

New ANP regulation deals with third-party access to fuel terminals

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ANP Resolution 881/2022 is a step forward in fostering competition in the Brazilian fuels market, but it has its challenges

In October 2022, Resolution 881/2022 issued by the National Oil, Natural Gas and Biofuels Agency (ANP – Agência Nacional do Petróleo, Gás Natural e Biocombustíveis) came into force. The new regulation deals with the use, by interested third parties, of port and waterway terminals for handling oil, oil derivatives, natural gas derivatives and biofuels.

ANP Resolution 881/2022 replaces the former regulation on the matter (ANP Directive [Portaria] 251/2000), and is designed to establish rules that will encourage competition in the handling and storage of fuels. The main issues addressed by the new rules are:

- i. **Non-discriminatory treatment for third parties:** The new Resolution reinforces the rules on non-discriminatory treatment for third parties by, for example, requiring terminal operators to give third parties access whenever there is available or idle capacity in the terminal and to publish the fees charged for access;
- ii. **Owner's priority:** The priority of "shipper-owners" – defined as legal entities that are simultaneously owner of the terminal, user of the service provider by the terminal operator and owner of the product being stored – which previously existed for private terminals only has been extended to public terminals. At the same time, the priority is no longer based simply on the terminal's capacity, and is now limited to 10 years and to the volume determined by the ANP, based on the volumes historically moved by the owner; and
- iii. **Deverticalization:** The Resolution bars shipper-owners from operating the terminal: in other words, where the owner of the terminal also uses the terminal's services, the owner cannot also be the terminal's operator. Companies that are owners, users and operators of the same terminal have until 2025 to comply with the new rules.

The new rules have a direct impact on terminal operations and have raised a number of questions over the measures that terminals should adopt to bring themselves in compliance with the new regulation, and over the criteria and procedures that the ANP will adopt to verify companies' compliance with the new rules.

From a broader, public policy perspective, the rules under ANP Resolution 881/2022 may lead to more efficient use of port infrastructure in Brazil by facilitating third-party access to idle capacity. On the other hand, by limiting guaranteed use of terminals by their owners, the new rules could create obstacles to new investment in the sector. **Close attention will be needed in**

implementing the new rules, because in the absence of incentives to stimulate investment in the sector, the result of the new rules may be the opposite of their intended effect.

ANP Resolution 881/2022 is one element in a broader initiative to promote competition in the Brazilian fuels sector. Another part of the initiative is the commitments made with Brazil's antitrust agency, CADE, for divestment of Petrobras refineries, and the growing proximity between CADE and the ANP in pursuit of this common objective: of the eight refineries contemplated by the agreement, two have already been sold. Recently, in reviewing the sale of REMAN – Petrobras's refinery in the state of Amazonas – to fuel distributor Atem, CADE reinforced, by means of a written commitment, certain obligations under ANP Resolution 881/2022, making compliance with those obligations subject to monitoring by the antitrust agency as well.

The same line of reasoning can be seen in Bill PL 2.316/2022, now before Brazil's Chamber of Deputies, which would amend the Petroleum Law to boost the ANP's efforts to ensure non-discriminatory access for third parties to pipeline and terminal infrastructure. The fate of the Bill, and of the commitments between CADE and Petrobras that have not yet been implemented, however, will depend on the new government's agenda.

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