six months transition period, it will fully come into force on May 29, 2012.

The introduction of new Brazilian Competition legislation has been praised by virtually every specialist for its institutional advances. Once it enters into force, the Antitrust enforcement in Brazil will be performed by a single Agency (the new CADE, also called Super CADE), which will see a dramatic increase in its budget and staff members (about 200 new technical staff should be allocated to the new CADE).

This growth of the Authority will be necessary to implement the main substantive change, which will be the move towards an ex ante merger analysis system, common in most jurisdictions across the globe – a topic Brazil was lagging behind by holding a post merger review system.

The new CADE will be composed of an instruction and enforcement body (for both mergers and conduct) called Superintendency General and the adjudicative Tribunal – and also an Economic Studies Department, already in place and responsible for supporting the other two bodies.

These are the most remarkable changes brought about by the new law and thus to be in place starting June 2012. These are commented in every newspaper article and paper produced on the enactment of Law 12529/2011. There are nevertheless more subtle changes introduced by the legislation, with high impacts on antitrust enforcement in Brazil. These deserve a more in-depth analysis than what has been dedicated to it in most literature on the topic. The remainder of this article tries to fill such gap.
IV – Law 12529/2011: Beyond the Basics

A few interesting features of the new Brazilian Competition Law deserve special analysis. We divide the main issues in the topics or subsections that follow.

Merger notification thresholds

The first subtle change in legislation is one not that subtle and which has been quite commented in the specialized literature. However, all the comments we saw were in the sense of praising the change introduced. Our analysis, on the other hand, raises concerns on it.

There is a current trend of reducing the scope (and volume) of entrepreneurial acts that are subject to necessary approval of CADE (Art. 54 of Law Nr. 8884 of 1994, the antitrust law currently in force). The goal is to decrease the workload of the Brazilian System of Antitrust (SBDC) in relation to control structures, allowing SBDC to focus in major cases. It cannot, however, under this argument, remove from the scrutiny of antitrust authorities those acts that may cause harm to competition.

Law 8884/94 provided the following (alternative) criteria for merger notification: R$ 400 million in sales of one of the companies involved or the resulting merged firm holding more than 20% of the relevant market.

Law 12529/2011 kept what was proposed in the original Draft of Law and kept in PLC Nr. 06/2009 regarding the mergers to be notified to the system:

Article 88. It shall be submitted to CADE by parties in a transaction an economic merger in which, cumulatively:

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3 In a previous article, published in Radar IPEA n. 13 (in Portuguese) and submitted and accepted for the CRESSE Conference on Advances in Competition and Regulation 2011 (in English, available upon request), the authors presented and discussed the amendments to the Law proposed when it was being considered at the Brazilian Senate. Most – but not all – concerns at that point have been solved by the Law finally published. Just to mention one, a Senate amendment (n. 33) introduced a provision concerning a supposed (and subtle) subsidiarity of the competition law “to specific legislation and to the relevant laws creating regulatory agencies”. Such provision was dismissed by the Chamber of Deputies.

4 This trend is also evidenced by the recent move of CADE in considering itself incompetent to deal with intellectual property licensing agreements, which previously were frequently notified by major companies. Morais has written on the concerns raised by this in a newspaper article (Valor Econômico, 27/06/2011) and more deeply in a research report for the Secretary of Special Issues of the Brazilian Presidency (SAE/PR), to come out soon as a book (in Portuguese).

5 About 225 million USD or 170 million euros.
I - at least one of the groups involved in the transaction has registered, in its last balance sheet, gross annual sales or total turnover in the country, in the year previous to the operation, equivalent or superior to R$ 400,000,000.00 (four hundred million reais), and

II - at least another group involved in the operation have registered at its last balance sheet, annual gross revenue or total turnover in the country, in the year preceding the operation, equivalent or superior to R$ 30,000,000.00 (thirty million reais). 6

Therefore not only it is required that the relevant market is booming, or deals with some reasonable amount of money, but also that the smaller merging party (usually an acquired firm) has a reasonable size, for the merger to be notified. It is crucial to emphasize that we are not discussing approval thresholds nor fast track criteria, but the criteria for mergers to be brought to the knowledge of the Brazilian Competition Policy System (BCPS).

That is, the market share is no longer an alternative criterion based on the percentage of the relevant market – which shows a significant change with respect to the previous model (that of Law 8884/1994). Moreover, it is noteworthy that both new criteria are cumulative and not alternative, contrary to the criteria previously in force.

Most specialists praise the changes introduced as they criticized heavily the previous alternative criterium of 20% of the relevant market share, arguing this was subjective. As in most mergers market definition is a controversial issue discussed thoroughly in the case itself, it was argued to be non-sensical to require a party to notify its merger if the resulting firm had 20% of some relevant market no one knows what it is by the time of notification.

We disagree. In practice, the presence of such criteria had a much reduced impact. As recognized by the OECD Peer Review7 of the BCPS in 2010, the “criticism, that the market share test is too subjective, remains, but this effect too has been blunted over time. The number of notifications in which the market share test is met but not the revenue test is few. CADE seldom initiates an enforcement action for failure to notify under the market share criterion.”

It should be noticed that “seldom” does not mean “never”. Moreover, even if it were, having the possibility of intervening is crucial in those cases for CADE – and this is no longer the case under the new legislation. One has thus to recognize that although in practice the impact was small, in theory its importance is non-negligible. It certainly

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6 Three different Amendments in Senate proposed changes to the original thresholds but were rejected by the Chambers of Deputy. The most striking one was Amendment 24 which reviewed those values of 400 and 30 million reais of art. 88 to 1 billion and 40 million reais, respectively. If approved, it would unduly reduce the workload – and the scrutiny – of the BCPS.

7 Organisation for Economic Co-operation and Development Inter-American Development Bank, 
Competition Law and Policy in Brazil – A Peer Review (2010).
boosted notification of mergers in the limbo – where merging parties did not fall within the scope of the revenue threshold of 400 million but were not sure of not having over 20% of some relevant market. By having a possible obligation to notify, parties not only tended to do so to avoid ex post intervention by the BCPS and the imposition of non-negligible fines for not notifying the contract, but also it left the BCPS the possibility of intervening in those case. This was certainly rarely used, but the new law withdraws this enforcement power.

Under the new law, whichever sectors whose relevant market is limited in terms of revenue – given the lack of substitutability on the demand side or because it is confined to small geographical limits – will be free of any scrutiny. Even if a merger involves relevant markets of modest economic dimension, they are still crucial to the welfare of consumers. However, this is not only about sectors whose outputs are of small market value, such as needles or toothpicks, but also about geographically restricted markets. In the latter case, we are talking about fuel sales (gas stations), regional products or local services of varied sorts (including in some cases public utilities) in not-too-big towns, transportation included. Else, it can also be the case of goods which by their own nature have limited substitutability with alleged similar goods, such as medicines.

The same applies to sectors intensive in intellectual property, which are increasingly becoming more important in modern economies. For example, small business of information technology – where to start small is typical, since many companies are born at the universities – can be purchased freely by companies of billionaire revenue since the new model requires that the two conditions of the new Article 88 are cumulatively present. The same applies to small publishers, biotechnology companies, etc.

By removing mergers in these markets, as well as the general ones in which a billionaire company buys another company with 1% market share, of the scrutiny of the Brazilian System of Antitrust (SBDC) is a mistake. In other words, the law is exempting mergers from antitrust scrutiny involving large corporations established in the market and emerging companies, providing more incentives for the acquisition of the latter, which undermines competition in the future because it prevents these small companies to develop and become competitors – which would ensure dynamically greater welfare for the society.

Once again, we are discussing notification criteria, having the BCPS becoming aware of those mergers, and being able to intervene if it is considered necessary. Or, else, decide for a fast-track procedure and quick approval with no restrictions.
Every emphasis is not enough to highlight that the criteria simplification effort can backfire and this has important perverse effects on antitrust enforcement. In this perspective, the new cumulative criteria for notification of mergers based only on revenues of applicants, and of two of the applicants and not only the big partner may generate benefits in terms of reducing the workload to the BCPS, allowing it to focus on big cases. On the other hand, the new law exempts from antitrust scrutiny mergers which do not have demonstrably low or non-existent potential for harm.

It does not seem that pulling out of its jurisdiction potentially harmful acts can strengthen the SBDC at any level - even more in the forthcoming setting of increased resources, including number of qualified professionals.

**The value of fines**

Law 12529/2011 introduced several changes in the way fines for anticompetitive behavior should be calculated. The final value of fines to be imposed in case of conviction depends obviously on both the percentage and the basis on which those percentages are calculated. The new law changed both.⁸

**Article 37.** The practice of infraction to the economic order subjects the ones responsible for it to the following penalties:

I - for the enterprise, a fine of 0,1% (one tenth percent) to 20% (twenty percent) of gross revenue of the company, group or conglomerate obtained, in the year prior to the initiation of administrative proceedings, in the branch of business activity in which the breach occurred, which will never be less than the obtained advantage, when its estimation is possible;

II - in the case of any other persons or public or private entities, as well as associations of persons or entities constituted as a matter of fact or of law, albeit temporarily, with or without legal personality, which do not perform business activities, thus not allowing the use of the criterion of value of gross revenue, the fine will be between R$ 50,000.00 (fifty thousand reais) and R$ 2,000,000,000.00 (two billion reais);

III - in case of administrator, directly or indirectly responsible for the committed infraction, when guilty or intention is proven, penalty of 1% (one percent) to 20% (twenty percent) of that applied to the company, as provided in item I of the caput of this article, or to the legal persons or entities, as provided in item II of the caput of this article.

§ 1 In case of recidivism, the imposed fines will be applied twice.

§ 2 In calculating the value of the penalty mentioned in item I of the caput of this article, Cade may consider the company's or group of companies’ total revenues, when the value of sales in the branch of business activity in which the offense occurred, defined by Cade, is not available or when it is submitted incomplete and / or not unequivocally and credibly demonstrated.

⁸ The legal texts are freely translated by the authors to this article. We opted for a more literal translation in order to provide the reader a better flavour of the Brazilian Law itself. In this sense, for example, we kept “practice of infraction of economic order”, instead of replacing it by more mainstream terminology such as “anticompetitive behaviour”.
The PLC Nr. 06 which reached the Senate had kept the values of the percentages for the fines (for both the company and the administrators) – but restricted the calculation base. The original percentages were 1% to 30% for the company and 10% to 50% for the administrator. Moreover, the calculation basis was the company's global sales in the previous year of exercise, but solely from revenues in the relevant market where the conduct occurred.

It already represented a major change with respect to the previous system, of Law 8884/1994, where the basis was the whole revenue of the firm and the percentages were: from 1% to 30% of that. Also, since 1994 the fines to the administrator were already set at that level of 10% to 50% of the fine to the firm.

As such, even if the law was approved the way it reached the Senate, there would already be a substantial reduction of punishment applied to each case. However, in the Senate, Amendment 22 changed items I and III of art. 37, giving them the content above. That is, Amendment 22 changed the percentage of the applied fines, reducing them significantly with respect to the PLC Nr. 06, and dramatically with respect to parameters in force today (under Law 8884/1994). Such changes were introduced in a direction diametrically opposed to international best practices, which have seen a steadily increasing effort to deter anticompetitive conducts by imposing higher fines, arguing in favor of their educational, remedial and deterrent effect.

Economic theory indicates that such a huge reduction in the prospective expected level of fines (currently prescribed by law) can only operate as a perverse incentive to infringing practices. This is so because the benefit of the practice is unchanged but there is a significant reduction in the expected cost of an infringing practice, once and if detected. Thus, everything else constant, the expected gain to the practice becomes more attractive. In other words, the changes brought by the new law operate as a powerful incentive mechanism for infringing practice, everything else constant.

Finally, the new Law (also due to Senate Amendment 22) innovates negatively by changing the basis on which those now reduced percentages will be calculated. Currently, the calculation base is the gross revenue of a firm within Brazil, the PLC proposed it to be the company's revenue in the relevant market object of the conduct – already a huge reduction in the prospective expected penalty, as mentioned above.

However, Law 12529/2011 adopted Amendment 22 text, considering as a basis the revenues of the firm in the branch of business activity. To say the least, it inserts a new terminology into antitrust practice with no clear meaning: “the branch of business
activity”. The relevant market, albeit the controversy on its definition in real cases, is a consolidated concept in antitrust. The use of terminology whose meaning is unclear will cause legal uncertainty and subjectivity in applying the law to concrete cases and, therefore, will result in more judicial challenges to the decisions of CADE.

It is interesting to note, however, that in the explanations given by the Senate Rapporteur for such Amendment, he mentioned that:

"By the amendment, the basis for calculating returns to the violator's gross revenues on its overall value, but excluding the amount paid in taxes."

This might have been the intention of the Amendment, but it was definitely not the result. Our guess is that in speaking of "branch of business activity", one wanted to limit the basis for calculation to the overall revenue in the sector of activity, where by sector we mean broad economic categories – like mining, transportation, food production, publishing, computer manufacturing, software development etc.

Although there would still be some uncertainty concerning the precise scope of those categories, it would be smaller, and possibly to be easily remediated by infra-legal precise specification, based on some objective criteria – as the one in the national accountancy system. If it were the case, this would seem a fair change to the 1994 calculation system, since some conglomerates do have economic activities in more than one and unrelated “branches” or “sectors” of economic activities. In such case, it seems fair to calculate the fine to be imposed based only on the “branch” where the anticompetitive conduct occurred and its revenue.

**Emphasis on intellectual property rights**

The Brazilian Competition Policy System (BPCS) has struggled in recent years in initiating preliminary and administrative proceedings to investigate conduct of companies affecting competition through the abuse of their intellectual property rights.

The intervention of Brazilian Competition Policy within the domain of intellectual property rights started with the classical precedent of Colgate-Kolynos merger in toothpaste, where the trademark Kolynos was suspended for four years. The imposition of restrictions to trademarks and even patents as conditions for merger approval have increased in Brazil in recent years.

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\[9\] The trademark Kolynos was then abandoned by the merged entity, while within this four-year period the only world player absent the Brazilian market – Aquafresh – entered the market.
On the other hand, it was not until the end of 2010 that Brazil saw the first convictions of conducts associated with intellectual property rights. They are almost always associated with an abuse in enforcing legally obtained intellectual property rights, through the abuse of the right to petition, i.e. companies using the administrative and judicial procedures with the aim of harming its competitor in the market. This was the main claim in the tachographs case (PA 08012.004484/2005-51, involving Siemens Brazil, renamed Continental, the dominant firm), which ended with conviction only for invitation to cartel. The first conviction in a purely anticompetitive litigation (or sham litigation) case in intellectual property arena dealt with the anticompetitive abuse of copyrights in sales TV channels, the Shop Tour case (PA 08012.004283/2000-40). At virtually the very same time came the conviction of car manufacturers in the Anfape case for enforcing their industrial design on external autoparts onto small autoparts manufacturers (AP nº 08012.002673/2007-51).

Finally, there had been five investigations open for years on anticompetitive litigation in the pharmaceutical industry. On December 5th 2011, three of them have been concluded and sent to CADE for judgment, with a recommendation for conviction.

The legal framework, however, did not previously put the same emphasis on possible abuses in unduly obtaining or enforcing intellectual property rights. Law 12529/2011 introduced main changes in this respect and this is highly appreciated.

The first change concerns the illustrative list of potentially anticompetitive practices in the law. In Law 8884/1994 there was mention to intellectual property only in one item (of article 22). The new article 36, paragraph 3, kept the same item as previously – mentioning the obstruction to the exploration of intellectual property rights – and introduced a new one. This new item (article 36, paragraph 3, XIX) mentions explicitly: “exert or explore abusively industrial or intellectual property, technology or trademark”. As seen, the intended scope was as broad as possible.

Moreover, the new Competition Law corrects a historical mistake in Law 8884/1994. The old law mentioned the compulsory licensing as a possible punishment for anticompetitive behavior, on top of other sanctions, fines in particular (art. 24, IV, a). The historical mistake concerns the fact that the legal text expressly mentions it deals with “compulsory licensing of patents”. The new law (art. 38, IV, a) speaks of “compulsory licensing of intellectual property held by the infractor”.

As concerns mergers, the new law also prescribes expressly the possibility of “compulsory licensing of intellectual property rights” (article 61, paragraph 2nd, V). This seems to be too much of an emphasis, an unnecessary and misleading one.
As a merger to take place – even more under pre merger review – requires CADE’s approval, there is no need to issue compulsory license in any merger. CADE can simply credibly signal towards merger rejection and the parties to the merger, if interested, will use their free will to voluntarily license the intellectual property necessary to compensate for the anticompetitive harm of the merger. Therefore, we can safely argue that theory and the Brazilian recent experience have shown that there was no need for such a legal provision, in the case of mergers.

V – Conclusions

This article aimed at analyzing some aspects of the new Brazilian Competition Law (Law 12529/2011) usually neglected by commentators, which are in our view of great importance due to its impacts in terms of competition compliance and enforcement.

There is no doubt the new law perfectly fulfils the objective of enhancing competition policy in Brazil. Crucial changes are being introduced – in particular in terms of institutional design – and should be praised. The final result of Brazilian republican dynamics ensures very positive perspectives for the Brazilian competitive environment in 2012 and onwards. We will definitely count on an equipped institutional framework and a set of instruments that will consolidate the efforts towards the defense of one the principal pillars of market economies and democracies: the right to compete and the freedom of choice.

On the other hand, this article pointed out some concerns not to be neglected coming from changes introduced in the merger notification thresholds and on the size of prospective fines. In our view, these issues could jeopardize the goals of improving the effectiveness and the efficiency of the Brazilian competition law. At the same time, our article praised the emphasis given to the treatment of intellectual property by the new Antitrust legal text, which is in total accordance with international best practices and Brazilian recent enforcement measures.