

Law No. 10149 OF 21ST OF DECEMBER, 2000

Amends Law No. 8884 of 11th of June, 1994, which turns the Administrative Council for Economic Defense – CADE (*Conselho Administrativo de Defesa Econômica*) into an autonomous government agency (*autarquia*), makes provisions regarding the prevention and control of infringements of the economic order, and makes other provisions.

THE PRESIDENT OF THE REPUBLIC: I hereby declare that the National Congress has enacted and I sanction the following law:

Art. 1. Arts. 2, 26, 30, 35, 53 and 54 of Law No. 8884 of 11th of June, 1994, shall read as follows:

"Art. 2."

§ 1. A foreign company is deemed resident in the Brazilian territory if it operates or has a branch, affiliate, subsidiary, office, place of business, agent or representative in Brazil.

§ 2. The person in charge of the branch, affiliate, subsidiary, office, or place of business in Brazil shall be notified and informed on behalf of the foreign company of all procedural acts, notwithstanding any power of attorney or contractual or statutory provision" (NW — New Wording)

"Art. 26."

§ 1. The amount of the daily fine mentioned in the opening paragraph of the present article shall be included in the document containing the request of the competent authority.

§ 2. The fine provided for in the present article is calculated daily until ninety days after the date set in the document mentioned in the previous paragraph.

§ 3. The requesting authority is fully responsible for imposing the fine provided for in the opening paragraph of this article.

§ 4. The branch, affiliate, subsidiary or office of the foreign company in Brazil is jointly liable for the payment of the fine provided for in the present article.

§ 5. Should the principal or a third party unjustifiably fail to appear when summoned to provide oral clarification during the course of administrative procedure, preliminary inquiry or administrative proceeding, he shall be subject to fine ranging from R\$ 500.00 (five hundred reais) to R\$ 10,700.00 (ten thousand seven hundred reais) depending on his economic situation, which shall be imposed by means of a notice of violation issued by the competent authorities."
(NW)

"Art. 30. The SDE shall carry out preliminary inquiries, in the discharge of official duty or upon written, justified request by any interested party, when all circumstantial evidence of the infringement of the economic order do not suffice for the institution of an administrative proceeding.

§ 1. During the preliminary inquiries, the SDE Secretary is entitled to take any measures provided for in articles 35, 35-A and 35-B herein, including summoning the principal or third parties to provide explanations in writing or in person.

....."

§ 3. At the discretion of the SDE Secretary, preliminary inquiries shall be kept confidential in the interest of the investigations." (NW)

"Art. 35. Upon the end of the period for defense, the SDE shall call for investigations and the production of evidence in the interest of the SDE to be submitted within 15 days. The SDE is also entitled to exercise its fact-finding powers as provided for herein, maintaining confidentiality when necessary.

§ 1. All investigations and evidence gathering procedures called for by the SDE Secretary, including the inquiry of witnesses, are to be concluded within 45 days, with the possibility of a 45-day extension if deemed justifiably necessary.

§ 2. In compliance with the object of the preliminary inquiry, administrative procedure or proceeding, the SDE Secretary is entitled to authorize, by means of a substantiated decision, the inspection of the head office, place of business, headquarter, branch or facilities of the company under investigation. The company shall be given at least 24 hours' notice and the investigation shall not start before 6 a.m. or after 6 p.m.

§ 3. Under the circumstances of the previous paragraph, inventories, objects, papers of any nature, books and records, computers and magnetic files are subject to inspection. In addition, copies of any document or electronic data can be made or requested." (NW)

"Art. 53."

§ 5. The provisions of this article do not apply to the infringements of the economic order related to or stemming from conducts provided for in items I, II, III and VIII of art. 21 herein." (NW)

"Art. 54."

§ 3. The acts mentioned in the opening paragraph include those aiming at any form of economic concentration, be it mergers, incorporations, the creation of a society to control other companies or any other type of corporate grouping that guarantees for the resulting company or group of companies a share of at least 20% of a relevant market, or that results in a gross revenue of R\$ 400,000,000.00 (four hundred million

reais) as shown in the most recent financial statement of any of the participating companies.

....." (NW)

Art. 2. The following articles shall be added to Law No. 8,884 of 1994:

"Art. 26-A. Any attempt to impede, hinder or prevent the inspection authorized by SDE or SEAE (the Secretariat for Economic Monitoring — *Secretaria de Acompanhamento Econômico*) under a preliminary inquiry, administrative procedure or proceeding shall subject the inspected entity to fine ranging from R\$ 21,200.00 (twenty-one thousand two hundred reais) to R\$ 425,700.00 (four hundred and twenty-five thousand, seven hundred reais), depending on the offender's economic situation, by means of a notice of violation issued by the competent authorities." (NW)

"Art. 35-A. The Federal Attorney's Office (*Advocacia-Geral da União*), upon request by the SDE, may ask the Judiciary to issue a search warrant to seize objects, papers of any nature, books and records, computers and magnetic files of individuals and corporations in the interest of the production of evidence under the administrative procedure, preliminary inquiry or administrative proceeding, with the enforcement, when applicable, of the provisions of article 839 and following articles of the Code of Civil Procedure, the proposal of main action being unclaimable.

§ 1. During the course of administrative procedure aiming at the production of evidence for representation to be brought to SDE, SEAE may exercise, when applicable, the powers provided for in the opening paragraph of the present article and in art. 35 herein.

§ 2. At the discretion of SEAE, the administrative procedure mentioned in the previous paragraph may be kept confidential in the interest of the investigations." (NW)

"Art. 35-B. The SDE, on behalf of the Brazilian Federal Government, may enter into a leniency agreement with individuals or corporations who have committed infringement of the economic order, which will either extinct the punitive action of the public administration or reduce one to two thirds of the applicable penalty, under the terms of the present article, provided that they effectively collaborate with both the investigations and the administrative proceeding and that such collaboration results in:

I – the identification of the coauthors of the infringement; and

II – the gathering of information and documents that are proof of the alleged or investigated infringement.

§ 1. The provisions of the present article are not applicable to corporations or individuals who have been found to be the leaders of the conduct deemed illegal.

§ 2. The agreement mentioned in the opening paragraph of the present article can only be executed if the following requirements are fulfilled cumulatively:

I – the corporation or individual is the first to qualify with regards to the alleged or investigated infringement;

II – the corporation or individual fully stops their involvement with the alleged or investigated infringement as of the date the agreement is proposed;

III – the SDE does not hold sufficient evidence to ensure the condemnation of the corporation or individual at the time the agreement is proposed; and

IV – the corporation or individual confesses to their participation in the infringement and fully collaborates with the investigations and the administrative proceeding by appearing at their own expense and whenever summoned until the conclusion of the proceeding.

§ 3. The leniency agreement entered into by the SDE on behalf of the Brazilian Federal Government shall stipulate the conditions deemed necessary to ensure the effective collaboration of the beneficiary and the fruitful result of the proceeding.

§ 4. The execution of the leniency agreement is not dependent on the approval by CADE. Nevertheless, at the time of the administrative proceeding trial, after the agreement is complied with, CADE is responsible for:

I – declaring the extinction of the punitive action of the public administration in favor of the offender in the circumstance that the agreement proposal was submitted to the SDE when it was previously unaware of the alleged infringement; or

II – in all other circumstances, reducing one to two thirds of the applicable penalties in accordance with the provisions of art. 27 herein. When deciding on the penalty, CADE must also consider the actual effectiveness of the collaboration and the good faith of the offender in the compliance with the leniency agreement.

§ 5. Under the circumstances of item II of the previous paragraph, the reduced penalty shall not be severer than the mildest of the penalties imposed to the other coauthors of the infringement taking into account the proportions set for the application of penalties provided for in art. 23 herein.

§ 6. The effects of the leniency agreement shall be extended to the directing and managing staff of the eligible company involved in the infringement provided that they also sign the agreement along with the company and being observed the conditions mentioned in items II to IV of § 2 of the present article.

§ 7. The corporation or individual that fails to obtain eligibility to enter into the agreement described in this article during the course of investigations and the administrative proceeding may enter into another leniency agreement with SDE regarding another infringement that the SDE was previously unaware of before the original case is sent for trial.

§ 8. Under the circumstances of the previous paragraph, the offender shall benefit from a reduction of one third of the applicable penalty in the original proceeding without prejudice to securing the benefits provided for in item I of § 4 of the present article in relation to the new alleged infringement.

§ 9. The proposal mentioned in the present article shall be kept confidential except in the interest of the investigations and the administrative proceeding.

§ 10. The leniency agreement proposal rejected by the SDE Secretary, which shall be kept confidential, does not mean a confession to having committed the infringement or the acceptance of the unlawfulness of the conduct under analysis.

§ 11. The enforcement of the provisions in the present article shall comply with regulation to be issued by the Ministry of Justice." (NW)

"Art. 35-C. In respect of crimes against the economy under Law No. 8137 of 27th of November, 1990, the execution of the leniency agreement, under the terms herein, calls for the suspension of the prescription period and prevents the case from being brought to court.

Sole Paragraph. Upon the fulfillment of the leniency agreement by the offender, the punishability of the crimes listed in the opening paragraph of the present article is automatically canceled."

Art. 3. As of January 1st, 2001, the Procedural Fee provided for in item I of article 5. of Law No. 9781 of 19th January, 1999, shall amount to R\$ 45,000.00 (forty-five thousand reais), which shall be shared in equal parts by each of the following bodies:

I – Administrative Council for Economic Defense - CADE (*Conselho Administrativo de Defesa Econômica*);

II – Secretariat of Economic Law Enforcement – SDE (*Secretaria de Direito Econômico*) of the Ministry of Justice;

III – Secretariat for Economic Monitoring – SEAE (*Secretaria de Acompanhamento Econômico*) of the Ministry of Finance.

Art. 4. The acts performed under Executive Order (*Medida Provisória*) No. 2055-4 of 7th of December, 2000 are hereby revalidated.

Art. 5. This law shall come into force on the date it is published.

Brasilia, 21st of December, 2000

179th year of the Independence

112th year of the Republic.

FERNANDO HENRIQUE CARDOSO – President of the Republic

José Gregori – Minister of Justice

Pedro Malan – Minister of Finance