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2012 will be remembered as a turning point in Brazilian competition policy. The country hosted the ICN annual meeting in April 2012, in a charming and colorful gathering of representatives of 82 jurisdictions and nearly 500 participants. More importantly, the organizers proudly had something to show to all participants: the new Brazilian competition law (Law 12.529-11) was to take effect in the following month. And that was, indeed, something to be proud of.

Brazilian competition policy had been evolving in a more or less continuous way since the mid-1990s, when most of its former legal statutes were enacted. The accumulation of jurisprudence, increased learning within the competition agency, new investigative instruments, and an increasing societal awareness about competition rules brought Brazilian competition policy to a prominent position among developing jurisdictions. Notwithstanding these achievements, however, merger control was still ineffective, and scarce resources produced both lengthy conduct cases and more superficial analyses when compared with more mature agencies. 2012, however, was a year of a discrete jump in an evolution towards a more effective and efficient competition policy.

The Law No. 12,529 brought three major changes. First, a former and ineffective ex-post merger notification system was replaced by the international standard of pre-merger notification. Under the former law, companies could—sometimes strategically—disassemble production lines, dismiss human resources, or combine brand names within the 15 days they had to notify the competition agency *after* the completion of the merger. The *status quo ante*, thus, was not an option for the commission, which could block the merger but not restore the exact prevailing state of competition. The pre-merger notification system changed the effectiveness of unilateral decisions and, in particular, the bargaining power of the antitrust agency in negotiated procedures. It also radically changed the incentives for companies to protract the merger review, inasmuch as the delay would harm their business and not affect the antitrust decision. All these changes will have a substantial impact on practitioners and companies and are further explored later in this article.

Second, the antitrust activities are now reorganized in a single antitrust agency, Cade, which will also receive additional resources (mainly human resources) to enforce competition law. Under the previous law, two governmental bodies—SDE and Seae—subordinated, respectively, to the Ministry of Justice and the Ministry of Finance, were also part of the Brazilian competition policy system, being responsible for important antitrust functions. This institutional arrangement resulted in redundancies and delays in investigation, and sometimes in an open conflict among the three components responsible for the antitrust enforcement: Cade, SDE, and

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Seae. The reorganization has resulted in lower coordination costs among antitrust activities, more efficient use of resources (and, hence, greater capability of investigation), and a higher degree of independence, since all activities are now performed by Cade, an independent autarchy.

Finally, the new law also changed the basis for calculating fines in conduct cases, as well as the range of fines, but with dubious effects on deterrence. On the one hand, these changes allow for more proportional fines, as the basis for calculation is less sensitive to companies' corporate governance and organizational structure (such as diversification in different sectors and division into different business units), since it takes into account the group turnover in the industry subject to the antitrust offense. Under the former law, the basis for calculation was the total turnover of the individual firm under investigation, which could result in distortions if the relevant market was only part of a firm's overall market. For instance, one of the members of the crushed rock cartel received a fine more than 20 times higher than a similar participant in size and role. The fine, later revised by the commission, was higher because that company had chosen a corporate governance structure in which all business activities were conducted by the same individual firm, differently from the other cartel members that had several firms within the business group.

On the other hand, the range of fines decreased substantially, from between 1 percent and 30 percent to between 0.1 percent and 20 percent of the aforementioned basis of calculation. Since the median estimation of cartel overprice is approximately 25 percent,[2] and the probability of detecting a cartel in its first year of operations is far from certain, the administrative penalty is surely insufficient to deter price-fixing. An effective enforcement of competition law towards cartels in Brazil must also rely on damage reparation and criminal prosecution, two ongoing but still timid trends in Brazilian competition policy.

Companies, practitioners, and consumers in general will experience the impact of this upgrade in competition policy during the next few years. Simple merger cases have been cleared in about ten days, and the amount of mergers reviewed reduced drastically due to the higher turnover thresholds adopted by Cade. The most interesting effect, however, is the likely change in the profile of merger cases. Mergers are strategic decisions made by companies taking into account their competitive and regulatory environment. This is to say, mergers are endogenous. Inasmuch as the new pre-merger notification system enhances the effectiveness of intervention by and bargaining power of the competition agency, some mergers that would raise serious antitrust concern are now aborted before closure.[3]

Moreover, companies will be less prone to endure an adversarial procedure in complex merger cases, both because delaying is now more costly to them and a judicial review that tends to preserve the *status quo* is less attractive as a strategy to protract agency decision. In short, law firms will have fewer notified merger cases and those cases will tend to be, on average, less time-consuming. On the other hand, the demand for antitrust risk analysis before closing a merger

[2] J. Connor, *Price-fixing overcharges: legal and economic evidence*, (22) RESEARCH IN L. & ECON. p. 90 (2007).

[3] In the first six months since the enactment of the new law, there is already anecdotal evidence that illustrate this effect.

will increase substantially, and the demand for expertise in pre-merger negotiations, and also in negotiating remedies with the agency, will probably thrive.

The use of negotiated procedures deserves further elaboration. Since 2007, Cade has been fostering negotiation procedures and improving its expertise. The former organization of the Brazilian competition policy system left the leniency policy under the control of SDE at the Ministry of Justice, while the settlement policy was under the discretion of Cade. Both are obviously complementary instruments and their reunion within the same organization will allow non-negligible gains from coordination. As an illustration of this effect, five months after the enactment of the new law Cade proposed a new resolution for its settlement policy, which is clearly more aligned with the leniency program. As for mergers, the adoption of a standard pre-merger notification system creates opportunities for international coordination among antitrust agencies for investigation matters, and also among practitioners in the coordination of negotiated remedies.

With more resources, better organization capabilities, and fewer merger cases to review, Cade will be able to dedicate more time and energy to the scrutiny of conduct cases. Two consequences are foreseeable. First, an effect-based approach, grounded in a more rigorous economic analysis, will gain momentum, taking advantage of the new expertise to be built in the Department of Economic Studies. Second, Cade now has the instruments to be more proactive in building new conduct cases and to rely less on plaintiff representations, although they will still play an important role as they do in more mature jurisdictions. After a few years under the umbrella of the new competition law, time enough to build the necessary capabilities for its enhanced protagonist role, Cade will deliver more sophisticated decisions about a more comprehensive set of conducts and sectors, with the likely effect of increasing deterrence of anticompetitive behavior.

Although the future seems promising, the path towards it will be far from trivial. Commissioners, practitioners, and the judiciary will have to tackle new questions that unavoidably are left open when a new law is enacted. For instance, what is the prevalent law for cases that began before May 29 2012, when the new law took effect? Or what are reasonable presumptions to calculate damages? Cade will provide an answer to all these questions when a particular case raises them; but companies will likely challenge Cade's decision at the judiciary if there is any controversy and, hence, there is leeway for revision. The proportion of Cade's decisions that are challenged in the judiciary, which experienced a sharp and consistent decrease since 2004 from 68 percent to less than 10 percent, will probably increase in the next couple of years as companies will call on the judiciary to challenge Cade's interpretation of several of the unanticipated questions that typically emerge with the enactment of a new law.

Likewise, the resources guaranteed by the new law are expected to arrive only at the end of 2013, and probably will be just part of the staff originally planned. In the meantime, Cade has had to settle and move to a new facility, rearrange its information system, reorganize files, and perform all the required activities implied by these changes. Overloaded with new challenges and counting on approximately half of its expected staff, Cade has been giving a reassuring answer to the concerns raised by the most skeptical practitioners. After the first six months the average duration of a merger case has been just 19 days, and the most complex cases were concluded in less than two months. It is fair to say that the real complex cases are probably still waiting, after

which we will be better able to evaluate the new merger enforcement, but the results so far are remarkable.

The cartel fighting policy has continued to receive support, even during this transition period. In the six months after the new law took effect, Cade conducted four dawn-raids and signed about six leniency agreements (this number is not precise as Cade's report informs 10 agreements for the whole year of 2012). These numbers may not sound impressive for more mature jurisdictions, but they demonstrate the growing effort of Brazilian competition authorities towards cartel deterrence. The first leniency agreement was signed in 2003; in the first six years 10 cases benefited from whistle blowers protected by leniency agreements—the same number that Cade signed in 2012 alone. The tendency is to increase detection consistently even though urgent measures, such as administrative transition, have been absorbing tCade's scarce resources.

These achievements, however, have not come without a cost. The staff has been working overtime, and one can predict that it will not be easy to maintain the same level of energy for a long period. Moreover, with the focus on the new pre-merger notification system, unilateral conduct cases, which we predict to be an important activity in competition policy in the future, have been left aside for the moment.

2013 will be a particularly challenging year for the new Cade. More complex mergers are likely to be filed, conduct cases will demand more attention, companies may ask for judicial review regarding the open questions raised by the new law, and the new Cade will remain, for a while at least, working with its old and reduced staff. The future is promising for the Brazilian competition policy as it moves down its path towards best practices for an effective and efficient antitrust enforcement. The transition, however, will be tough.