

## Competition Law

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## The undesirable punishment of efficiency

Cade will not be able to handle the quantity of investigations that will be initiated, if Bill no. 4,063/2019 is converted into a law.

At an inappropriate moment, a Congressman, certainly with noble and praiseworthy intentions, presented Bill 4.063/2019, which adds paragraph 4 to article 36 of Law no. 12,529/2011 (Brazilian Competition Law/ Lei de Defesa da Concorrência, in Portuguese - LDC), "Whenever a company or group of companies controls one third or more of the relevant market, an administrative procedure will be initiated to investigate violations to the economic order by this company or group of companies, without damaging other antitrust actions."

It should be noted that art. 36 of the LDC deals with conducts that harm free competition, and therefore is subject to sanctions. In fact, its first paragraph registers an (apparent?) incompatibility with the proposed text by saying, "The takeover of a market resulting from a natural process, yet based on the greater efficiency of an economic agent over its competitors does not characterize the illegality provided for in item II of the main section of this article." The aforementioned item refers to, "dominating the relevant market of goods or services."

The idea that emerges from this first paragraph is that organic growth cannot constitute an infraction. In this situation, the company grows because it is better, more efficient, more competent, etc. than its competitors, not because it infringes on the law in some way. We have many examples of successful companies and entrepreneurs.

Nevertheless, what the mentioned bill, if turned into a law, will impose as a consequence is to turn growth - any growth - of any company, even an organic and efficiency based one, into a possible infringement, if the participation in the relevant market exceeds one third. However, what most companies and entrepreneurs want is growth in the capitalist system. Moreover, there should not be any penalties or discouragement for efficiency. It is uninteresting to point in a way that claims against cutting costs, using new technologies, creating jobs, etc.

It can be used as an argument that the mentioned bill only defines the beginning of an Administrative Investigation which does not constitute a court conviction by itself. Although, the mere initiation of an Administrative Investigation is already a heavy burden for any company, given not only the need to hire lawyers, but also the work of preparing the information to be provided. In addition, the companies eventually need to create accounting contingencies, which constitute a financial burden. All of this should be added to the burden of monitoring, and experience indicates that this might last for years.

At the end of the day, the practical effect of this eventual Law will be the transformation of efficiency into yet another form of infringement of the economic order.

Worse yet, the text is evidently unconstitutional; in fact, paragraph 4 of article 173 of the Brazilian Constitution establishes, "The law shall repress the abuse of economic power aimed at market domination, elimination of competition, and arbitrary increase in profits." Thus, in order for the domination of a given market to be the object of an investigation, it is essential that there be existence of abuse of economic power previously demonstrated (or an infringement of the economic order, in the language of the LDC).

There is still an important practical issue. The structure of the Brazilian Administrative Council for Economic Defense - Cade - is already so overwhelmed that it will not be able to handle the amount of administrative investigations that might be opened if this bill is transformed into a law. Although there are no official statistics to know where (which relevant markets) and how many dominant companies with more than a third share there are, the estimates are worrisome when it comes to the structure of the agency.

For example, imagine, a small local market that is considered unique or that has one or two competitors, and due to this characteristic, it starts to be investigated by CADE. It is difficult to know how many markets and how many situations we are dealing with. It is also hard to tell the enormous amount of investigative demands that will reach CADE. With this potentially huge number of procedures to deal with, the Council could take incalculable periods of time, harming not only efficient companies, which will need to be monitoring and permanently available, in order to provide the authority with information, as well as the state organization in charge of the investigations itself.

For this reason, it is very important that this bill does not go through.

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