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Competition: Legislation establishing temporary Private Law rules comes into force, with vetoes by Brazil's President

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Law 14.010/2020, published on 12 June 2020, makes temporary changes in relationships governed by private law in response to the Covid-19 pandemic, with eight vetoes by the President.

The new legislation originates in **Bill 1179/2020**, which was proposed on 30 March 2020 and approved by National Congress on 19 May 2020, and then sent to the President of the Republic for sanction.

Because of the vetoes exercised by the President, Bill 1179/2020 will return to Congress so that the deputies and senators can decide whether to maintain or remove the vetoed provisions, **but Law 14.010/2020 came into effect on the date it was published.**

Temporary changes to the application of the Antitrust Law (Law 12.520/2011)

In addition to temporary changes to consumer relations, leases, and other matters, Law 14.010/2020 modifies the application Brazil's Antitrust Law during the Covid-19 pandemic:

Anti-competitive conduct:

- ***Exemption for two specific types of commercial conduct – predatory pricing and cessation of business:*** Law 14.010/2020 temporarily suspends application of the provisions that list, as examples of antitrust offences, the sale of products and services at a price below cost, without good reason (predatory pricing), and the cessation of business without good reason.

  Past investigations by Brazil's antitrust authority, CADE (Conselho Administrativo de Defesa Econômica), reveal that it is difficult to obtain sufficient evidence of these offences from a competition point of view, and in fact CADE does not appear to have found any business guilty of these two practices in recent years.

  These provisions of Law 14.010/2020 are intended to provide comfort to market agents by assuring them that CADE will not seek to investigate or punish such conduct during the exceptional situation created by the pandemic.

- ***More flexibility in examining other conduct under investigation:*** Law 14.010/2020 provides that CADE must take into consideration extraordinary circumstances arising out of the pandemic when judging conduct occurring during the Covid-19 outbreak.

Although the Law does not expressly say so, CADE is likely to require that parties under investigation demonstrate a causal relationship between the exceptional circumstances and the events under investigation, as a condition to a more flexible approach.

Furthermore, it is unlikely that CADE will mitigate the application of the Antitrust Law in “hard core” practices such as cartels.

Just as in the truckers’ strike in 2018, CADE has been dealing with legitimate cooperation between competitors in emergency situations through the less formal procedure of consultation with the interested parties. In fact, in light of the exceptional circumstances in the current crisis, and even before Law 14.010/2020 was approved, on 28 May 2020 CADE authorized, through the simplified consultation procedure, a temporary agreement for collaboration between competitors in the food and beverages segments made to counter the effects of the pandemic.

In its review of the agreement, CADE took into consideration (i) the exceptional nature of the circumstances faced by the parties, (ii) the urgency in taking action, (iii) the causal relationship between the crisis and the proposed cooperation, and (iv) the efficiencies generated and the extent to which they were passed on to consumers. In addition, the proposal submitted to CADE (vi) did not involve coordination of commercial actions or the exchange of sensitive information, and (vii) was subject to specific committees created to deal with competition matters. The agreement will last until 31 October 2020, and may be extended if the pandemic scenario persists, on prior notice to CADE.

Merger review:

- ***Prior notice suspended for associative agreements, joint ventures, and consortiums:*** Law 14.010/2020 temporarily suspends the requirement to notify CADE of agreements for collaboration such as consortiums, joint ventures, and associative agreements, thus allowing the parties to implement the agreement immediately.

  The suspension does not, however, prevent CADE from examining, at a later date, agreements that were not necessary to counter or mitigate consequences of the pandemic – either in the form of a proceeding brought for review of a merger that is not subject to prior notification (one of CADE’s legal powers, which was not modified by Law 14.010/2020), or in the form of an investigation into anticompetitive conduct.

Other competition-related measures

Under Provisional Measure 926/2020 (which National Congress has not yet considered) procedural time limits are suspended, including those in proceedings before CADE.

According the CADE’s published interpretation of the Provisional Measure, the suspension applies only to procedural time limits that operate against investigated parties in certain types of proceedings, such as enforcement proceedings related to competition offences and administrative proceedings for imposition of procedural sanctions; time limits continue to run in merger reviews and all other investigative proceedings.

Accordingly, the one-year time limit for CADE to decide to review mergers that are not subject to prior notice, and the 240-day limit (extendable to 330 days) to complete merger reviews, run normally.

Term and retroactive effect of Law 14.010's competition-related measures

Although Law 14.010/2020 came into force on the date of publication, its effects with respect to the Antitrust Law will apply to **acts performed from 20 March 2020 to 30 October 2020, or while the state of public emergency lasts** (as declared under Legislation Decree no. 6 on 20 March 2020).

Urban mobility and price controls

Among other matters, the President of Brazil vetoed articles 17 and 18, which proposed to alter guidelines under the national urban mobility policy to require companies operating ride-hailing and delivery apps to reduce their cut of trip fares by 15%, to the benefit of drivers and delivery people.

As approved by Congress, Bill 1179 also prohibited any increase in prices to final consumers by reason of the measure described above.

In a Technical Note issued by its Economic Studies Department (dated 25 May 2020 and therefore while Law 14.010/2020 was still awaiting Presidential sanction), CADE stated that it was against the price controls under article 17 and 18, and stressed the importance of leaving market agents free to establish their pricing strategies.

According to the Note, the first impact of the proposed measure would be to reduce companies' profits or increase their losses, which would in turn reduce the quantity and quality of services offered and investment in innovation. In addition, the forced, linear reduction at the proposed percentage could harm businesses whose competition strategy relies on small margins and lower prices, and prevent the entry of new competitors.

The President took a similar line in his reasons for vetoing the provisions, which refer to the guarantees of free enterprise and free competition, and state that, as drafted, the provisions would be harmful to the free operation of the affected markets, to the detriment of users of the apps, and would produce incentives for coordinated conduct among companies.

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