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& Associados
Sociedade de Advogados

NEWSLETTER

ISSN 1647-272
No 7
JUNE 2010

EU and Competition Law

In this edition

PCA prohibits the merger of Ongoing / Prisa /Media Capital - reflections on the decision following the opinion of the sectoral regulatory authority

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On October 8, 2009, the Portuguese Competition Authority ("PCA") was notified of a concentration consisting in the acquisition of the joint control of Grupo Media Capital by Ongoing and Vertix, following the conclusion of a shares purchase agreement and a shareholders' agreement between Grupo Prisa and Ongoing.

Under Law No. 18/2003, 11 June ("LdC"), in concentrations that occur in markets subject to sectoral regulation, such as in the media sector, the PCA is obliged to request an opinion from the relevant regulatory authority, prior to the adoption of a final decision (ex vi Article 39º of the LdC), which occurred on October 13, 2009.

On February 10, 2010, after assessing the consequences resulting from the transaction, the Media Regulatory Authority ("ERC") unanimously approved an opinion opposing the proposed transaction provided that Ongoing sells - in favour of a third entity, not related to itself, directly or indirectly, by any legal or contractual means the amount of shares required to lower Ongoing's participation in Impresa's share capital to 1%, prohibiting Ongoing from (i) an increase in its participation in the share capital of Impresa beyond that limit and (ii) any interference, directly or indirectly, individually or together with other shareholders, in the internal affairs of Impresa, while being Media Capital shareholder.

Notwithstanding other arguments presented by ERC to render its opinion, we herein emphasize ERC's concerns regarding (i) the risks to the pluralism and diversity of media resulting from the simultaneous presence of Ongoing in the share capital of Impresa and Media Capital, and (ii) the significant increase in the risk of interference on the independence and autonomy of journalists and other media professionals considering that the subsidiary companies are the owners of the only two private free-to-air television operators in Portugal and have broad and diverse activities in other subsectors of the media.

Given the contents of ERC's opinion, the PCA considered itself legally bound to adopt a decision opposing the merger on the basis of Articles 107º of the Code of Administrative Procedure ("CPA"), 39º of the LdC and 4º (2) of Law 32/2003, of August 22 (Television Act), which occurred on March 30, 2010.

Apparently, this was the first time, under the current LdC, that the PCA adopted a decision opposing a merger based on a negative binding opinion issued by a sectoral regulator. Without entering into considerations on the merits or the arguments on which ERC issued the opinion, we will now analyze the decision adopted by the PCA following the negative opinion from the sectoral regulator, which, in our view, raises some doubts as to its suitability in face of the applicable law.

In the absence of a clear and accurate indication from the competition law on the consequences of a binding and obligatory negative opinion from a sectoral regulator in the merger control procedure, Article 30º of the LdC points to the rules of the administrative procedure seeking an appropriate response, which, in any case, should take into account the various interests at stake: on one side, ERC's concerns to ensure the plurality of media and, on the other side, the legal obligation upon the PCA to adopt a decision based on a competition assessment and following the legal and economic criteria set out in Article 12º of the LdC (see also Articles 35º and 37º of the LdC).

Consequently, given the provisions of the LdC as to the mandatory request for an opinion from ERC, and the importance of this opinion given by the Television Act, we tend to consider, as a decisive factor, that a binding and obligatory opinion, when issued, imposes on the decision-making authority an obligation to follow its conclusions, thus approving or transposing them into its final decision.

Therefore, in face of a negative binding opinion, the object of the administrative procedure becomes void.

"This was the first time, under the current LdC, that the PCA adopted a decision opposing a merger based on a negative binding opinion issued by a sectoral regulator."

From this perspective, in case of a negative opinion of the ERC, the PCA should adopt a decision revoking the merger control procedure, ignoring completely the conditionality contained in ERC's opinion, pursuant to and for the purposes of Article 112º of the CPA.

In that case, even if Ongoing sells the participation which it currently holds in Impresa's share capital, the completion of the merger would always depend on a new notification before the PCA following the fulfilment of the conditions imposed by ERC, and hence a new merger control procedure would include, among other things, a new request to ERC for an opinion under Article 39º of the LdC, as the current procedure would be void as an inevitable consequence of ERC's opposition.

In fact, the final outcome resulting from the solution presented herein does not materially differ from the final result obtained with the decision adopted by the PCA, but they radically differ from each other formally. To begin with, nothing in the LdC appears to consent to the adoption of a decision opposing the transaction in phase I and, secondly, the law does not establish other reasons to oppose a transaction than the ones of competition nature.

Therefore, in a case such as the present one, the PCA appears to be bound to declare the extinction of the procedure, as the adoption of any other decision referred to in the LdC would require a competition assessment which the PCA did not conclude. ■

First decision of the Portuguese Competition Authority condemning a professional order for abuse of dominance

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On May 18, 2010, the Portuguese Competition Authority ("Authority") condemned *Ordem dos Técnicos Oficiais de Contas* ("OTOC" - the Bar of Official Accountants)[1] for anticompetitive practices in the market for the mandatory training of the Official Accountants (*Técnicos Oficiais de Contas* or "TOCs") and imposed a fine of 229.3 thousand euros. The authority's decision may be subject to appeal to the Lisbon Commercial Court.

According to the Authority, one of the two infringements of the Competition Act (Law No. 18/2003, June 11) consists in the abuse of dominance by the OTOC in the above-referred market. It is the first time the Authority has condemmed a professional bar for this type of practice.

The practices condemned by the Authority

On July 12, 2007, OTOC published its Regulation for the Formation of Credits (*Regulamento de Formação de Créditos*), which created the market for the mandatory training for the exercise of the activity of Official Accountants. According to the Authority, through the enactment of this regulation the OTOC has artificially segmented the training market and has reserved to itself exclusively a third of the mandatory training , besides having set specific criteria for the admission of other entities providing training as well as for the approval of its formation sessions.

The Authority declared proven two violations of legal provisions of the Competition Act resulting from the OTOC's behaviour. More precisely, on the one hand and in association with undertakings, the OTOC adopted a decision to create the market referred to above with the characteristics in question (through the enactment of the Regulation) whose object or effect was to appreciably impede, distort or restrict competition thereby infringing article 4 of the Competition Act. On the other hand, the Authority considered that, despite the OTOC's being the regulator of TOC, the OTOC has been competing in a market which has been segmented by it and in which, through the enactment of the said Regulation, decided on the entry of competitors on the basis of its own criteria, collecting fees for the access to the market and for the exercise of the said activity. Thus, the Authority also considered proven the abuse of dominance in this market by the OTOC.

In recent years the Authority has condemned professional bars for imposing minimum fees (decision of August, 2005, relating to the Bar of Medical Dentists) and for imposing minimum and maximum fees (decision of May, 2006, relating to the Bar of Doctors), in the context of the regulatory powers the same bars enjoyed. But until now there had never been a professional bar condemned by the abusive exercise of its commercial activity in competition with the undertakings or professionals that are under its regulatory powers which the law confers upon the same professional bar.

> "It is the first time the Authority condemned a professional bar for abuse of dominance."

According to the Authority, the inquiry over the OTOC's practices was undertaken after the receipt of an anonymous complaint, which was subsequently reiterated by APOTEC - *Associação Portuguesa dos Técnicos de Contabilidade* (the Portuguese Association of Accountants).

The abuse of dominance

The abuse of dominance consists in the unduly use by an undertaking of its respective market

> "The inquiry over OTOC's practices was undertaken by the Authority after the receipt of an anonymous complaint, which was subsequently reiterated by the Portuguese Association of Accountants."

power and has an objective nature. Its confirmation does not depend on the undertaking's intention. The abuse may result from either discriminatory practices (as the application of discriminatory prices or commercial conditions to equivalent transactions), or exclusionary practices (which aim at impeding competing undertakings from developing the economic activity in question on equal terms and eventually leading them to leave the market) or through both types of practices. Both at the national level - in the light of the Competition Act - and at the EU level according to Article 102 of the Treaty on the Functioning of the European Union the abuse of dominance constitutes a prohibited practice and undertakings may be subject to substantial fines.

Additional penalties applied by the Authority

The Authority has also ordered the OTOC to adopt the necessary measures to put an end to the anticompetitive practices in question and fixed a periodic penalty payment should the OTOC decide not to comply with the decision. Lastly, the Authority ordered the OTOC to publish a summary of the same in the Official Gazette and also in a newspaper of national coverage. ■

[1] The Bar of the Official Accountants was created by Decree-Law Nr. 452/99, of November 5, which approved its Statutes and until October, 26 2009, date of publication of Decree-Law Nr. 310/2009, which amended the same Statutes, the Bar was designated "Chamber of the Official Accountants".

Portugal Telecom successful on appeal against Competition Authority fine

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"THE COURT'S CONCLUSIONS ON THE FACTS OF THE CASE SUPPORTED THE COMPETITION AUTHORITY'S DECISION. THE COURT'S DECISION FOCUSED PRIMARILY ON THE ISSUE OF WHETHER PORTUGAL TELECOM'S UNDERGROUND DUCTS SHOULD BE CONSIDERED AN ESSENTIAL INFRASTRUCTURE."

The Lisbon Commerce Court has recently ruled in favour of Portugal Telecom in its appeal[1] against a 38 million euro fine imposed in 2007.

In August, 2007, [*see previous update, «*Portuguese Competition Authority fines Portugal Telecom for refusing access to ducts and network infrastructure*», September, 2007], the Portuguese Competition Authority fined Portugal Telecom for refusal to grant access to its underground ducts to two competing cable operators. This decision and the fine in question have subsequently been reversed by a ruling adopted in March, 2010.

In several respects, the court's conclusions on the facts of the case supported the Competition Authority's decision. Among other facts, the court concluded that Portugal Telecom knowingly refused access to ducts in which there was sufficient physical space for its competitors' cables to be deployed and that its refusals were not justified on technical grounds or for cost-related reasons.

Regarding Portugal Telecom's access policy, this was allegedly based on the need to reserve at least two unoccupied ducts in all segments, for purposes of network maintenance and from 2002 onwards, network expansion. The court concluded, on this item, that the justifications for the defendant's refusals to grant access were not always consistent regarding the number of spare ducts to be reserved or the reasons for such a policy. In addition, it was deemed proven that, in several areas of Portugal Telecom's network, cables were deployed in sections where no spare ducts existed.

Furthermore, the construction of an infrastructure for the deployment of cables with the aim of providing pay-tv, broadband internet and fixed telephony service) was considered not to be an overall alternative for the roll-out of a cable network due to land use limitations and the costs involved.

Nevertheless, the court's decision focused primarily on the issue of whether Portugal Telecom's underground ducts should be considered an essential infrastructure in those specific segments and locations where access was denied. On this issue, although the court considered that the complete replication of Portugal Telecom's extensive system of underground ducts did not constitute a relevant alternative namely due to the costs implied it found that insufficient evidence was adduced to demonstrate that no adequate alternatives existed in specific segments where access was denied. It could not, therefore, conclude that the ducts in question constituted an essential infrastructure at the local, rather than national, level.

As a result, the Competition Authority's decision and fine were reversed and Portugal Telecom acquitted. The Competition Authority has subsequently appealed this first instance ruling to the Lisbon Court of Appeal. ■

"INSUFFICIENT EVIDENCE WAS ADDUCED TO DEMONSTRATE THAT NO ADEQUATE ALTERNATIVES EXISTED IN SPECIFIC SEGMENTS WHERE ACCESS WAS DENIED."

[1] Case n.º 1065/2007, 2nd Section of the Lisbon Commerce Court.

European Commission applies the settlement procedure in a cartel case for the first time

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On May 19, 2010, the European Commission adopted for the first time the settlement procedure by agreement with the involved companies in a cartel case regarding 10 producers of memory chips or DRAMS used in computers and servers.

I. Framework of the Settlement Procedure

The directive *Settlement Procedure* is provided in the Commission Notice 2008/C167/01 (OJEU of 2.7.2008). This procedure should not be mistaken with the *Leniency Regime*, included in Commission Notice 2006/C 298/11 (OJEU of 8.12.1996), as the second is based on the voluntary submission of information or elements of proof to the Commission so that the latter may initiate or may materially advance an inquiry regarding the breach of Article 101 TFEU under which a company may be granted full immunity to the application of a fine. While the settlement procedure is addressed to companies which are able to recognize an ongoing inquiry within negotiations with the European Commission, their participation in a cartel breaches Article 101 TFEU, and, as a consequence, are able to benefit from a reduction of 10% to the applicable fine.

The *Settlement Procedure* is, however, only triggered by the European Commission following a written request by the companies involved in the case, submitted during the inquiry phase and prior to the adoption of a statement of objections by the Commission.

Following the request, and if the Commission considers advisable to initiate settlement discussions, contacts are established between the Commission and the companies interested in the settlement, but the Commission retains the discretionary power to determine, within the negotiation phase, the adequate timing to disclose information to the companies, including elements of proof, legal qualification of the conduct, gravity and duration of the infringement, attribution of liabilities to each of the involved companies and an estimation of the range of likely fines.

The companies within the negotiations with the Commission must submit a final settlement proposal. If such proposal is not filed, the case shall follow the general procedural rules of an antitrust case and the settlement procedure closed.

The final settlement proposal submitted by the company to be considered valid by the European Commission shall fulfill the following conditions: *(a)* acknowledgement in unequivocal terms by the company of its liability supported by material facts; *(b)* indication of the maximum fine amount that the company foresees to be imposed by the Commission; *(c)* confirmation by the company that it has been sufficiently informed of the objections the Commission envisages against it and that it has been given sufficient opportunity to make its views known; and *(d)* confirmation by the company that it does not envisage requesting access to the file or the adjournment of an oral hearing unless the Commission does not reflect its settlement submission in the statement of objections and in the final decision.

Hence, the final settlement proposal submitted by a company must be materially reflected by the Commission in the statement of objections, and after the reply to the statement of objections by the company confirming its commitment to settle, the Commission can, without any further procedural steps, adopt a final decision.

Under the *Settlement Procedure* a company may be granted, as provided above, a reduction by 10% to the amount of the fine to be applied, and this reward may be combined with a potential fine reduction resulting from the application of the Leniency Regime, when this second procedure is also duly activated by the company before the European Commission.

> "Under the Settlement Procedure a company may be granted a reduction by 10% and this reward may be combined with a potential fine reduction resulting from the Leniency Regime."

II. Application of the Settlement Procedure to the computer memories (DRAMs) price cartel

The Commission applied the *Settlement Procedure* to this price cartel imposing in the May 19, 2010, decision a total fine of 331 million euros on Samsung, Hynix, Infineon, Nec, Hitachi, Mitsubishi, Toshiba, Elpida e Nanya. The decision was also addressed to Mícron, but as the company revealed the existence of the cartel to the Commission, it received, under the Leniency Regime, full immunity to the application of a fine.

From our perspective, due to the circumstance that the computer memories price cartel was the first antitrust file in which the Settlement Procedure was applied by the Commission, all the defendants were rewarded with the 10% reduction on the applicable fine, eventually with the aim of inducing other companies involved in cartel cases to trigger this mechanism.

A final decision by the Commission, in which the settlement procedure is applied, can still be subject to judicial review before the European Union General Court. ■

Inputs to an effective competition compliance policy

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In the past years, a growing number of companies operating in a variety of sectors have sought to increase their level of competition awareness through the implementation of internal competition compliance policies, often translated into the adoption of so-called compliance programmes.

A recent research undertaken by the UK's Office of Fair Trading ("OFT") into the practical implementation of competition compliance policies has shed light into the reasons for success or failure of compliance programmes and has pointed out a set of best practices in competition law compliance[1].

As a rule, a company's competition compliance policy is part of its general approach to corporate governance and corporate responsibility, alongside other issues such as anti-bribery, environmental issues and health and safety.

The adoption of compliance programmes is mainly driven by the need to avoid the risk of heavy financial penalties and reputational damage that are associated with a violation of competition rules. Notwithstanding the above, companies recognize that their internal compliance policy may constitute a competitive advantage in the market because it allows them to differentiate themselves from competitors through the adoption of an image of an "ethical" business, which can be relevant in order to gain new business. On the other hand, the implementation of compliance programmes is an opportunity to give employees with the necessary knowledge tools to compete vigorously within the "rules of the game", thus avoiding the damage that can arise from an overly-cautious approach to business, often as a result of ignorance of the applicable rules or of unjustified fear of breach.

The best practices identified include the adoption of a risk-based approach, the implementation of solutions that are tailored to the needs of each particular business, the adoption of formal competition law compliance programmes, which give incentive to effective compliance and provide the employees with the relevant competences in order to internalise a compliant behaviour.

Amongst the most common causes for failure of a competition compliance policy hence, a common cause of non-compliance is a lack of clear, unambiguous, ongoing commitment by the senior management to the facts that competition law compliance is a core part of the corporate culture and that the management expects its employees to comply with competition law.

But even a company that is unambiguously committed, from top to bottom, with a compliance programme can see its efforts compromised by the actions of a "rogue" employee (someone who, voluntarily and consciously, incurs in a defaulting behaviour), or, conversely, by involuntary non--compliant behaviour in unclear areas of the law. In both events, the company risks being part of an illegal conduct and subject to an investigation, which can result in high financial penalties and serious reputational damage, thus frustrating the purposes of the compliance programme in the first place.

This raises the question of whether competition authorities - the OFT, in particular - should adapt their penalty policy so as to acknowledge that a previously implemented compliance programme can be assessed as a mitigating factor for penalty purposes and clearly state the requirements for such an assessment and the respective penalty reduction. The OFT, however, considers that the previous

> "Is an opportunity to give employees with the necessary knowledge tools to compete vigorous ly within the "rules of the game"."

enforcement of a compliance programme must not, in theory, be valued either as a mitigating or as an aggravating factor. Nonetheless, that entity admits that, in individual cases and depending upon the circumstances of the case, it may consider the previous enforcement of a compliance programme as a mitigating factor, in which case a reduction of up to 10% shall be awarded.

Finally, the report lays down some hints on the fundamentals of an effective competition compliance policy - the so-called virtuous circle. Starting from one fundamental requirement - an unambiguous commitment to competition law compliance at all levels of the management chain - an effective competition compliance policy shall have as first step risk identification, then followed by the assessment of the risks previously identified. Subsequently, it is necessary to identify appropriate risk mitigation activities, e.g.: appropriate policies and procedures and appropriate training. Finally, it is important to undertake a continuous review of all stages of the process in order to assure the adequacy of the programme in place. ■

The design and implementation of effective competition compliance programmes present important challenges to companies and their lawyers.

The experiences referred to in the OFT's report provide relevant input to understanding those aspects that can contribute to the success in the implementation of competition compliance programmes. The best practices identified are in no way mandatory as the effectiveness of a programme is largely dependant on its design according to the specific needs of the businesses and companies at stake, on the basis of a preliminary risk assessment. Some of the basic principles of an effective compliance culture laid down in the report are potentially valid in any sector or activity or business in Portugal.

[1] "Drivers of compliance and non-compliance with Competition Law" - An OFT Report, May 2010, OFT 1227.

EU Commission adopts new Block Exemption Regulation on Motor Vehicle Distribution and Aftermarkets

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On May 2010, the Commission adopted a new Regulation on the application of Article 101(3) of the TFEU to vertical agreements in the motor vehicle sector - Regulation EU No. 461/2010 - hereinafter **Motor Vehicle Block Exemption Regulation**.

Article 101(3) of the TFEU allows paragraph 1 of the same article, which prohibits agreements which might affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition to be declared inapplicable in relation to certain agreements or category of agreements.

The Motor Vehicle Block Exemption Regulation has as its object (i) the distribution of new motor vehicles, (ii) the distribution of spare parts and (iii) the provision of repair and maintenance services for motor vehicles.

In order to simplify their analysis and since there do not appear to be any significant competition short-comings as regards the distribution of new motor vehicles, the newly approved **General Vertical Block Exemption Regulation** (Commission Regulation (EU) no 330/2010 of 20.04.2010) will, in general, be applicable to vertical agreements for the distribution of new motor vehicles. However, in order to allow operators time to adapt to the general regime, the General Vertical Block Exemption Regulation will only be applicable to such agreements in 3 years time and until then the old Regulation (EC) No 1400/2002 shall continue to apply.

"THERE DO NOT APPEAR TO BE ANY SIGNIFICANT COMPETITION SHORT-COMINGS AS REGARDS THE DISTRIBUTION OF NEW MOTOR VEHICLES."

"THE MOTOR VEHICLE BLOCK EXEMPTION REGULATION CONTAINS SPECIFIC RULES REGARDING THE MARKETS OF DISTRIBUTION OF SPARE PARTS AND THE PROVISION OF REPAIR AND MAINTENANCE SERVICES."

Experience acquired by the Commission regarding motor vehicles allows it to conclude that, in **markets of distribution of spare parts and the provision of repair and maintenance services**, competition is inherently less intense and the costs borne on average by EU consumers for repair and maintenance services represent a very high proportion (around 40%) of total consumer expenditure during the motor vehicles' lifetime.

In order to deal with such issues, the Motor Vehicle Block Exemption Regulation contains specific rules regarding the markets of distribution of spare parts and the provision of repair and maintenance services which are applicable since the July 1, 2010.

With the new rules, the Commission intends not only to reduce the costs borne by consumers but also to "protect access by spare parts manufacturers to the motor-vehicle after-markets" (§ 18 of the Supplementary Guidelines) and to enhance the competitive interaction between independent and authorized repairers (§ 58 of the Supplementary Guidelines).

Vertical agreements regarding the distribution of spare parts and/or the provision of repair and maintenance services will only automatically benefit from the block exemption if they (i) fulfill the conditions for an exemption under the General Vertical Block Exemption Regulation **and** (ii) do not contain any of the three hardcore restrictions of article 5 of the new Motor Vehicle Block Exemption Regulation.

As regards the vertical agreements' general regime, it is worth mentioning the introduction of a new double market share threshold: according to article 3 no 1 of Commission Regulation (EU) 330/2010, for a vertical agreement to benefit from the block exemption both the supplier and the distributor must have a market share that does not exceed 30% of their relevant markets.

Furthermore, the additional 3 hardcore restrictions foreseen in article 5 of the new Motor Vehicle Block Exemption Regulation, in practice, mean that no vertical agreement between producers, suppliers of spare parts and/or repairers may impede or restrict:

a) the sales of spare parts by members of a selective distribution system to independent repairers;
b) the supply of spare parts, repair tools or diagnostic or other equipment by the respective supplier to authorised or independent distributors or authorised or independent repairers or end users;
c) the ability of the supplier of components used in the initial assembly of motor vehicles to place its trademark or logo effectively and in an easily visible manner on components or on spare parts supplied to the manufacturer.

The inclusion of any such clause on a distribution agreement will prevent it from benefiting from the block exemption, which means that Article 101, No. 1 TFEU will apply, thereby increasing legal uncertainty and other associated risks (e.g., agreement might be considered null and void, fines, etc.). ■

[1]Cfr. a versão desenvolvida deste texto no *Briefing* publicado em Janeiro de 2010. [2]Estão também disponíveis reduções substanciais de coimas aos denunciantes que contactem a Autoridade e apresentem informações e elementos de prova relevantes após a abertura de inquérito.

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Control power and dominant influence in the Brazilian case law

The Brazilian System of Economic Defense (SBDC) is gradually consolidating the concepts of control power and dominant influence as a reference for the analysis of many acts of economic concentration.

The Brazilian Antitrust Law (Law # 8884/94) provides that concentration acts must be submitted to the review and approval of the SBDC whenever they are made by companies or groups of companies holding a 20% market share, or having gross revenues of more than R$ 400 millions in Brazil in the last year.

"IN ANTITRUST LAW, AN ECONOMIC GROUP IS ANALYZED UNDER THE PERSPECTIVE OF CORPORATE CONTROL TRANSFERENCE AND THE POSSIBILITY OF EXERCISING RELEVANT OR DOMINANT INFLUENCE."

The meaning of "economic group" is crucial to the correct application of the law and to verify whether a transaction must be submitted to the approval of CADE - the Administrative Council for Economic Defense (the administrative agency responsible for judging concentration acts and anticompetitive conducts in Brazil), since the concept of group of companies differs in Corporate Law and Antitrust Law.

In Corporate Law, a group of companies can be defined as a group of independent companies that have their own and distinct legal personalities, but that are subordinated to a common direction. They are legally independent, but economically dependent of the mother company's command[1].

In Antitrust Law, an economic group is analyzed under the perspective of corporate control transference and the possibility of exercising relevant or dominant influence. It is necessary to identify if a company actually has powers to influence the competitive relevant decisions of another company that could change the market dynamics.

Such influence can be expressed, for instance, when a shareholder has powers to elect members of the Board of Directors, through a Shareholders' Agreement or by any contract that grants to the shareholder powers to discuss strategic matters, or still by veto and vote rights in strategic areas.

Based on Doctrine references, CADE began to consider four areas as economically strategic: (1) research and development (R&D); (2) investments; (3) production; and (4) sales.

In the example given by CADE's President[2]: *"a shareholders' agreement that grants to a minority shareholder the right of not only to deliberate, but also to decide on these areas; or the right to elect or dismiss the majority of the directors in charge of these areas. These two hypotheses indicate a dominant influence from the antitrust perspective, a direct and determining influence, to actually choose those responsible for the four mentioned areas."*

The concepts of control power and dominant influence were used by CADE as a parameter

"CADE BEGAN TO CONSIDER FOUR AREAS AS ECONOMICALLY STRATEGIC: (I) R&D; (2) INVESTMENTS; (3) PRODUCTION; AND (4) SALES."

for the *Stare Decisis Doctrine* #2, which provides for the following: "The acquisition of a minority interest over the voting capital by a shareholder who already has a majority interest does not have to be filed, if all the following circumstances occur: (I) the seller did not have powers from law, by-laws or contract to: (I.a) appoint managers, (I.b) decide on commercial policies, or (I.c) veto on corporate matters; and, (II) the juridical acts do not contain clauses, such as: (II.a) non compete of more than five years or with territorial limits larger than the effective company's activity, and (II.B) that result in any type of control power among the parties after the transaction."

Before the *Stare Decisis Doctrine* #2, if a majority shareholder acquired the equity interest from a minority shareholder with or without a change of control the antitrust filing was not carried out, because it was assumed that the company's competitive behavior would not be changed in a relevant way. Currently, there is a significant increase in the number of antitrust filings made in Brazil, since many transactions are framed in the provisions of the aforementioned *Stare Decisis Doctrine* #2. ■

[1] Law Nº 6404/76, chapter XXI article 265. [2] Opinion issued by the CADE President Arthur Badin in the Concentration Act # 08012.010455/2008-71.

New regime for vertical commercial relations in force since 1.06.2010

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"The new framework tries to adapt the 10 year old legal rules to increasingly important new realities, such as online sales and increasing buyer power in some sectors of activity."

As of 1.06.2010 undertakings involved in so-called "vertical" commercial relations (maxime, distribution agreements) are under a new EU legal framework applicable both to existing agreements and to new ones - see Commission Regulation (EU) n.º 330/2010 (the "Regulation"), of 20.04.2010. The Regulation provides for a *safe harbour* - presumption of legality - for agreements that fall within its scope of application and was adopted together with accompanying Guidelines, which although binding only on the Commission, enjoy a relevant role for companies and all other economic agents in interpreting the Regulation and providing guidance for the assessment of agreements outside the *safe harbour*. The Regulation applies also to purely internal situations, as established by the Portuguese Competition Act.

The new framework tries to adapt the 10 year old legal rules to increasingly important new realities, such as online sales and increasing buyer power in some sectors of activity, while at the same time providing more extensive guidance on situations that may benefit from individual exemption to the prohibition of article 101 of the treaty on the functioning of the European Union ("Treaty").

Undertakings which take part in preexistent agreements enjoy a one-year transitional period to amend them accordingly with the new set of rules. It is thus advisable to undertake a review of those agreements notably in order to assess (i) whether the agreement continues to benefit from the safe harbour under the new rules, and if not, to undertake an individual assessment of the agreement in light of article 101, 1 and 101, 3 of the Treaty; (ii) whether a modification of existing agreements and practices concerning online sales is necessary in the light of the new Guidelines.

On the other hand, the new framework should also be considered whenever new "vertical" agreements are being negotiated as well as upon renegotiation of existing agreements.

For more detailed information on the most relevant changes brought about by the Regulation and its Guidelines please see MLGTS Briefing entitled "*New regime for vertical commercial relations enters into force today*". ■

"The new framework should also be considered whenever new "vertical" agreements are being negotiated as well as upon renegotiation of existing agreements."

[1]Official Journal L 102, 23.4.2010, p.1-7.

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ISSN 1647-2721