

## THE NEW BRAZILIAN ANTITRUST LAW

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### I) INTRODUCTION

After seven years in negotiation with the Brazilian Congress, it was approved on October 5, 2011 the final wording of the Legislative Bill number 3.937-B of 2004, which deeply amends the actual antitrust Brazilian legislation.

In this article, we punctuated the main differences between the actual antitrust Law, the new one and its consequent impact in corporate transactions in Brazil (such as mergers, acquisitions, joint ventures, etc.).

Among several changes introduced by the Legislative Bill, we can identify in the items below those that are understood to have the greatest impact on the mergers and acquisitions market (i) the new internal composition of the Brazilian Antitrust System, (ii) the new criteria to identify acts of market domination, and (iii) the notification time of the operation to CADE.

We emphasize, however, that the new antitrust Law will only be in force in Brazil after one hundred and eighty (180) days from the date of the signature of the Law by the Brazilian president.

### II) THE NEW COMPOSITION OF THE BRAZILIAN ANTITRUST SYSTEM – SUPER CADE

Today, the Brazilian Antitrust System (“SBDC”) is composed of three main bodies bounded to the Ministry of Justice: the Antitrust Administrative Council (“CADE”), the National Secretariat of Economic Law (“SDE”) and the Secretariat for Economic Monitoring (“SEAE”). They have different and specific attributions but act together in order to prevent and repress market domination acts.

The Legislative Bill 3.937-B/04 amends such structure in order to eliminate the SDE and modify the role of SEAE (which will only opine about antitrust subjects as Laws, Decrees, regulations, etc.). Such amendments will grant CADE powers to do the preventive and repressive control over mergers and acquisitions. For these reasons the Legislative Bill has been called the Super CADE.

For this purpose, CADE will be composed of: (i) Antitrust Administrative Court; (ii) Superintendent General; and (iii) Study Department, with the assistance of the

Federal Attorney and the Public Prosecutor Office.

### III) THE CRITERIA TO IDENTIFY MARKET DOMINATION ACTS

The antitrust Law in force states that any act that may limit and/or hinder the free competition or result in the control of relevant markets of goods or services must be notified to CADE

The current requirements for characterization of a merger or acquisition as a market domination act are: (i) the participation of a company or group of companies that results in the domination of twenty percent (20%) of the relevant market and/or, if one of the parties has an annual gross income equal to or greater than R\$ 400,000,000.00 (four hundred million reais).

Nevertheless, as provided in the Legislative Bill, the criterion for characterizing a market domination act has been changed. Now the requirements to submit a merger or acquisition transaction to CADE are as follows:

- one party has gross annual sales or total turnover in Brazil equal to or greater than R\$ 400,000,000.00 (four hundred million reais), and
- the other party has gross annual sales or turnover in the country equal to or greater than R\$ 30,000,000.00 (thirty million dollars)

Therefore, the criterion regarding the percentage of the relevant market area will no longer be used and it will be now

considered the gross annual sales or turnover in the country of the other company participating in the merger or acquisition transaction.

We expect that these changes reflect a substantial decrease on the number of acts submitted for CADE's analysis, since the criteria for characterization of concentration act will be less rigorous.

### IV) TIME OF NOTIFICATION

The most significant change made by the Legislative Bill 3.937/04 is the time of notification of a market domination act to CADE.

Today, such notification has to be made within fifteen working days from the date of signing of the first bidding document between the parties, and, the analysis is usually made after the parties have already implemented its operation.

This statutory provision is detrimental to mergers and acquisitions and for consumers, since a possible non-approval or approval by CADE with restrictions, such decision shall be rendered after the closing of a business and thus the companies are structured and have been in operation for some period of time, requiring the undoing, partial or total, of all acts.

With the new arrangements, the transaction must be notified to CADE prior to the merger or acquisition transaction, which will be a condition for the execution of the any business.

However, CADE has a period of two hundred and fortydays to analyze the

transaction. In case of failing to meet such term, the parties may proceed with the execution of the business. This period may be extended for sixty days, with the request of the parties, or for ninety days, by reasoned decision of the Administrative Tribunal.

The Legislative Bill also provides that any act performed prior to the analysis of CADE will be considered null and fines can be applied, varying between R\$ 60,000.00 (sixty thousand reais) to R\$ 60,000,000.00 (sixty million reais).

Almeida Advogados' Consulting Department has a specialized team in antitrust matters and remains at your disposal for any necessary clarification on the matter raised in this article.