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ARTICLES

Foreword 02

Preliminary remarks 03

Promotion and defence of competition 04

Antitrust Procedures 05

Merger Control 06

Infringements, sanctions and leniency 08

Judicial Appeals 09

SPECIAL CONTRIBUTION: MATTOS FILHO

The new Brazilian Antitrust Law 10

Foreword

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THERE ARE DOUBTS FOR THE TIME BEING AS TO HOW THE AUTHORITY WILL, IN PRACTICE, USE THIS (EVEN MORE) POWERFUL INSTRUMENT IT HAS BEEN AWARDED WITH

Next July 8, following a long and intense debate, the new Portuguese competition act, approved by Law No 19/2012, 8 May, will enter into force. The new law is of the utmost importance for economic agents and brings about relevant legal changes vis-à-vis the previous regime.

Some of the modifications brought by the new act aim at providing this area of the law with increased autonomy in relation to the typical branches of law in which it is inspired, v.g. criminal and misdemeanours and administrative law. Other innovations are the result of an effort to align the national competition system with the evolutions occurred in EU law since 2003, when Law No 18/2003, de 11 June, which is now being repealed, was approved.

The amendments concerned impact throughout the whole legal text, probably with greater emphasis in the areas of processing of complaints, investigative powers in antitrust cases and appeal mechanisms in antitrust cases as well. But there are other important innovations in the field of merger control and penalties.

It is around these topics that will focus the 14th edition of our EU and competition law newsletter. We will subsequently present a set of articles that seek to evaluate and anticipate the implications of the new act in the areas mentioned in the preceding paragraph, opening with a preliminary remark on the scope of the implemented reform.

We think many of the solutions provided in the recent competition act are steps in the right direction, but we also express reserves in relation to others. In any event, there are doubts for the time being as to how the Authority will, in practice, use this (even more) powerful instrument it has been awarded with. ■

Preliminary remarks

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The Portuguese competition law regime went through a drastic reform after being applied for almost a decade. In need to comply with international commitments assumed by Portugal, namely in the so-called Stability and Growth Plan (IV) and reaffirmed in the Memorandum of Understanding signed with the EU Commission, the IMF and the ECB, the legislator has taken the opportunity to enlarge the scope of it's intervention and to revisit many of the applicable rules.

The convenience and the need to modernize a handfull of sporadic, albeit relevant, aspects of the national legal regime were evident, furthermore so in order to eliminate disparities when compared with EU law's ever continuing evolution. On the other hand, nearly 10 years of implementation of the 2003 regime revealed some original defects, gaps, uncertainties and legal solutions in need of being rethought, as was underlined by the Portuguese Competition Lawyers' Circle.

But most importantly, recent years have witnessed an increasing number of public complaints manifested by the national regulatory authority regarding the alleged insufficiency and inadequacy of the legal regime to efficiently ensure and promote competitive markets.

> The deserved applause for some substantial improvements is overshadowed by the fear of slim guarantees and weaker judicial control, in the name of efficiency and effectiveness of the regulatory authority.

Even thought the New Competition's Law draft was subject to public discussion and stakeholders abundantly expressed their views, the end result reveals an overwhelming influence of the Portuguese Competition Authority in the modifications that were brought about to the new legal regime.

Thus we worryingly notice that the increase in efficiency in promoting and supporting competition was achieved mainly by reinforcing and enlarging the powers of the Portuguese Competition Authority (the Authority")and by alarmingly reducing the defence prerogatives and rights of undertakings and individuals, especially when engaging with courts.

As it is widely known, the Authority does not enjoy a very successful relationship with Portuguese courts. The Authority's decisions, in their vast majority, (especially those that assumed greater importance in the context of competition's defence due to the relevant value of the fines imposed) have been consistently criticized, reversed, reduced and annulled by national courts, for the most varied reasons, but in particular, due to the Authority's failure to comply with obligations needed to ensure a due process and its' disrespect for the rights of defence of the accused.

To overcome this regulatory entanglement the new legal regime significantly reinforces the powers of investigation and discovery in sanctionatory procedures and introduces obstacles to the judicial control of the Authority's decisions.
The fact that the new regime allows the Authority to follow certain conducts that have been previously declared by courts as illicit due to their inherent disrespect for fundamental rights well illustrates this trend.

However the most significant and distressing aspect is how the new law tries to discourage the use of the right to appeal to courts by sanctioned individuals and undertakings. To this effect, the new law not only increases the statute of limitations (the maximum is now 10 years and a half) and allows the courts to increase the fines or to apply more burdensome sanctions than those foreseen by Authority, but also eliminates the suspensive effect of the judicial appeal, forcing the undertakings to pay the fines before challenging them in court.

One can easily foresee the considerable harm that the defendants will inevitable suffer if they are first sanctioned by the Authority and then absolved by the court: since it is a well-known fact that the Portuguese Administration, when following courts' orders, is everything but diligent in returning unduly charged amounts to undertakings and individuals. The allocation of such fines to a multitude of public institutions and the need to recover them after represents a true administrative and judicial nightmare. Such recovery procedures will bring about opposition, lack of standing briefs, objections amidst other well-known exceptions used to postpone the return of such amounts which in the meanwhile have most likely been absorbed by the voracious public budgets.

The possibility given to the judge to set bail (or any financial security) is unlikely to solve the situation given the difficulty (if not outright impossibility) felt nowadays by undertakings to convince financial institutions to provide security (since these represent granting credit, and as such are subject to credit ceilings, fees, taxes and the need to provide counter guarantees).

In this context, the deserved applause for some substantial improvements introduced in the new legal regime (namely, concerning concentrations and leniency) is overshadowed by the fear that we are about to enter a new era of slim guarantees and weak judicial control, in the name of efficiency and effectiveness of the regulatory authority. ■

Promotion and defence of competition

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"Under the new Act, the AdC can now prioritise between different matters falling under the scope of its powers"

The recent Portuguese Competition Act (Law no. 19/2012, of 8 May) has substantially altered the previous competition law regime. In addition to the in-depth review of the chapters on the substantive and procedural regulation of anticompetitive practices and merger control – including the rules governing appeals from decisions by the Portuguese Competition Authority ("PCA") – the new Competition Act contains several new aspects starting from its initial chapter.

Chapter I of the Act, entitled "Promotion and defence of competition", is longer than the corresponding section in the previous Act due to the addition of four new provisions.

Article 5 summarises several aspects related to the powers, financing and presenting of accounts by the PCA which, as a whole, are already provided for in its statute (approved by Decree-Law no. 10/2003, of 18 January). The most significant innovation relates to the duties, set out in paragraphs 5 to 8 of this provision, for the PCA to prepare an annual report on its activities, a balance sheet and annual accounts, which it submits to the Government that, subsequently, refers them to Parliament. Following their approval, these documents are published in the Portuguese official gazette and on the PCA's website.

Article 6, in turn, reinforces the monitoring of the PCA's activity by Parliament, in two ways. Firstly, it provides for at least one debate in the Parliament's plenary session in each legislative term (article 6, 1). Secondly, it determines that the members of the PCA's Council must present themselves to the relevant parliamentary committee for a hearing on the annual activities report and, in addition, provide any *ad hoc* clarification on competition policy issues.

Perhaps the greatest innovation is the introduction of an opportunity criterion regarding the opening of investigations by the PCA, as set out in Article 7. Thus far, the PCA was bound by a strict legality principle according to which it was under a duty to open an investigation whenever it acquired knowledge, by any means (including third party complaints), of eventual unlawful practices. Under the new Act, the AdC can now prioritise between different matters falling under the scope of its powers. In addition, it is no longer bound to initiate an infringement procedure to investigate all allegations of anticompetitive behaviour, as it may now weigh up that option in the light of several criteria (such as the seriousness of the eventual infringement or the likelihood of proving its existence – Article 7, 2).

As a counterweight to this increased flexibility in the exercise of its sanctioning powers, Article 8 expressly governs for the first time the PCA's handling of complaints. This provision allows for an interactive process during which the PCA may request additional clarification or comments from complainants, with the possibility of rejecting complaints it considers to be without sufficient grounds or that fall outside its priorities. However, the Act ensures the right to appeal against any decision by the PCA to reject a complaint, which protects the rights of third parties (such as companies injured by the unlawful practices) within this more flexible framework of the opportunity criterion.

In short: in its innovative segments, the new Chapter I of the Competition Act reinforces the publicity given to the PCA's activities and its accountability to Parliament, allowing also for a more flexible management of its investigative powers in accordance with previously defined priorities. ■

Antitrust Procedures

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The powers of the Portuguese Competition Authority (*PCA*) are now significantly muscled in light of the Former Competition Act (*Law 18/2003*), as Articles 13 to 35 of the New Competition Act (*NCA, Law no. 19/2012*) enhance the powers of the authority in antitrust procedures. These legislative modifications are aimed to increase the efficiency and effectiveness of the authority's competition enforcement.

Request for information by the authority should now, as a rule, be answered within a period of 10 business days and confidential information or business secrets should be duly identified and justified as such by companies (Article 15). Procedurally, notifications can now be made by the authority, in the context of antitrust proceedings, directly to a company located outside the national territory (Article 16) and members of governmental bodies and agencies have the duty to communicate to the authority potential or effective competition law infringements – Article 17(5).

The authority's standard powers of inspection (Article 18) continue to be aligned with those of the Commission under Article 20 of EU Regulation 1/2003. As a significant development *vis-à-vis* the former Competition Act, the authority now has (under Article 19) the possibility to search the homes of *(i)* company's shareholders, *(ii)* members of the board, *(iii)* workers, and, in general, *(iv)* any given company assistant. In addition, the authority can now, in accordance with Articles 19(7) and 20 conduct searches in lawyer's offices and in medical offices. The legal provisions that grant the authority the power to search private homes and lawyer's offices should, following an antitrust case in which these are applied, be reviewed by the Portuguese Constitutional court, as these provisions do not appear to conform with the relevant provisions of the Portuguese Constitution, notably in terms of adequacy, necessity and proportionality.

The settlement procedure in the inquiry phase is now, *ex novo*, regulated in the Competition Act (Article 22) and can be triggered *ex officio* by the authority or by request of the defendant. Third parties cannot access a settlement proposal – Article 22(16). The investigation, in the inquiry phase, can now also be closed through the proposal of commitments by the defendant (Article 23). Prior to the acceptance of such commitments, the authority must publicize in its web page and in two national newspapers a summary of the case and respective proposed commitments – Article 23(4). The authority's decision which accepts the commitments does not recognize the existence of a competition law infringement – Article 23(6). As a rule the inquiry phase should be concluded within a period of 18 months counting from the date in which the case was opened – Article 24.

The standard period of time to reply to the statement of objections in the instruction phase is now 20 business days – Article 25(1). The new Competition Act also grants the authority the possibility to issue additional statement of objections in the same file – Article 25(6) – conduct which materially led in the past to the annulment of authority's decisions in the judicial phase by the judicature. The settlement procedure can also be triggered by the defendant in the instruction phase (Article 27), following the adoption of the statement of objections. Third parties cannot access settlement proposals – Article 27(11). Commitments can also be proposed in the instruction phase (see Article 28 in articulation with the above referred in relation to the use of commitments in the inquiry phase under Article 23).

> "The provisions of the New Competition Act that grant the authority the power to conduct searches in private homes and lawyer's offices, following an antitrust case in which these are applied, should be reviewed by the Portuguese Constitutional Court, as these provisions do not appear to conform with the Constitution of the Republic, notably in terms of adequacy, necessity and proportionality."

In terms of company's confidential information and business secrets protection, the authority now has the power to *ex officio* dismiss such protection when it deems that the company's confidential information is necessary to give evidence of the antitrust infringement (Article 31(3)), hence having the power to materially disqualify the protection of company's business secrets.

In terms of access to the file by the defendant, Article 33(3) states that the authority holds the power to impede such access when it considers that such access could be prejudicial do the investigation, thus, this provision, can materially affect the due process of law and the adversarial system.

Finally, Article 34 grants the authority the power to adopt interim measures, which are valid, as rule, for a standard period of 90 days, without prejudice to subsequent extensions, and Article 35 details the articulation of the authority with sectorial regulators in antitrust procedures, which can lead, *inter alia*, to the suspension of the PCA's case while the sectorial regulator investigates the same facts under the respective competences and attributions. ■

Merger Control

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Main amendments:
- Revision of notification thresholds
- Abolition of notification deadline
- Alignment of the substantive test with EU law

The most relevant amendments on merger control in the new Competition Act are the new *de minimis* market share notification threshold and modified turnover thresholds, which aim at exempting from notification transactions without significant effects in Portugal. The abolition of the current 7-day notification deadline (which was unnecessary and resulted in a number of incomplete notifications) is also a welcome change. In terms of substance, the new Competition Act aligns the substantive test with the Significant Impediment of Effective Competition ("SIEC") test of the EC Merger Regulation, which also influences other amendments to the Act.

Jurisdictional thresholds

The new Act provides three alternative sets of thresholds for a concentration to be subject to mandatory filing:

- **The turnover threshold is revised:** The combined turnover in Portugal of the parties to the transaction in the preceding year must have exceeded €100 million (previously €150 million), and at least two of the merging parties must have achieved €5 million in Portugal in the same period (previously only € 2 million);

- The **standard market share threshold is increased to 50%** of the national market of a given good or service (in the former Act, the standard threshold was 30%); and

- **New *de minimis* market share threshold**, according to which the acquisition, creation or reinforcement of a share between 30% and 50% of the "national market" will be subject to mandatory filing only if at least two of the participating undertakings achieved individually in Portugal a turnover of at least €5 million in the previous financial year.

New substantive test and criteria of review

The dominance test of the former Competition Act is replaced with the Significant Impediment to Effective Competition (SIEC). This change aligns the standard of review in Portugal with EU law, and may affect the outcome of a small number of "unilateral effects" cases, notably where the elimination of important competition constraints would have harmful effects on competition, even if a dominant position of the merged entity cannot be established.

The New Act also adds two new criteria to be considered by the Authority in the substantive analysis of the transaction, in addition to the existing standard criteria common with EU law. The first allows for a limited "efficiency defence" and provides that the evolution of economic and technical progress that does not constitute an obstacle to competition must be taken into account, insofar as efficiencies benefitting consumers result from the transaction. The second is most controversial, as it requires the Authority to take into account the bargaining power of the merged entity towards its suppliers, in order to prevent the reinforcement of "the state of economic dependence" of the latter. By contrast, the criterion of "international competitiveness of the Portuguese economy", which was never referred to in Authority's case practice, no longer appears in the Competition Act.

Procedural rules

- **Elimination of notification deadline**, which was unnecessary, as the parties are prohibited from implementing the

transaction before an express or tacit clearance decision is adopted by the Authority.

- **Voluntary notification** before execution of the relevant legal instruments is expressly permitted, if a "serious intention" can be demonstrated.

- **A number of procedural deadlines are revised:**
  - No limit to deadline suspension from additional information requests (before there was a limit of 10 working days in Phase II).
  - In phase II cases, the Authority must issue a statement of objections to merging and third parties within 75 working days from notification.
  - Submission of commitments in both phases of the procedure stops the clock for 20 days.
  - The decision deadline may be extended for up to 20 working days in phase II by initiative of the notifying party or its consent.
  - Binding opinion from the media regulator (ERC) suspends the deadline.
  - Deadlines *for ex officio* proceedings are aligned with standard deadlines.
  - The introduction of substantial amendments to a notified merger restarts the clock.

- **Access to the file of third parties will be limited**, and allowed only in the period to submit initial observations in phase 1 and in the period of third party hearing (before a decision is adopted) in both phases of the procedure.

- **Reduction of investigative powers.** In merger control cases the Authority no longer has competence to conduct unannounced searches of the premises of merging parties (such powers were never used under the previous Act).

Exemptions

- **Scope of bankruptcy exemption will be narrowed**, as only acquisitions by an insolvency administrator within insolvency proceedings will be exempt from filing, in keeping with EU rules.

- **Exemption of transitory acquisitions by financial institutions will also be more limited**. As under EU rules, such transactions will only be exempted if securities are acquired with a view to its resale, the acquirer does not exercise the corresponding voting rights with a view to determine the competitive behaviour of the target, and if the disposal of the controlling interest occurs within 1 year (extension possible).

Other amendments

- **Interrelated transactions.** Two or more transactions within two years between the same parties will be considered a single transaction and subject to notification if combined they exceed the turnover thresholds.

- **Suspension of all effects before clearance.** The New Act clarifies that a transaction implemented before a clearance decision is adopted does not produce any legal effect.

- **New standstill obligations.** The new Act expressly requires that acquiring parties should suspend their voting rights in the acquired company. Conversely, the management of the acquired company is limited to "normal management" duties and is expressly barred from selling any of the company's assets (apparently even if not related to the concentration under review). ■

For a detailed overview of Portuguese merger control rules, please see Carlos B. Moniz and Pedro G. Melo, International Comparative Legal Guide to: Merger Control 2012, Global Legal Group, Portugal chapter.

Infringements, sanctions and leniency

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The new Competition Act (Law n.º 19/2012) deals with infringements and sanctions in Chapter VII and with the exemption or reduction from fines ("Leniency") in Chapter VIII.

As a preliminary point, the **new law solves the previously existing shortcomings regarding the lack of legal basis for the Portuguese Competition Authority's sanctioning of infringements to articles 101.º e 102.º of the Treaty on the Functioning of the European Union**. Article 68.º, 1, b) now expressly foresees that those infringements amount to "an administrative offence punished with a fine", which means that the Portuguese Competition Authority (PCA) is no longer limited to a mere finding of infringement but is also able to sanction it.

The remaining rules on infringements and sanctions do not bring about groundbreaking changes, however, some of the new rules are important to mention.

In article 69.º, the (non-exclusive) criteria for determining the fine is further detailed via the express reference to additional aspects such as the nature and the dimension of the affected market, the duration of the infringement, the economic situation of the undertaking concerned, previous fining decisions and the consideration (only) of those advantages enjoyed as a result of the infringement that can be identified. These are criteria which application already occurred, to a large extent, as a result of subsidiary legislation or as a result of the courts case law when reviewing the PCA's fining decisions.

We are glad to see that, **following the comments presented in the course of the public consultation occurred in late 2011, the final text includes the suggestion (n.º 8 of article 69.º) that future guidelines on the method for the setting of fines be adopted by the PCA**. This is mostly welcomed, given the importance of the subject matter and the interest of the undertakings/individuals concerned in having the highest possible degree of certainty regarding potential fines.

Still on this article, **the maximum amount of the fine for undertakings is now calculated by reference to the turnover earned in the fiscal year immediately preceding the final fining decision of the PCA**, a solution which contradicts the case-law of the Lisbon Court of Appeal (for whom the relevant year should be the year when the infringement came to an end). For **individuals**, the **maximum permitted fine** can now go up to **10 % of the annual income** earned while working at the infringing undertaking, during the last full year of occurrence of the infringement.

In the calculation of the maximum **fine applicable to an association of undertakings** the relevant turnover is no longer limited to the aggregate annual turnover of the associated companies *that have participated in the infringement* but rather, it **covers the aggregate turnover of *[all] associated companies***. This solution leads to an unfair result for those associations that cover a wide range of activities which are separable and distinct, whenever the associated companies/activities at stake in a given proceedings concern only a part of those activities.

Article 73.º introduces detailed rules regarding the responsibility of undertakings for administrative offences, however, this higher level of detail does not always correspond to a widening of the scope of responsibility for companies.

Hence, **for infringements which result from the acts of an employee** (who is not a member of the companies corporate bodies nor a companies' representative or someone with authority to control the activity of the company) the **new rule – which follows closely the provisions of the Penal Code in this respect – limits the companies responsibility to cases where the employees' superiors have breach their duties of surveillance and control** (and therefore, the mere requirement that the employee has acted on behalf or on account of the company or in the exercise of its duties does not seem to suffice, as it did under Law n.º 18/2003).

In this same article - n.º 8 - **companies whose legal representatives where members of the directive bodies of an association of undertakings are held joint and severally liable in relation to the payment of the fine imposed upon the association**. The joint and several liability can only be set aside if those members have opposed in writing to the decision that constitutes or serves as basis for the infringement.

On the statute of limitations, the new law modifies the maximum permissible period of suspension of the limitation period from 6 months to 3 years, which seems unjustifiably long, taking into account (inter alia) that a new specialized court is about to start operating. **As a result of this new rule, the maximum limitation period for infringement proceedings can now go up to 10,5 year for the most serious offences.** Taking in account, in addition to the above, that the limitation period is also suspended while judicial review of the final decision is pending, it can be concluded that the relevance of the statute of limitations is considerably undermined.

In relation to leniency, the new law revokes the previous leniency regime and the new rules on leniency are now dealt with in Law n.º 19/2012 (articles 75.º to 82.º). **Significant changes are introduced, which bring the Portuguese leniency regime closer to the one in force at EU level.**

The scope of the leniency regime is reduced and, as a result, **only agreements or concerted practices between competitors which envisage the coordination of market behaviour or to influence relevant aspects of competition are eligible for a leniency request** (and not any type of restrictive agreement or practice, be it horizontal or vertical, as was previously the case).

Full immunity is still limited to "first in" situations, however, it is no longer required that the PCA has not yet initiated an investigation. **Therefore, full immunity will still be possible if an investigation is already going on**, provided that the leniency applicant is the first to provide the information and elements necessary for the PCA to (i) conduct an inspection or (ii) to verify that an infringement exists (together with other conduct requirements imposed upon all applicants).

Fine reductions are possible for all companies that render information and proof of significant added value and it is this criteria (and not the number of companies that have already applied) that determines whether or not a reduction is available (in addition to the fulfilment of the conduct requirements referred to above).

Lastly, **the law qualifies as confidentiality the documents and information presented in the context of a leniency request** (and the respective formal request and oral statements) and introduces **significant limitations on the access to leniency documents** by the company concerned in the investigation as well as on the access by third parties. ■

Judicial Appeals

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For the benefit of the reader, we shall focus on the regime applicable to appeals of antitrust proceedings, given that there are no relevant changes as to appeals relating to administrative proceedings. In fact, the new act even maintains an unbalanced aspect, provided in the former law, whereas there are only two levels of judicial scrutiny for antitrust appeals, compared to three degrees of jurisdiction in administrative cases, which are typically less complex and severe.

General remarks

Antitrust appeals are probably the issue that has been generating larger controversy in the framework of the new act.

Since at least 2008 the Authority has been claiming for a revision of the appeal mechanisms in antitrust proceedings. The Authority considers that incentives should be reduced so that defendants do not resort to this right indiscriminately.

However, the fact is that reality itself contradicts the idea that appeals are being used as a delaying tactic. At the outset, any limitation on rights that are constitutionally safeguarded and fully consolidated in democratic legal orders, such as the right to a fair trial and the presumption of innocence, should only be considered in the face of relevant aims with equivalent value. And this does not seem to be the case here.

Actually, even the figures show that, in a significant number of antitrust appeals, Portuguese courts decide in favour of the appellant and end up quashing, in whole or in part, the Authority's decisions. This fact alone confirms the need to continue keeping effective judicial scrutiny of the Authority's activity in this field.

In any event, the legislator made important modifications in the appeal process of antitrust cases.

As a rule, appeals no longer suspend the effects of the Authority's decisions

There was an inversion of the prior rule, adopted in criminal infractions and in most misdemeanours, on the basis of which the challenge of an Authority's decision suspended the execution of such decision. In the new act, the contested decision must be executed by the defendant even prior to its assessment by the court, save for the exceptions mentioned below.

The impact of this modification is particularly serious if one takes account of the high amount of fines that are usually involved, of the difficulty to collect from the State sums that are unduly paid and of the absence of any mechanism able to restore the economic value of these unduly paid sums (and of the economic losses incurred by companies thereby) should the Authority lose the appeal.

The new competition act envisaged to offset some of these negative implications, by providing, on the one hand, that the appeal suspends the effects of potential structural measures accompanying the decision and, on the other, that the appeal may suspend the effects of the entire decision if the defendant demonstrates that the execution of such decision causes him a considerable damage and, instead, pays a deposit.

The first exception is the least acceptable, given the irreversible effects of structural remedies. It is only left to know what application will the second exception have and whether, in practice, due to the current financial difficulties and requirements that companies face and to the thresholds, deadlines and criteria set by the new Supervision, Regulation and Competition Court for the deposit, the substitution of the fine for the deposit is in fact viable.

It is true that the possibility to have the court suspend the payment of the fine corresponds to the model of the EU. However, the Commission holds an impressive success rate in antitrust cases and such model has been created almost 50 years ago, at a time and context that do not resemble the existing ones, with the known financing constraints.

Reformatio in pejus

The prejudice of the former aspect is aggravated by the introduction of another new feature of the appeal process, which, alone, would suffice to meet the Authority's concerns about an eventual disruptive use of appeals in competition proceedings: competent court now has unlimited jurisdiction to resolve disputes, i.e., it may either maintain, reduce or increase the amount of fines and other sanctions applied by the Authority.

Decisions to terminate proceedings are not subject to judicial review

The new act provides that it is not possible to appeal against Authority decisions terminating antitrust proceedings, regardless of whether they have conditions attached to it or not. This ban, all the more announced in such absolute terms, is not reasonable. A defendant concerned by a condition decision terminating proceedings may be interested in challenging that decision, if, for instance, the Authority imposes conditions which are not the result of commitments offered by the defendant. Even Authority decisions adopted in the framework of a settlement procedure may be appealed within some constraints, as long as the defendant does not seek to challenge facts that he himself confessed.

Nevertheless, our main objection to this prohibition has to do with the position of third parties, in particular complainants. It does not seem reasonable or fair that complainants are barred from having their claims reviewed by a court where the Authority refrains from intervening. Moreover, it does not make sense that Authority decisions rejecting complaints may be appealed under the terms of Article 8(4), and those decisions which terminate the proceedings in the inquiry or even in the instruction may not, when it is obvious that in the latter case there was an investigation and evidence gathering that may benefit the complainant.

The deadline for lodging an appeal has been extended, but is still insufficient

The time limit for bringing judicial proceedings against final conviction decisions has been extended from 20 to 30 working days, although the new deadline still seems scarce, bearing in mind the complexity, the size and the sanctioning consequences of these cases. It is worth noting that the defendant has no less than 20 working days to respond to the statement of objections in the term of the inquiry, which requires much less time to prepare than an appeal of a final decision (which is often quite long). It would have been wiser, as suggested in the public consultation, to provide for a 2 month time limit equivalent to the action for annulment existing at EU level. ■

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SPECIAL CONTRIBUTION MATTOS FILHO

The new Brazilian Antitrust Law

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"The main innovation of the new Brazilian Antirust Law is the introduction of the pre-merger control regime, by which the transactions submitted cannot be concluded prior to an approval by Cade"

The new Brazilian Antitrust Law – Law No. 11,259/2011 – entered into effect on May 29, 2012, and brought important changes on the analysis of economic concentrations. The main innovation was the introduction of the pre-merger control regime, by which the transactions submitted cannot be concluded prior to its approval by to the Brazilian antitrust authority, the Administrative Council for Economic Defense (in Portuguese acronym, "Cade"). Also on May 29, Cade issued regulations that defined criteria for reporting and analysis of mergers.

The new Brazilian legislation provides for the mandatory notification to the Brazilian antitrust authorities of all transactions that (i) amount to an economic concentration; (ii) have effects in Brazil, either by direct local presence of one of the parties, or by export sales of products or services into Brazil; and (iii) at least one of the economic groups involved in the transaction have registered gross revenues in Brazil of at least R$ 750 million, and the other group registered gross revenues in excess of R$75 million in the previous fiscal year.

For purposes of calculating the revenues, are considered members of the same economic group: (i) companies under common control, internal or external, and (ii) companies in which those companies under common control at least 20% of capital or voting.

In the case of investment funds, the revenues of the "group" shall take into account: (a) the manager of the fund; (b) the funds subject to a common manager; (c) the investors holding, directly or indirectly, over 20% of the quotas of any of such funds; and (d) the portfolio companies in which any of such funds holds at least 20% share.

Transactions involving the transfer of corporate control are subject to mandatory filling with Cade. This is the case, for example, of: (i) merger of two previously independent companies; (ii) direct or indirect acquisition or consolidation of control; (iii) direct or indirect acquisition of part of one or more companies, through purchase or exchange of shares, quotas, securities or securities convertible into

shares or assets, tangible or intangible, by contract or any other form.

There are also transactions which, although not involving transfer of corporate control should be filled. These are the cases of (i) transactions which give the buyer the status of largest investor in a company or group of companies; (ii) acquisition of a 20% stake, in the event the companies involved are not active in any horizontal or vertically related markets; (iii) acquisition of a 5% stake, in the event the companies involved are active in any horizontal or vertically related markets; and (iv) association agreements, consortia and joint ventures, except if created for the sole purpose of taking part in a tender process launched by the Public Administration.

As a general rule, the notification must be filed with Cade after a binding document is signed between the parties, and before the consummation of any act related to the transaction. Exception to this rule is the acquisition of equity through public bids, which may be notified after the completion of the securities transaction which gives rise to the concentration act. In this case, however, the acquirer cannot exercise the political rights attached to the acquired shares, except as expressly authorized by Cade for investment protection.

Competition conditions between the parties involved in the transaction shall be preserved until the judgment of the transaction. Thus, the parties are forbidden to transfer shares, engage in any kind of influence on each other or exchange information that are not strictly necessary for the conclusion of contracts. Failure to comply with these conditions may subject the parties to a fine between R$ 60,000 and R$ 60 million (approximately € 23 000 to € 23 million), the declaration of nullity of the practiced acts, and a possible investigation for violation of the economic order.

Nonetheless, the parties may request for a precarious and temporary authorization to conclude the transaction in cases where there is imminence of substantial and irreparable financial damage. To this end, in addition to the imminent damage, the parties must demonstrate that the anticipated conclusion of the transaction does not entail a danger of irreparable damage to competition, and that all measures are fully reversible.

Finally, the new law also provides for the possibility of Cade determine the submission of acts that do not fit in the legal criteria, within one year from the date of consummation of the transaction. ■

"As a general rule, the notification must be filed with Cade after a binding document is signed and before the consummation of any act related to the transaction"

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