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# EU AND COMPETITION LAW

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## ARTICLES



## SPECIAL CONTRIBUTION: MATTOS FILHO

# A good reason for companies investing in coffee machines for workers? Employee of *Suez Environment* by negligently breaking an European Commission seal costs the Suez Group 8 million euros

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The European Commission, by Decision of May 24, 2011[1], applied a fine of 8 million euros to *Suez Envireonment* and its wholly owned subsidiary *Lyonnaise des Eaux France* due to the breach of a seal affixed in a door during within an antitrust inspection at the headquarters of Lyonnaise des Eaux France carried out by the Directorate General for Competition of the European Commission and by the French competition authority in April 2010.

EU Regulation no. 1/2003 on the application of Articles 101 and 102 of the Treaty on the Functioning of the European Union, provides that the European Commission can impose fines on companies of up to 1% of their turnover for breaking, either deliberately or negligently, seals affixed by the Commission during an inspection. Within an investigation into alleged antitrust conducts in the European market of water and waste water purification markets, in April 2010, the European Commission conducted a surprise inspection at the headquarter premises of *Lyonnaise des Eaux France*.

The European Commission agents, being unable to complete the inspection in a single day, sealed the doors of several office rooms, including the door of room B.508 at the end of the day on April 13, 2010.

The Commission's seals are plastic stickers, 20 centimeters long by 7 centimeters wide, which, if removed, do not tear but the word "*OPENVOID*" irreversibly appears in red on its plastic surface. In addition to affixing the seals, the Commission now also takes photographs of the places where the seals are affixed so that no doubts afterwards arise about a seal condition. From our perspective, this new procedure of taking photographs of the seals following their placement has been adopted by the Commission services, pursuant to the relevant issues that were raised by the *E.ON* company in a prior procedure which culminated in the application of a 38 million euro fine to *E.ON* due to the breach of a seal affixed by the Commission – being, notwithstanding, the fine afterwards confirmed by ruling of the General Court of the European Union[2], with an appeal now pending to the European Court of Justice, registered as case C-89/11 P.

> "The Commission can impose fines on companies of up to 1% of their turnover for breaking seals affixed during an inspection."

In the *Lyonnaise des Eaux France* case, the Commission agents on April 14, 2010, when they returned in the following day to the premises of the company to continue the antitrust inspection, noticed that the term "*OPENVOID*" was visible in the seal affixed by the Commission in the door of office room B.508. Within the subsequent investigation on the seal breach, conducted by the Commission and also by the company, it was considered proved that the door of the room in which the seal appeared as "*OPENVOID*": (i) had not been closed with a key; (ii) the company staff the day before had diligently placed a warning paper (with 21x27 centimeters) in the door stating "***ATTENTION: do not open or touch this door under any grounds***"; and (iii) a company worker looking for a colleague in the company facilities negligently tried to open the door of office room B.508 at 10 a.m. on April 14 – even though he did not enter the room has he felt some resistance when trying to open the door (due to the seal) and simultaneously he saw the Commission seal.

Thus, eventually if the worker had taken that morning a strong *cappuccino* coffee he would had been able to see the Commission seal and also the warning sign diligently placed by the company on that door…

Pursuant to the above factual framework and to the circumstance that the two companies did not contest the facts and accepted the findings of the Commission, both were sanctioned, as a result of negligence, with a joint and severally fine of 8 million euros. Even if we take into account the general need of preventing companies from breaking seals affixed by the European Commission within antitrust dawn-raids, the amount of the applied fine seems excessive as the two companies voluntarily and without delay passed on to the Commission a great deal of information shedding light on the facts which facilitated the Commission's investigation and in this context it was also found that the *Lyonnaise des Eaux France* worker did not even enter the office room where the breached seal had been affixed. ■

[1] Available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/39796/39796_554_6.pdf .
[2] *See "E.ON case. Be careful with the clenaning lady? Tampering with a Euroean Commission seal can cost a company 38 million euros.,* in 10th EU and Competition Newsletter of Morais Leitão, Galvão Teles, Soares da Silva & Associados, March 2011.

# The Financial Assistance Program Memorandum: Far-Reaching Reforms for Competition and Regulatory Law

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## Introduction

Enhancing the competitiveness of the Portuguese economy through structural reform is one the main issues addressed in the Memorandum of Understanding signed on May 17 2011, by the Portuguese Government, the European Commission, the European Central Bank and the International Monetary Fund. This Memorandum, which established the basis for the economic and financial adjustment programme that will allow Portugal to benefit from a financial assistance package worth up to €78 billion, was recently revised on 1 September 2011, following the first quarterly review by the international authorities.

Several of the proposed reforms are related to or inspired by competition law. They include:

- the revision of the **Competition Act**;
- greater independence and resources for the **Competition Authority and sector-specific regulators**;
- the creation of a **specialised competition appeals court and a specialised IP** court as part of an ambitious reform of the judicial system; and
- **a vast range of measures to enhance competition in regulated sectors**, such as energy, communications, postal services, healthcare, transport and the regulated professions.

## Revision of Competition Act

The Government proposes to implement measures to "improve the speed and effectiveness of competition enforcement". It has undertaken to present Parliament, by December 2011, with a bill to amend the Competition Act (Law 18/2003).

### *Procedural rules*

The principal aim of the reform is to make competition law as independent as possible from administrative and criminal procedural law, thereby ensuring effective enforcement of competition rules. The subsidiary application of criminal law procedures to competition law infringement actions has raised concerns in recent years and has resulted in the courts quashing a number of Authority decisions on procedural grounds.

The Government will also seek to "ensure greater clarity and legal certainty in the application of procedural administrative law to merger control", although the subsidiary application of administrative procedures to merger control cases has raised relatively little controversy.

### *Opening competition investigations*

The Government proposes to "rationalise the conditions that determine the opening of investigations, allowing the Competition Authority to assess the relevance of the claims". At present, the Authority is legally bound to initiate an investigation when it receives a complaint in respect of an alleged infringement.

### *Merger control*

The Memorandum states that "necessary procedures are to be established" to bring Portugal's law on merger control more closely into line with the EU Merger Regulation (139/2004), in particular, regarding the thresholds for a concentration to become subject to compulsory filing. Portugal's competition regime incorporates both turnover and market share jurisdictional thresholds. Although in recent times there have been calls for the market share threshold to be repealed or revised, it plays a part in the merger control rules of a number of jurisdictions, such as Spain or the United Kingdom.

Another likely change in the field of merger control concerns the substantive test for the assessment of mergers. The so-called "dominance test", whereby a concentration is prohibited if it creates or reinforces a dominant position in a relevant market that impedes effective competition, is likely to be replaced by the "significant impediment of effective competition" test, in use in EU law since 2004.

## Competition Authority and Sector Regulators

The Government is committed to ensuring that national regulators have the necessary independence and resources to exercise their responsibilities. An independent report will be commissioned from internationally recognised specialists, to be delivered by March 2012. The report will benchmark appointment practices, responsibilities, independence and resources of the main authorities against best international practice. On the basis of this report, the Government will present a proposal to Parliament by June 2012 to implement the best practices identified and reinforce the independence of regulators.

A key issue in this respect will be the nomination of the heads of regulatory agencies, who, at present, are appointed by the government with no external oversight (as is the case of the Competition Authority). There have been a number of recent proposals to increase the independence of the regulatory agencies, including the transfer of powers of appointment to the President, subject to the confirmation of Parliament.

## New competition appeals court

The Memorandum sets out a comprehensive and ambitious set of reforms to improve the operation of the courts. As part of the reforms, Law 46/2011 has recently created a specialised "competition, regulation and supervision" appeals court and a specialised Intellectual Property court, which the Government commits to be fully operational by March 2012.

Although the creation of a specialist appeals court is welcome, the implementation of the proposal remains uncertain. When it becomes operational, this court will have jurisdiction to hear appeals against decisions by all of Portugal's independent regulatory agencies, including sector regulators for the banking, insurance, capital markets, media and communications sectors - as such, it will hardly be a dedicated competition forum. One way of ensuring that the Memorandum commitment is met would be to establish a specialised chamber within the new court that deals exclusively with competition law cases.

## Increased competition in regulated sectors

The Government has pledged to "address excessive profits and reduce the scope for [unsustainable] profit-seeking behaviour" in a number of regulated sectors.

### Energy

The Government will seek to increase competition in the energy markets and to further the integration of the Iberian energy markets. It will also anticipate the full liberalisation of the energy sector by phasing out regulated tariffs by January 1, 2013. The main principles for this have already been approved by Resolution of Council of Ministers 34/2011, and implementing legislation is to be approved until the end of the year.

The implementation of the Third EU Energy package (directives 2009/72/EC and 2009/73/EC) is to be completed until March 2012, following the recent amendment to the framework laws for electricity and gas by Decree-laws 77 and 78/2011. In addition, until the end of 2011 the Government will review the efficiency of support schemes for cogeneration and renewables (including options for reducing the implicit production subsidy), and reassess the legacy support measures associated with the production of electricity.

### Communications

The Memorandum expresses the aim of increasing competition in the communications markets by lowering entry barriers and facilitating the entry of new players. Besides the recent implementation of the EU "Better Regulation" Directive (2009/136/CE) by Law 51/2011, of 13 September, this will be achieved by:

- launching an auction of spectrum for the assignment of further radio frequencies for broadband wireless services, in full compliance with the principles of EU law, until the end of December 2011;.
- lowering mobile termination rates (September 2011);
- reducing restrictions on the mobility of consumers, along the lines proposed by the Competition Authority (September 2011), reviewing barriers to entry and adopting corrective measures (March 2012); and
- renegotiating the concession contract for the provision of universal services, and launching a new tender for the designation of universal service providers (December 2011).

### Healthcare

The Government proposes to increase competition among private healthcare providers. It is committed to assessing compliance with EU competition rules in the provision of services in the private healthcare sector by March 2012.

### Postal services

The Government will further liberalise the sector by implementing the EU Third Postal Directive (2008/06/EC), and will ensure that the sector regulator retains adequate powers and independence in view of its increased role in monitoring prices and costs by September 2011.

### Rail transport

The rail regulator's independence and competences are to be strengthened, and the state-owned railway operator will be made fully independent of the state. The government also proposes to revise the existing public service obligations to allow for the gradual introduction of competitive tendering (September 2011).

### Regulated professions

The government has promised to:

- review and reduce the number of regulated professions, in order to fully implement the Services Directive (2006/123/EC).
- eliminate restrictions on the use of advertising in such professions;
- improve the legal framework for recognition of professional qualifications; and
- relax the requirements for cross-border service providers in Portugal.

Amendments to the existing legislation will be presented to Parliament by December 2011, and are expected to be approved by March 2012.

### State's special rights over privatised companies

The Government has already fulfilled the commitment to eliminate all provisions that give the State special rights over the decision-making processes of public companies, further to the revocation by Decree-law 90/2011, of 25 July of legislative provisions on special rights of the State over EDP, GALP and Portugal Telecom (the former incumbents for electricity, fuel and gas, and telecommunications), and the amendment to the companies' articles of association approved in shareholders' meetings held in July and August.

In addition, public bodies will not conclude, as shareholders, agreement which influence the management or control of companies or hinder the free movement of capital. (The participation of the State, through CGD, in the shareholder agreement in GALP, will cease with the full privatization of GALP by December 2011). The Government also commits, in the forthcoming privatisations, not to set or allow holding or acquisition caps beyond each privatisation transaction. ■

### Comment

**This bold and far-reaching programme sets a strict implementation schedule, and the international authorities will monitor its progress by means of quarterly implementation reports. The first report, issued on 12 August 2011, was overall positive.**

**The Government is expected to release a draft proposal to revise the Competition Act in the coming weeks. The proposal is likely to incorporate the commitments in the Memorandum and should be based in a proposal sent by the Competition Authority not yet made public.**

**In this context, the Círculo de Advogados Portugueses de Direito da Concorrência, an association of the competition practitioners in Portugal chaired by MLGTS partner Carlos Botelho Moniz, recently presented to Parliament and to the Government a reflection paper on the revision of the Competition Act.**

**Suggested amendments focus in particular on:**

- **procedural rules, especially on judicial secrecy and access to the authority's files, reasoning in statements of objections, time limits for exercising rights of defence, complainants' rights and rights of appeal;**
- **the clarification of substantive rules on unilateral conduct;**
- **powers to impose fines for infringements of Articles 101 and 102 of the Treaty on the Functioning of the European Union and to accept commitments to end antitrust investigations;**
- **detailed criteria for the calculation of fines;**
- **the introduction of a settlement procedure for cartels; and**
- **measures to incentivize competition law enforcement by private parties directly before the courts.**

**Given the scope of the expected changes, it is hoped that the proposal will be subject to public consultation before it is presented to Parliament. The Minister for the Economy has publicly committed to do so.**

Note: an earlier version of this article was published in the International Law Office Competition Newsletter of 9 June 2011.

# Attribution of liability in "parent-subsidiary" relationships: the Dutch beer market cartel

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On the past 15 of September the General Court of the European Union ("the Court") issued a judgment of relevance regarding the issue of attribution of liability for anti-competitive behaviour, within economic groups[1].

At the origin of the case was the European Commission's 2007 decision regarding the participation of the brewer groups Inbev, Heineken, Grolsch and Bavaria in a cartel in the Dutch beer market[2].

In its decision the Commission concluded that, for a period of approximately 3 years, the above-referred groups had coordinated beer prices, beer price increases and customer allocation for both the "on-trade" and "off-trade" segments and had occasionally coordinated other commercial conditions offered to individual "on-trade" customers in the Netherlands. The cartel operation was based on rounds of multilateral meetings between the four groups, complemented by bilateral meetings.

Grolsch NV – the only Grolsch group company at stake in the decision – appealed on the grounds that its direct participation in the infringement had not been proven. Indeed, all of the "Grolsch managers" identified by the Commission has having participated in cartel meetings (with one sole exception, relating to one meeting) were employees of its subsidiary Grolsche Bierbrouwerij Nederland BV. ("Grolsche Bierbrouwerij"). Grolsch NV' therefore argued that the Commission could have not established its direct participation in the infringement; but rather, it could have only attributed to Grolsch NV the liability for an infringement by its subsidiary Grolsche Bierbrouwerij.

The Commission recognised that it had not distinguished between the two companies at stake (parent-company and subsidiary) nor referred that the attendants to cartel meetings were employees of Grolsche Bierbrouwerij, a company under the control of Grolsch NV. Still, according to the Commission, such differentiation would have not been necessary as the two companies were one economic entity and it was that economic entity that participated in the infringement.

In assessing the issue of Groslch NV's direct participation in the infringement, the Court considered that there were few elements in the files pointing to an individual direct participation by that company and that the existing elements were not, in themselves, sufficient to conclude that Grolsch NV had participated in the continuous cooperation (in light of the scope and the nature of such infringement).

The Court further assessed whether or not there had been a sufficient statement of reasons on the attribution on the infringement to Grolsch NV. It began by referring that where, as in the present case, a decision concerns a number of addressees and raises a problem of attribution of liability for the infringement identified, it must include an adequate statement of reasons with respect to each of the addressees, in particular those who, according to the decision, must bear the liability.

According to settled case-law, the conduct of a subsidiary may be imputed to the parent--company where, although having a separate legal personality, that subsidiary does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent-company having regard in particular to the economic, organisational and legal links between the two entities.

In the specific case of a 100%-owned subsidiary there is a rebuttable presumption that the parent-company exercises a decisive influence over the conduct of its subsidiary and therefore, in those circumstances, it is sufficient for the Commission to prove that the subsidiary is wholly-owned by the parent company, in order to presume that the parent exercises a decisive influence over the commercial policy of the subsidiary (and thus, to regard the parent company as jointly and severally liable for the payment of the fine imposed on its subsidiary).

This will not be the case, however, if the parent company adduces sufficient evidence to show that its subsidiary acts independently on the market.

The Court considered that the Commission had simply equated Grolsch NV to the Grolsch group and the subsidiary's employees (who attended cartel meetings) to employees of the parent-company, without stating the reason why the subsidiary's participation on the cartel should be attributed to its parent-company. This omission – which deprived Grolsch of the possibility to question the attribution if liability before the Court – constituted a breach of the obligation to state reasons.

The Court decided, as a result, to annul the Commission's decision insofar as it concerned Grolsch NV.

Even tough the Court's reasoning was kept within the boundaries of its settled case-law on the attribution of liability within economic groups (a case-law not without controversy) it did give a relevant contribution in clarifying the requirements and limits to the Commissions' conduct with this regard.

Two main ideas flow from the judgment: on the one hand, the assessment of individual attribution is to be undertaken on the basis of a thorough analysis of the proof presented as well as of its sufficiency in light of the characteristics of the infringement at stake. It is interesting to note that even though the files did show evidence of the direct participation of one Grolsch NV's representative in at least one cartel meeting, that was considered merely as an isolated indication and insufficient to attribute liability to the parent company taking into account, in the case at stake, the coordination in place was "complex" and required regular contacts throughout a long period of time.

On the other hand, even in cases where the proof by the Commission of attribution of liability to the parent company is made easier by a presumption of decisive influence (as in the case at hand) the Commission cannot neglect the thoroughness of its analysis and must, in any event, allege and prove the existence of the links (such as the 100% capital ownership) that allow it to attribute the subsidiary's conduct to the respective parent. ■

[1] Case T-234/07.
[2] The fines imposed by the Commission on the companies of groups Heineken and Bavaria were reduced by the Court on appeal. The Inbev group was granted immunity under the leniency programme.

# The solitary act of appealing in competition law

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The EU limitation periods regime applicable to competition law infringements is highly protective of the Commission's investigative powers. Essentially, according to Article 25 of Regulation (EC) No 1/2003, the most serious competitive infractions are subject to a period of limitation of five years, which shall however be interrupted whenever the Commission or the national competition authorities undertake any action for the purpose of the investigation or proceedings. This means that it suffices that the Commission or the national authorities open an inquiry or ask information from the companies for the limitation period to start running afresh from each interruption.

Apart from interruptions, limitation periods are also subject to suspensions, which apply for as long as a decision by the Commission is pending appeal before the European Court of Justice. Once the judgment is rendered, the limitation period continues from the point it was suspended.

Without prejudice to these rules, the limitation period shall expire on the day on which a period equal to twice the limitation period (i.e., ten years), plus the eventual suspensions, has elapsed without the Commission having imposed a fine or other penalty payment.

In late March 2011, the Court of Justice, in the *ArcelorMittal* judgment[1], clarified some important aspects regarding the running of the limitation period in appeals relating to anticompetitive behaviors involving several companies. In the court's view, when one or more addressees of a Commission's decision in an antitrust case, be it an intermediary investigative decision or a final decision, chose to bring an action against that decision in the Court of Justice, the matter to be tried concerns only the elements of the appeal. Elements of the decision concerning other addressees that did not challenge the decision are not within the scope of the appeal.

"The EU limitation periods regime applicable to competition law infringements is highly protective of the Commission's investigative powers."

The court also held that an appeal by an undertaking involved in an antitrust investigation only has the suspensive effect provided in Article 25 of Regulation 1/2003 with respect to the appellants but not to the remaining undertakings. The court considered that, according to the wording and the objectives of that provision, the appeals holding suspensive effect cover both intermediary Commission decisions against which actions lie and appeals referring to final decisions.

Thus, since Article 25 does not draw any distinction as regards decisions to which suspensive effect is attached, the *ArcelorMittal* court declared that it is not possible to award *erga omnes* suspensive effect to judicial actions brought against Commission decisions. On the contrary, the suspension of the limitation period resulting from the appeal takes effect only *inter partes* and does not benefit the companies that did not challenge the Commission decision concerned.

At the outset this case law may seem harmless but it has major practical implications for competition cases involving several undertakings. A proof of that is given by an interesting decision adopted by the European Commission on 4 July 2011, in a case that bears no relation with *ArcelorMittal*.

On 11 November 2009, the Commission has imposed a total fine of approximately 174 million Euros on 24 companies active in the production of plastic additives for allegedly engaging, between 1987 and 2000, in a cartel covering the whole European Economic Area through which the companies have fixed prices, allocated markets, shared customers and exchanged sensitive commercial information[2].

"The suspension of the limitation period resulting from the appeal takes effect only *inter partes* and does not benefit the companies that did not challenge the Commission decision concerned."

However, two of the alleged participants in the cartel, Ciba/BASF and Elementis, only did so until 1998. Consequently, the Commission's decision of 2009 was adopted for these two companies after the expiration of the ten-year period foreseen in Article 25 of Regulation 1/2003. The issue was that, during the investigation, some companies other than Ciba/BASF and Elementis had challenged in the Court of Justice the Commission's investigative measures.

Bearing this into account, the Commission took the view that the suspension of the limitation period resulting from the appeals applied to all companies involved in the cartel, even to those that had not brought court action. After the *ArcellorMittal* judgment, that had nothing to do with the plastic cartel, the Commission was faced with the opposite view.

Therefore, and on its own initiative, on 4 July 2011 the Commission repealed the plastic cartel decision in so far as it condemned Ciba/BASF and Elementis, and accordingly annulled their respective fines of approximately 68 and 33 million Euros[3]. The Commission was forced to conclude, in the light of the *ArcelorMittal* case law, that the infringement allegedly committed by those two companies had expired at the moment they were sanctioned, because the limitation period had not been suspended during the course of the appeals lodged by the other defendants. ■

[1] Joined cases C-201/09 P and C-216/09 P, 29.3.2011.
[2] The press release referring to this decision is available at http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/1695&format=HTML&aged=1&language=EN&guiLanguage=en.
[3] The press release referring to this decision is available at http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/820&format=HTML&aged=0&language=EN&guiLanguage=en.

# PCA fines companies for breaching competition rules

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## PCA fines 2 industrial cleaning companies for collusion in 16 public procurement bids

On June 2, 2011, the Portuguese Competition Authority ("PCA") fined two industrial cleaning companies (Conforlimpa and Number One) for colluding in 16 public tenders, between February 2006 and November 2007.

Pursuant to two complaints from the tender (REFER) and another bidder (Iberlim), the PCA opened an antitrust procedure to investigate whether both cleaning companies have presented similar proposals in the bids. According to the complaints, the alleged collusion between the cleaning companies allowed them to be classified sequentially, and whenever the tender imposed the rule of not contracting all services to the same company, such classification overcame the rule and ensured them the award of all services.

During the investigation, the PCA concluded that both companies had presented identical bids to 16 public tenders, both in terms as in prices, as result of collusion and exchange of sensitive information between them.

By altering the competitive conditions of the market in breach of competition rules, both cleaning companies enhanced their chances of winning the public tenders thus benefiting from a more advantageous, though illicit, position towards their competitiors.

In this context, the PCA has found both cleaning companies guilty of breaching Article 4 of Law 18/2003, June 11 ("Competition Act") and imposed fines between €253,703.18 and €62,620.90.

## PCA condemns 7 driving schools from Funchal for price-fixing

Pursuant to an anonymous complaint presented in the beginning of 2008, the PCA opened an antitrust investigation to ascertain whether the generalized increase of prices by seven Funchal driving schools for light vehicle's driving lessons resulted from any concerted practice.

In accordance to the press release of 17 June 2011, during the investigation the PCA concluded that there were no reasons, from an economic point of view, that explained the coincident price increase for driving lessons, between December 2007 and March 2008. Moreover, the PCA concluded that contacts between those seven schools were held to coordinate the increase of prices.

The PCA argues that price increases in January and May 2008 to amounts that were more than double of those prevailing in December 2007 were preceded by meetings held between driving schools, and no economic arguments were presented during the investigation that explained such outstanding increase.

By reducing the uncertainty of their competitor's behavior in terms of price as a result of unlawful exchange of information, the schools altered the competitive conditions of the market and unlawfully gained higher profits to the detriment of consumers.

Therefore, the PCA held the seven driving schools from Funchal guilty of breaching Article 4 of the Competition Act and imposed fines between €684.07 and €2,731.36. ■

## Comment

**The PCA mission is to ensure compliance with competition rules by every economic sector with no distinction between companies whether based on their economic weight or the damage caused by the alleged restrictive practice. This means that competition rules are applicable to all economic sectors, including regulated ones, and to all companies.**

**With these two convictions, the PCA confirms its interest for all complaints submitted to it, regardless of the size of the companies allegedly involved and the extent of the damage resulting from the alleged unlawful conduct. Otherwise would not be expected as the PCA is legally bound to open an inquiry whenever it acknowledges, by any means, a possible anti-competitive practice.**

**This means that (in our opinion), the PCA is legally bound to investigate all claims presented before it, regardless of the type or size of the undertakings involved or the damage caused, with the exception of the complaints that dot not include a minimum of reliable or plausible information regarding the alleged anti--competitive practice.**

**Contrary to other jurisdictions, the PCA cannot "*select*" sectors of the economy that it considers more problematic from a Competition point of view and concentrate its investigation efforts and means towards them.**

**Although the eventual effect of dispersion of (limited) means and resources available to the PCA to accomplish its mission, we believe that such extensive obligation to investigate all claims has a "*big brother*" effect over all economic agents which deterrents less compliant conducts. In reality, there are no "*comfort periods*" during which some economic activities would be "*saved*" from a greater scrutiny by the PCA, as a result of being focused in other activities/sectors.**

**Nevertheless, a more proactive approach to address competition problems with the business community is highly desirable, especially with small and medium size companies – perhaps less familiarized with Competition Law – as such actions would bring innumerous advantages to all economic agents, in particular to consumers.**

**For that purpose, a more transparent action and access to the PCA activity and decisional practice in antitrust (safeguarding, off course, defendants' rights and ongoing investigations) is required. This would also help economic agents to have a more accurate idea on how to comply with competition rules and which is the PCA understanding on some antitrust matters. In order to make competition compliance a matter of importance to all economic agents, the PCA has to make itself present in the daily life of companies and consumers.**

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SPECIAL CONTRIBUTION MATTOS FILHO

# Filing requirements for transactions involving investment funds

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"There has been controversy on what revenues shall be attributed to the investment fund to which extent an investment fund should be viewed as part of a specific "economic group"."

During the past few years, the number of transactions involving investment funds has registered a significant increase in Brazil. Many of those transactions have been reviewed by the Brazilian antitrust authorities under the Brazilian merger control rules. One of the main discussions concerning such transactions refers to the question of whether a merger filing is required under Brazilian Competition Law (Law No. 8.884/94 – "BCL").

Article 54, paragraph 3, of the BCL sets forth that corporate transactions in general, such as mergers, acquisitions and joint ventures, shall be subject to mandatory filing with the Brazilian antitrust authorities whenever the transaction may cause any participating company or group of companies to achieve twenty percent (20%) market share in a relevant market, or any of the groups involved posted annual gross revenues in Brazil of at least R$400,000,000.00 (four hundred million Reais) in the previous year.

There has been some controversy on what revenues shall be attributed to the investment fund involved in a transaction for the purpose of assessing whether a merger filing is required. There has also been some debate about to which extent an investment fund should be viewed as part of a specific "economic group" for this purpose.

In previous years, the Administrative Council for Economic Defense ("CADE") had taken the position that the base criteria for determining whether a certain transaction would trigger the merger filing obligation was the combined turnover generated by the investors of the relevant fund in Brazil: the transaction would be subject to mandatory filing whenever the investors of the relevant fund had combined revenues in excess of R$400,000,000.00.[1]

The discussion gained additional attention at CADE once again in 2010.[2] One of the current Commissioners proposed a two-prong test that can be summarized as follows.

[1] See, among others, Merger Case No. 08012.014090/2007-73 (WRC Operadores Portuários S/A, TESC, Carlos Alberto de Oliveira Junior, Porto Novo Participações S/A and Logística Brasil – Fundo de Investimento em participações); Merger Case No. 08012.013885/2007-64 (Santal Equipamentos S/A Comércio and Indústria e Empreendedor Brasil – Fundo Mútuo de investimento em Empresas Emergentes); and Merger Case No. 08012.000328/2008-64 (Companhia Brasileira de Locações e Logística Brasileira – Fundo de Investimento em Participações).

[2] Merger Case No. 08012.004911/2010-69 (FIPAC – Fundo de Participações and Consolidação FMIEE e TSL – Tecnologia em Sistemas de Legislação S.A.) and Merger Case No. 08012.006989/2010-18 (Empresa de Eletricidade Vale Paranapanema S.A. and Fundo de Investimento do Fundo de Garantia do Tempo de Serviço – FI – FGTS).

The first prong consists in determining whether the transaction amounts to a concentration under the BCL. The concept of concentration is largely based on the idea of "relevant influence", meaning the ability to influence the strategic/commercial decisions of another company by means of shareholding or any type of a contractual relationship. This question is not trivial. It has to be assessed on a case-by-cases basis and CADE has not yet settled its position on which specific rights confer the acquirer relevant influence over a target company.

If the parties conclude that the investment fund will gain relevant influence over the target company, the analysis moves forward to the second step of the test. The second prong consists in determining whether the transaction meets either the market share or the revenues thresholds explained above.

In recent cases, the position supported by Commissioner Olavo Chinaglia is that one should identify the investors having relevant influence over the strategic decisions of the fund; the revenues generated by each of such investors and their respective economic group shall then be considered separately. If any of the investors (and its respective economic group) registered gross revenues in Brazil in excess of R$400,000,000.00, the transaction shall be subject to mandatory filing. The parties are also required to take into account the revenues generated by the companies over which the fund has relevant influence, even if they are not directly involved in the relevant transaction. If the combined revenues of such companies exceed the R$400,000,000.00 threshold, the transaction will also be subject to mandatory filing.

As we can see, the assessment of whether a specific transaction involving investment funds is subject to mandatory filing in Brazil still raises important questions. The parties have to carefully consider, on a case-by-case basis, the specific features of the relevant transaction, in particular the relationship among all the undertaking involved – i.e. investors, the fund and portfolio companies, so as to avoid future questions and/or sanctions on the part of the Brazilian antitrust authorities. ■

"The assessment of whether a specific transaction involving investment funds is subject to mandatory filing in Brazil still raises important questions."

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