

NEW PARTNER IN THE ECONOMIC LAW DEPARTMENT

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A decreased participation of the Government in the economy and improved free-market policies have increased the importance of antitrust law matters. From its inception, Law No. 8884/94, which instituted the Brazilian Competition Defense System (SBDC), has been implemented in such a way as to promote an improved efficiency and effectiveness of the bodies that are part of such system, namely, the Administrative Council for Economic Protection (Cade), the Economic Law Office (SDE) and the Economic Follow-up Office (Seae). The business community has been paying increased attention to the activities of SBDC, due to both the progressive complexity involved in the analysis of concentration acts and anti-competition practices and to a declared antitrust war. Consequently, the authorities have been encouraging the observation of antitrust laws and the adoption of antitrust compliance programs by private agents.

In keeping with market trends, Barbosa Müssnich & Aragão Advogados advances the growth of its economic law department. Following the departure of Luis Fernando Schuartz, who was head of the department until November 2005, when he left to become a councilmember of Cade, the Firm has hired a new partner to consolidate and strengthen the expansion of the department: attorney and former director of the Department of Economic Defense and Protection (DPDE) of the Ministry of Justice, Barbara Rosenberg.

Working for the government since 2003, Barbara was responsible for important changes implemented by SDE. She aimed at achieving efficient management practices in order to reduce the delay and backlog in the analysis of cases, thus enabling DPDE to focus its activities on the investigation of antitrust practices. In that regard, in addition to seeking different ways to improve cooperation among different bodies in the antitrust war, the activities of Barbara's team brought about innovations used in the investigation of cartels, including the execution of the first leniency agreements in Brazil, as well as the encouragement of adoption of antitrust compliance programs. "The change in the investigative behavior of the authorities in connection with concentration acts and conducts, which is increasingly in line with the best international practices, clearly raises the bar for companies with regard to antitrust compliance" says Barbara.

Barbara has a law degree from the University of São Paulo (USP), and a LLM from the University of California, Berkeley, as well as a doctorate in Economic Law from USP. In addition to her experience in the public sector, Barbara has also worked for Cleary, Gottlieb, Steen & Hamilton, in New York, and for Intellectual Property Division Office of the World Trade Organization (WTO).

Barbara's experience in the public and private sectors means that she has a global and interdisciplinary understanding of economic law and the market, which consolidates her well-regarded professional standing. "We are proud to be joined by a professional of Barbara's importance and have no doubt that she will develop an excellent line of work in this new era of our Economic Law department, which will certainly grow under her command", says Bruno Soter, the managing partner of the Firm.



Barbara Rosenberg, new partner in the economic law department

THE NEW LAW THAT ENABLES PUBLIC-FOREST CONCESSIONS

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After a swift procedural progress through the National Congress, Law No. 11284/2006 was published on March 2. Such law deals with the management of public forests for purposes of achieving sustainable production, it institutes the Brazilian Forest Service and also institutes the National Forest Development Fund (FNDF).

The ultimate purpose of the new law is to regularize the estate and environmental standing of public forest areas, which are currently being pressured by indiscriminate mining and deforestation practices, especially in the Amazon region. Even though the original project was sent to the Congress by the Executive Branch, several sectors took part in the debates that led to the approval of the final legal text.

According to Law No. 11284/2006, the management of public forests shall take place in three different ways: (i) direct creation and management of national forests, under Law No. 9985/2000 (National Conservation System Units Law); (ii) targeting of local communities, and (iii) the polemic concession of public forest areas to private parties, which shall apply to natural or man-planted forests as well as to handling units relating to national forests.

In the case of the direct creation and management of national, state and municipal forests, the Public Authorities will be able to manage such forests in a direct manner or to enter into agreements, partnerships or similar instruments with third parties.

The targeting of local communities that are established on public forests or that may be using such forests shall take place before the beginning of the grantal of concessions to private entities. In other words, the prior verification of the existence of any “established” local community is a condition for the grantal of a concession in the area. If that proves to be the case, such local community shall be targeted as a priority party in the concession of the area. Such concessions to local communities shall be free-of-charge, and shall take place via the creation of reserves that rely on forest resources and sustainable-development reserves, or via the grantal of concessions for use, to be carried out through forest camps that can be self-sustainable, rely on agricultural resources or camps of a similar nature.

On the other hand, forest concessions must undergo public bidding procedures, to be carried out as “competitive biddings”. Please note that such concessions shall be onerous. The bidding procedures shall take place according to the Annual Forest Grantal Plan (PAOF), as proposed by the managing body of the corresponding branch of Government, including a description of all public forests subject to the grantal of concessions for the applicable year. The subject matter of the concessions shall be the exploration of specific forest products and services, at a forest handling unit within a geo-referenced perimeter, as recorded in the corresponding public forest

registry and included in the forest concession plan.

Forest concessions shall also abide by certain limits of use and the grantal of the following rights is expressly forbidden: (i) ownership title or right of first refusal in the acquisition of title; (ii) access to genetic assets for purposes of research and development, bio-prospecting or collecting, as mentioned therein; (iii) use of water resources in excess of the specified limit, pursuant to the provisions set forth in Law No. 9433/97; (iv) exploration of mineral resources; (v) exploration of fishing or wildlife resources; and (vi) commercialization of credits resulting from avoided carbon emissions in natural forests.

Please note that the right to commercialize carbon credits may be included in the concession in cases of re-forestation of degraded areas or areas converted into alternative uses of the soil.

The concession for use shall be subject to an environmental licensing procedure, with the requirement for a preliminary environmental report or environmental impact report, depending, among other aspects, on the scale and intensity of the forest handling and the peculiarities of the environmental resources. Concessions will be inspected by independent auditors every three years, for purposes of verification of the status of the forest and the compliance with the concession agreements.

Another relevant aspect of the law is that it establishes that only companies or legal entities incorporated under the Brazilian laws, with headquarters and management offices in the country, can take part in the bidding procedures.

The law provides for the creation of FNDF, whose main purposes are to support the development of sustainable forest-based activities in Brazil and to promote technological innovations in the sector. FNDF resources can only be used in projects of public bodies and entities or in projects of non-profit private organizations.

The Brazilian Forest Service will also be created as part of the Ministry of Environment, with the main goals of managing public forests and regulating the concession-grantal system. The Brazilian Forest Service will be in charge of managing FNDF.

According to the law, the continuity of the economic activities currently developed in accordance with the law shall be ensured for a five-year term, in areas of up to 2,500 hectares currently occupied by private entities.

As a result of the approval of Law No. 11284/2006, matters such as bio-piracy and the concession to private entities of areas with potentially strategic importance to the country came to the attention of the public. That being so, the civil society and economic players have the duty to follow up on the regulation and implementation of such law, especially in light of the fact that Brazil is the country with the largest tropical forest on the planet.

AMENDMENT TO THE CODE OF CIVIL PROCEDURE: THE RISKS OF “BORROWED DECISIONS”

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On February 7, 2006, Law No. 11277/2006 was published. Such law amended the Code of Civil Procedure (CPC), introducing article 285-A, which enables the judge to render a decision dismissing the case immediately – without the submittal of defense and even before the service of process to the other party – if the case involves legal matters only and if that court has already rendered a decision dismissing an identical case. Under those circumstances, the new law enables the judge to reproduce the previous decision, which is known as “borrowed decision”. The law also enables the judge, in case of an appeal filed by plaintiff, to overrule his initial decision and order the processing of the lawsuit with the summoning of defendant.

According to the preamble of the law, the intention of the lawmakers was to confer “rationality and agility to court decisions without adversely affecting the right to adversary system and full defense”. Nevertheless, despite such description, such goal is not likely to be achieved by the new law.

The first practical problem of the new law - which is expected to come into force on May 8 – which already gave rise to a direct unconstitutionality action filed by the Federal Council of the Brazilian Bar Association (OAB)— are the thousands of decisions that are not disclosed to the public in general and that, due to the fact that they are not available via jurisprudential research systems, will prevent the processing of a regular lawsuit, without the parties knowing about the previous decisions that prevent the filing of such lawsuits.

But that is not all. Lawsuits discussing the same matter can have drastically different outcomes – regular or abbreviated courses – if they are distributed to different judges, which represent, without a doubt, unequal treatments to different plaintiffs.

At this point, it is important to make reference to the particular influence of this amendment on tax cases. Tax cases usually involve legal matters only, and are distributed to specialized courts, where, oftentimes, one single judge hears the cases. In the District of the Capital City of the State of Rio de Janeiro, for example, there is only one court that hears such cases. In this case, if the standing of the judge with regard to a certain matter is contrary to the thesis defended by the taxpayer, the access to the courts of all other taxpayers is all but obliterated.

In fact, if the amendment under review is combined with the new paragraph 1 of article 518 of CPC, which states that the judge shall not accept for hearing an appeal when the lower-court decision is in line with a precedent of the

Superior Court of Justice or of the Federal Supreme Court, a lawsuit may take months to be heard. If a judge renders a decision on a certain matter – involving legal aspects only – that, in his opinion, is in line with the precedents of the higher courts, then the plaintiff will be forced to file an appeal and, against the decision that denies such appeal, the plaintiff will be required to file an interlocutory appeal, thus delaying the processing of the lawsuit.

Likewise, the new rule is not in line with the principle of adversary system, since it prevents the participation of the parties in the development of the case – and such participation is not restricted to the production of evidence. The parties are prevented from influencing the outcome of the case, in equal conditions, via the submittal of allegations and arguments that may not have been taken into account by the judge.

It is also important to note a potential violation of the due process of law, since the judge dismisses the case without clarifying his reasons to do so, thus shortening the course of the lawsuit without any explanation as to why he decided not to hear the claims made in the complaint. The violation is blatant because all lawsuits are based on factual premises – even if only the legal relationship between the parties - as the basis for the claim.

It is important to note that in many cases the judge, overwhelmed by a heavy workload, could mistake similar cases for identical ones. The number of lawsuits that are filed everyday is staggering and a judge may have difficulty to identify, in a hasty manner, the minute details that characterize each lawsuit.

That being so, the speed in the decision-rendering process was privileged to the detriment of legal safety, which could sustain adverse effects when the new legal provision comes into effect. Despite the commendable intentions that fueled this legal amendment, the possibility to dismiss lawsuits via borrowed decisions deemed to be “identical” entails risks that could translate into violations of constitutional guarantees.

At this time, the direct unconstitutionality action (Adin) filed by OAB is pending trial by the Federal Supreme Court. Additionally, the legal community must intensify the debates on the matter, in such a way as to prevent the amendment – if actually implemented – from enabling the judges to bring court activities to a standstill in an attempt to render a faster service, thus preventing a reflection on the ongoing changes that currently affect society.

TRANSMISSION OF ELECTRICITY: CONTROVERSIAL TAX ASPECTS

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Is the activity of transmission of electricity a transportation service or a commercial activity connected to the generation and distribution of electricity?

This tax law controversy has two implications: the first one relates to the assessment of the Tax on Distribution of Goods and Services – ICMS and the second deals with the percentage of assumption that applies to the activity for purposes of ascertainment of the presumed profits with reflexes on the Corporate Income Tax – IRPJ and on the Social Contribution on Net Profits – CSLL.

With regard to ICMS, Supplementary Law No. 87/96 established, in article 9, that the payment of ICMS in electricity transactions shall be carried out pursuant to the tax replacement regime. In that regard, both in local transactions and in interstate transactions the State is able to assign the responsibility for the payment of such tax to the companies that generate or distribute electricity, in the capacity of taxpayer or tax replacement, covering the ICMS that is levied from the production or import to the last transaction.

Considering the current “non-vertical” structure of the sector, it seems reasonable to conclude that, if only one entity is in charge of paying the ICMS that is assessed on each transactions that is part of a chain (which goes from the producer or importer of electricity all the way to the sale thereof to the end consumer), then the transmission of electricity is subject to the assessment of such tax, even though the concessionaires of electricity transmission are not paying such tax to the States. If the transmission activity is part of the chain, since without it no energy gets transmitted to the end consumer, ICMS should be levied on the transmission of electricity and electricity transmitting companies are taxpayers of ICMS.

As taxpayers, for example, such concessionaires could use the ICMS credits assessable on their assets that are directly related to their activities, which would give rise to an accrued balance in their accounting records, which could be transmitted to third parties, subject to the rules of each State.

Nonetheless, the thesis described above is not as simple when it is analyzed in light of the events of levy of ICMS. Please note that, for purposes of assessment of ICMS, electricity is classified as goods. In that regard, if the mere transmission activity consists of the transmission of the electricity that was sold by a generator to a distributor or distributing agent, the transmitting concessionaire is not performing any commercial activity that could be classified under the concept of distribution of goods, since the electricity is not purchased by the transmitting company.

Such activity could be classified as a transportation service, thus representing an autonomous service rendered for purposes of ensuring that the “goods” (electricity), sold by the producer, can be

“delivered” to the end consumer. However, the concept of transportation according to the traditional doctrine generates to the transporter obligations such as “receiving and delivering the goods at the time and place agreed upon” and “being the depository of the received goods, issuing a receipt with a description of the nature, quality, quantity and weight of such goods”. Those characteristics are not in line with the activities developed by concessionaires of services of electricity transmission.

Therefore, a controversy exists with regard to tax laws. Since one cannot classify the transaction as purchase and sale, and since it is not possible to classify such transaction as transportation services, some authors argue that the transmission of electricity per se is not a triggering event of ICMS, and consequently, the concessionaires of services of electricity transmission are not taxpayers of ICMS.

At this point, the technical-legal accuracy is replaced by convenience. A number of electricity transmission companies have received infraction notices due to their failure to pay differences in ICMS rate at the time of the interstate acquisition of fixed assets and consumables, whereas the in other States such credits are disallowed. In other words: the characterization of a taxpayer is at the discretion of the tax voracity of each State.

In the federal sphere doubts also exist with regard to the identification of the percentage of profit assumption to be used in the taxation of revenues resulting from said activity under a presumed profit system or in monthly advance payments under an actual profit system.

Presumed profits is a form of ascertainment of IRPJ and CSLL in which the company chooses to calculate its taxable profits based on percentages established in the law, which are applied to the gross revenues of the company. The same percentages apply when the company chooses taxation according to actual profits, in which case monthly advance payments are made. Such percentages can vary from 1.6% to 32%, depending on the activity developed by the legal entity. The percentage of 32% applies to services in general and 8% applies to services of transportation of cargo, whereas the same percentage applies to commercial activities.

The Federal Revenue Office (SRF) indicated, in its “Tax Inquiry Answers” (answers to tax inquiry procedures), that the activity of transmission of electricity falls under the definition of services of transportation of cargo. Nonetheless, the answer to the tax inquiry has relative applicability and does not apply to companies other than the one that submitted the inquiry. Therefore, the doubt remains with regard to federal taxes.

Controversies and tax assessment are factors that heighten the creativity of taxpayers and public entities. However, it is expected that ICMS will not be assessed in an autonomous manner on the transmission of electricity as “transportation of cargo”.

CVM CHANGES THE CRITERIA FOR THE GRANTAL OF OPERATING LICENSES TO FMIEE, FIP AND FIDC

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A recent decision rendered by the Joint Committee of the Securities Commission (CVM), published by the Superintendence of Registration of Securities, represents an important change in the criteria for the concession of operating licenses for mutual investment funds in emerging companies (FMIEE), direct credit investments (FIDC) and equity investments (FIP).

The Joint Committee decided that, in principle, operating licenses will only be granted to the funds that carry out public offers of its quotas, which represents an amendment of the standing that had been in force thus far.

Please note that such decision does not prevent the private placement of quotas. However, the Joint Committee considered that the registration of funds with CVM is only necessary, in thesis, when the quotas of such funds are distributed in a public manner. All other cases would represent condominiums not subject to the rule of CVM.

Such standing is based on the fact that, in the absence of a law that grants legal identity of investment funds, in order to characterize the constitutive nature of the registration of the fund regulation with CVM or with the Registry of Deeds and Documents, the nature of investment funds is the one set forth in Law No. 4728/65, namely, "condominium funds". That being so, the constitution of securities condominiums is not conditional on a license to be granted by CVM. The existence of such condominiums is the mere result of the ownership of assets (i.e., securities) by more than one holder.

That being so, according to the decisions made by the Joint Committee, CVM regulates the constitution of condominiums organized as investment funds (from the standpoint of the contents of the articles of incorporation and publicity required from them), for the sole purpose of finding the most suitable regulation for the subsequent public distribution of quotas – which does require registration, according to article 19 of Law No. 6385/76. Since Law No. 10303/2001 included quotas of investment funds in the definition of securities, every public offer of quotas of an investment fund requires registration with CVM.

In light of the above, administrators who submit investment funds to the registration of CVM must bear all burdens inherent to a public distribution of quotas, even if no sale efforts are actually made, and such registration request shall be examined as if such efforts had been made. That being so, in order to obtain an operating license for the funds in question, thus enabling the subsequent trading of the quotas, the administrators must also register the public offer of distribution of quotas.

Nevertheless, please note that, as stated in the original wording of CVM Ordinance No. 202/93 (before the amendments introduced by CVM Ordinances Nos. 238/95, 245/96, 274/98, 309/99, 344/2000, 351/2001, 358/2002 and 373/2002), which regulates the registration of companies for purposes of the trading of their securities in Stock Exchanges or over-the-counter- markets, CVM itself accepts the waiver of registration of a public offer for the distribution of quotas, in cases like, for example, the ones described in articles 4 and 5 of CVM Ordinance No. 400/2003.

In those cases, as well as in other circumstances not expressly described in the regulations, in which CVM, at its own discretion and as a result of the nature of the transaction, may grant a waiver of the registration of the public offer of quotas, the Joint Committee considered that an operating license for funds may be requested from such agency. Nevertheless, such situation would cause the forfeiture of the "automatic registration" described in CVM Ordinances Nos. 356/2001 and 391/2003, which regulate FIDC and FIP funds, respectively, which consist of the automatic grantal of operating licenses for such funds upon the simple submittal to CVM of certain documents listed in such ordinances.

Finally, it is important to note that the decision in question considers as necessary the consolidation of the pertinent regulations, according to the opinion voiced by the Joint Committee. In that regard, such Joint Committee determined that (i) CVM shall enact general rules to regulate the waiver of registration of certain public placements of investment fund quotas; and (ii) such rules, after being revised, shall apply, in general, to the public distribution of all private funds and to all public funds with material liquidity restrictions.

The Economic Law Department will promote a debate on the current Brazilian antitrust laws.

The Economic Law Department, headed by partner Barbara Rosenberg, will host an event on May 24, when current Brazilian antitrust laws and the importance of antitrust compliance programs for national companies will be discussed.

For more information about this event or to sign up, access www.bmalaw.com.br/convite.html, send an e-mail to

bma@bmalaw.com.br or call (21) 3824-1018 or 3824-6025.

MORAL HARASSMENT IN EMPLOYMENT RELATIONS

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The number of lawsuits filed by employees who are victims of moral harassment is rising in Brazil. During the year 2005 alone, the number of complains involving such matter increased by almost 6%, according to date published by the Superior Labor Court.

In fact, both the employees and the Courts have been paying more and more attention to the psychological wellbeing at the workplace. This is a trend that results from movements to ensure the protection of human beings, which dates back to the classification of the principle of dignity as a fundamental right of our Republic, under the Federal Constitution of 1988.

Moral harassment, in general terms, can be described as a form of “qualified moral damages”. It takes place when the employer frequently generates obstacles and hindrances to the professional activities of certain employees, who are treated in an excessively rigorous manner and suffer from psychological aggravation.

Unlike behaviors that characterize moral damages, the main characteristic of “moral harassment” is the reiterated persecution, by a superior, of certain employees who, in general, report directly to such superior.

The examples that can be found in Brazilian labor courts are many. In that regard, it is worth mentioning a case heard by the Regional Labor Court of the 15th Region, headquartered in Campinas. The employee, feeling humiliated as a result of having been forced by a superior to wear a shirt with the image of a monkey after failing to meet certain sales goals, filed a labor claim against his employer. In the lawsuit, it was determined that the Plaintiff had been harassed at other times, due to his failure to meet sales goals, and, on occasion, had been forced to wear a chicken costume and also to subject himself to beatings by his coworkers.

The case mentioned above represents a typical case of harassment to the psychological wellbeing of the employee, which not only grants him the right to receive the corresponding award, but also to terminate his employment contract with cause, at the expenses of the employer.

Brazilian companies are gradually becoming aware of the need to implement rules of behavior that can regulate the treatment of employees. This concern is an old one in other countries, such as in the United States, where employees routinely receive extensive manuals describing the acceptable rules of behavior in the workplace.

Such rules of behavior, in general, establish guidelines that cover matters ranging from proper attire to how to address co-workers, prohibited words and acceptable greetings. Those guidelines represent not only the employer’s concern with the wellbeing of its employees, but also, and mainly, an important strategy in the prevention of lawsuits and reduction of contingencies.

In Brazil, the recent growth in the number of lawsuits that involve moral harassment claims requires that employers think about the importance of the adoption of measures to prevent abuse. In that regard, the implementation of rules of behavior, in addition to preventing lawsuits and reducing contingencies, can also generate workplace safety, since those that put the quality of the work environment in jeopardy are subject to punishment.

Therefore, in addition to representing a sensible move on the part of employers, the adoption of rules of behavior that can guide the interaction between employees and repress behaviors that could affect the wellbeing in the workplace is a highly advisable initiative.

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