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Competition Law and Litigation

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Changes in Cade by New Bill

This bill is very important, but some adjustments are necessary

Recently, Federal Deputy Jaime Martins (Pros-MG) presented Bill no. 10.830/18 with the purpose of amending Law 12.529/11, known as the Brazilian Competition Law (LDC). Its justification is commendable, inserting this Bill into a package of 70 bills to hinder the corruption practices.

Here are some comments on this Bill, beginning with the amendment of § 1 of art. 6, which originally had the following wording, "*The term of the office of the President and Commissioners is of 04 (four) years, and consecutive terms for reappointment are prohibited.*" The Bill added, after referencing to non-consecutive terms, "with a minimum interval of six months."

The Justification of the Bill correctly explains that, "The system of non-consecutive terms aims precisely at preventing the Executive Power from making block indications, compromising the autonomy and stability of the panel. The renewal of the majority of the court at once also compromises the predictability and legal security of decisions."

The above-mentioned excerpt from the Justification also concerns § 6 adding to the originals, "The term of office starts right after the end of the previous mandate, regardless of the indication date or nomination of the Court member."

The justification is explained by the following, "Notwithstanding, art. 113 of Law 12.529/2011 (Competition Law) has endorsed the implementation of non-consecutive mandates for Court members. It is noted that, in practice, the absence of an expressed provision that the four-year term of office would start after the end of the previous mandate, and not when the new member has taken office, undermined the effectiveness of the rule." It also explained that, "In 2015, three court members, appointed by the same President, have taken office, between July 15th and September 16th, which certainly undoes the intent of the Competition Law."

Thus, according to the Bill, when a Commissioner's term in office ends, the term of the newly nominated Commissioner will start on the following day. In practice, if the new Commissioner is not nominated in due time, the procedures of approval in the Senate can take off some time from the mandate period.

The Bill establishes, in §§ 7 and 8, the transitional rules, "The Executive Power shall provide transitional rules to ensure the non-consecutive terms of mandate, with a minimum interval of six months," and "The regulation referred to in § 7 of this article may provide for terms of less than 4 (four) years." The transition rule is commendable; the only criticism we have is concerning the importance of establishing the minimum time (which in our view should be two years) of mandate less than four years. We have the same objectives, outlined in the Justification: autonomy, stability, predictability, and legal certainty.

§ 2 of art. 12 amends the General Superintendent's mandate, which is now two years, allowing the term to be renewed - with the new wording, it shall change to four years, prohibited the renewal. In the Bill's Justification, it is mentioned that "this shorter mandate and the possibility of a renewal have weakened General Superintendent's independence." It is important to highlight that the nature of the General Superintendent's position is distinct from that of the commissioners. The commissioners have primarily the decision-making role, while the other have an investigational function, making them closer to the facts, but they do not make jurisprudences. This is the reason that their mandate is only for two years. We do not see an impairment of independence, which is why the change seems unnecessary.

In the case of the Chief Economist, the Bill presents radical change. In the applicable law, Cade's President and the General Superintendent appoint this position jointly. The Bill, through changing art. 18 of LDC, states that the Republic's President will appoint it, and the Federal Senate will approve it. According to the Justification, "the mandate of the Chief Economist also contributes to Cade's institutional strengthening to ensure greater independence to one of its technical bodies, and, consequently, greater fairness to the work." This change is correct, but it fails to establish that the term is four years, as well as being allowed to renew it for a further period. We see no reason for different treatment than the commissioners.

Item I of art. 37, regarding sanctions, is also object of the amendment by the Bill. The original writing starts talking about "company", a word that the Bill changes to "legal entities performing economic activities." According to the Justification, there is sterility in the current wording, explaining that the new writing "will allow the application of the provision to other legal entities that effectively earn revenue but are not entrepreneurial associations, as cooperative societies and partnerships." We believe that the Justification of this point is mistaken, because for a long time the concept of a company covers the economic activity, not to be confused with the concept of associations (civil or commercial).

Another amendment of item I of art. 37 solves one problem, but creates another, that is maybe worse. The Bill replaces the expression "gross revenues in the branch of activity" for "gross revenues." According to the Justification, this change "is desirable because the branch of activity is not a legal or economic concept, and it eliminates objectivity and legal security when setting the maximum amount of the fine." The Justification is correct when dealing with indeterminacy of the concept of "branch of activity," but at the moment when this expression is removed without a substitution by anything else (example: relevant market), there is a huge possibility of the principle of equality being violated. Imagine a cartel in which one of the participants is a company with multiple products and the other is a manufacturer of one single product, which is the object of the cartel. The company that offers various products should pay a fine related to many products outside of the cartel. If this product is marginal within the company's portfolio; instead of simply being fined, this becomes unfeasible, with consequences for the economy as a whole. This is not the goal of competition policy.

The Bill also deals with the dosimetry of the penalty to add to the eight items of art. 45 of LDC – "the gravity of the infringement", "the good faith of the offender", "the earned or intended benefit of the offender", "the consummation of the infraction", "the degree of injury or risk of injury to free competition, to the national economy, to the consumers, or to third parties", "the negative economic effects produced on the market", "the economic situation of the offender", and "recurrence" – the following three: "the role of leader or instigator of the offender", "the duration of the infringement", and "the effective repair of the damage caused to third parties because of the infraction." The clause that deals with the "economic situation of the offender also remains revoked." As for the withdrawal, once again, it refers back to the Justification, "(...) the generic arguments of the economic deficit situation are not sufficient to reduce the penalty without having made an effective economic and financial analysis of the offender." We oppose nothing on that.

The statute of limitations issue is also addressed by adding paragraphs to the art. 47, the most important being the first and second. The first says, "statute of limitations period to file a suit is referred to in the first sentence of this article - it shall be counted from the unequivocal knowledge of the infringement to the economic order;" the second establishes that, "unequivocal knowledge is assumed when Cade’s Court decision is published in the Brazilian Federal Gazette." The text is in line with Senate Bill 283/2016. A certain temporal element is created, which is not ideal, at least currently in benefit of legal security. However, the unification of the bills is important, especially given the possibility of conflicting amendments.

§ 3 is useless: "The opening of procedures for the investigation of infringements against the economic order by the General Superintendent suspends the statute of limitations period for the filing of actions referred to in the first sentence of this article." Indeed, there is no sense in suspending a term that has not even begun.

In general, a well-meaning Bill is very important; but as seen above, adjustments are necessary.