

**Competition Law and Litigation**

[Ricardo Casanova Motta](#) | [Julia Krein](#)

## THE NEW LAW OF REGULATORY AGENCIES APPROVED

This law establishes common rules for regulatory agencies, also regulating the interaction with other systems, such as that of competition defense.

On June 26, Law n. 13.848/2019, which establishes rules for management, organization, the decision-making process, and the control of Brazilian regulatory agencies, was published in the Official Gazette of the Union, providing common guidelines, subject to the particularities of each regulated sector. The law aims to increase the efficiency and transparency of their management, as well as their permeability to external demands.

The new text alters and complements the precepts of existing laws on the subject in each regulated sector, meanwhile changing some of the provisions of Law n. 9.986/2000 (which was established with a basis on the human resources of these agencies) by preserving the precepts, regarding the remuneration of their careers enacted during the Michel Temer government, by Law n. 13.326/16.

The National Electric Energy Agency (Aneel); the National Petroleum, Natural Gas, and Biofuels Agency (ANP); the National Telecommunications Agency (Anatel); the National Sanitary Surveillance Agency (Anvisa); the National Supplemental Health Agency (ANS); the National Water Agency (ANA); the National Water Transportation Agency (Antaq); the National Land Transportation Agency (ANTT); the National Cinema Agency (Ancine); the National Civil Aviation Agency (ANAC); and the National Mining Agency (ANM) are all subjected<sup>3</sup> to this law. The Central Bank of Brazil exercises regulatory functions over the financial and means of payment sectors and is the country's primary monetary authority; therefore, it is not considered a regulatory agency.

## MAIN PROVISIONS

**The law reinforces** the decision-making ability and financial autonomy of the agencies, which do not have a hierarchical link with the other agencies of direct and indirect public administration, which guarantees the functional stability of their leaders during their mandates. Direct solicitation needs to the Minister of the Economy for authorization to carry out public tenders and other themes associated with changes in the staff and human resources were established, subject to budgetary availability.

The number of agency directors (five - one of whom is the director-president) and their terms of office (five years) were also standardized. The requirements for the appointment of directors were increased; a duty that will continue to be the responsibility of the President of the Republic, with approval by the Federal Senate.

This law also regulated the decision-making process of the agencies, following the general principles of administrative law established in Law n. 9.784/99, but now with the implementation of Regulatory Impact Analysis ("AIR") and public consultations before adopting or altering normative acts of general interest. The need for the agencies to elaborate annual strategic and management plans, which should include the estimated disbursement of financial resources to allow these goals to be achieved, was established too.

Finally, control mechanisms for the operation of agencies were established, either through an internal ombudsman (who does not have hierarchical subordination to other agency employees) or through monitoring done by the National Congress, with the assistance of the Brazilian Court of Auditors. In order to enable monitoring, the law requires the preparation and submission of annual reports that analyze the fulfillment of these objectives, defined in the strategic and management plans of each agency.

## INTERACTION WITH OTHER AGENCIES

**In addition to the provisions above**, the law also establishes principles for the interaction and articulation of regulatory agencies between themselves and with other systems of state operation in economic activity, such as in competition defense, consumer protection, environmental operations, as well as with the regulatory agencies or regulatory organs of other federative entities.

In regards to the interaction with the Administrative Council for Economic Defense ("CADE"), the complementarity between the state regulation and competition defense is strengthened with CADE's current competence to analyze and approve mergers being maintained, as well as its ability to apply penalties for violations of the economic order in regulated sectors.

The need for interaction and dialogue between CADE and the regulatory agencies is reinforced, granting the ability to request for the regulatory agencies to elaborate opinions related to their sectors of operation, in order to assist in their analysis. Regulatory agencies are also required to notify CADE of any potential anticompetitive conduct in their sectors, and then Cade is required to inform the agencies of its final decisions.

The complementarity between competition defense and sectoral regulation has been defended for quite some time in CADE's case law, which has reinforced the possibility of its performance, even in regulated sectors. Therefore, the new law only regulates a policy that was previously implemented, so by establishing maximum deadlines for communications between the organs.

## PRESIDENTIAL VETORES

The law was sanctioned after five vetoes of the current President Jair Bolsonaro: (1) imposition of a triple list, being observed by the President in the selection of members; (2) mandatory annual attendance of directors of the Federal Senate for accountability; (3) a requirement of a nomination for the position of director, for a minimum period of removal ("quarantine") of twelve months of companies that operate in the sector, regulated by the agency to which they were appointed; (4) prohibition of reappointment of current directors of the agencies; and (5) exclusion of the Civil House as an organ of planning, budgeting, and federal financial administration systems (a provision that is not directly related to the purpose of the law). The vetoes can be maintained or not by the National Congress, who will make the final decision.

Law n. 13.848/19 will enter into force on September 24, 90 days after its publication.

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