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Judgement of the Supreme Court of Justice: the "reinstatement" of *rappel* in the context of sales below cost

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THE SCJ CONSIDERED THAT A "*RAPPEL*" DISCOUNT, WHICH IS BASED ON THRESHOLDS AND IN WHICH THE FIRST THRESHOLD BEGINS WITH ONE UNIT IS A QUANTITY DISCOUNT AND IS RELEVANT FOR THE PURPOSES OF ASSESSING THE EFFECTIVE PURCHASE PRICE, AS LONG AS THE REMAINING LEGAL REQUIREMENTS ARE MET

Introduction

In a judgement issued on 14 May 2014 in the context of an extraordinary appeal for the settlement of a case-law, the Criminal Section of the Supreme Court of Justice ("SCJ") unanimously decided that a reseller is entitled to deduct from the effective purchase price of a given product the amounts that were paid or credited by the supplier as a *rappel* discount (for the purposes of assessing a subsequent (re) sale below cost).

This decision comes as a consequence of two conflicting judgments issued by the Évora Court of Appeals in 2013, less than one month apart from each other, both ruling on the admissibility
of a "rappel" discount whose first threshold began in "1" unit.

The conflicting theories and the judgment for the settlement of the case-law

The two previous judgments conflicted solely on the issue of whether or not the *rappel* qualified as a discount "*directly related to the transaction*" (an essential condition in the wording of Decree-law 370/93, applicable to the case).

The judgment that accepted such qualification considered that (i) the purpose of a *rappel* discount is to incentivize sales' growth, which implies a reference to the quantities supplied, (ii) the setting of thresholds is the usual way to define the discount rates applicable to quantities previously defined so as to achieve the referred incentive and (iii) the establishment of thresholds is the differentiating element of such discount and its qualification as "quantity discount" is not set aside by the fact that the first threshold initiates in "1" unit.

The opposing decision refused to qualify the *rappel* as "*directly related to the transaction*" because it considered that (i) such discount always covers the quantities previously acquired by the buyer in other sales and purchases (and not merely in the sale and purchase at stake), (ii) a discount whose first threshold begins in unit "1" is not an economic discount directly related to the transaction and objectively justified by it and (iii) discounts that are fixed and unconditional and that apply systematically to a given economic agent by virtue of its track record of purchases are not acceptable for calculation of the effective purchase price.
The SCJ unequivocally rejected this second reasoning and substantiated its decision in two main ideas.

Firstly, it considered that the relationship established between a supplier and a distributor is of a global and permanent nature rather than limited to the mere succession of sporadic purchases and sales which are independent and autonomous amongst themselves; therefore, the assessment of the counter benefits negotiated between supplier and distributor must be undertaken in the context of such global and potentially long-lasting relationships.

Secondly, the purpose of a supply relationship cannot be merely to satisfy the purchaser's

interest in being supplied with certainty and on a regular basis but also the supplier's interest in assuring a constant flow for its products, thus incentivizing their purchase by the distributor.

In light of the above, the SCJ considered that a "*rappel*" discount, which is based on thresholds and in which the first threshold begins with one unit is a quantity discount and is relevant for the purposes of assessing the effective purchase price, as long as the remaining legal requirements are met: (i) it must be mentioned in the invoice either directly or indirectly by reference to existing contracts or price lists and (ii) it must be capable of being determined upon issuance of the invoice.

Comment

The judgment establishes a clear, precise and unequivocal dividing line between what is and is not permissible when calculating the effective purchase price. The SCJ distanced itself from an excessively formal approach to the legal prohibition of sales below cost, paving the way for an implementation of said prohibition more in line with economic reality, within the existing legal framework.

The Court's ruling is also relevant for its *timing* as few months have elapsed from the entry into force of the new regime on individual restrictive trade practices (of which the prohibition of sales below cost is – in practical terms – one key provision), which increased dramatically the amount of fines without, however, dissipating several doubts as to the interpretation of its key concepts (due to a very unfortunate wording of the law and extremely volatile and disputed interpretation and enforcement), all of which motivated considerable uncertainty for the envisaged *players*.

Even though the SCJ's decision applies the law previously in force - Decree-law 370/93, currently replaced by Article 5 of Decree-law 166/2013 - the assessment of the court is surely applicable to the new wording of the relevant provision now referring to "*discounts directly and exclusively related to the transaction of the products at stake*". The SCJ also points to that solution as it stresses that the intent of the 2013 legislator was –according to the preamble of Decree-law 166/2013 - merely to clarify the notion of effective purchase price, "*taking into consideration, amongst others, the discounts deferred in time*" (of which the so-called conditional *rappel* is the clearest example).

It is also relevant to note that the Authority for Food and Economic Safety, which is, at present, the entity in charge with surveillance, investigation and decisional powers in respect of Decree-law 166/2013, accepted the interpretation advocated by the SCJ and readily updated its FAQ's on the matter (which serve as guidance for economic players regarding the Authority's views on the law) harmonizing them with the line of reasoning established by the SCJ, in particular in what concerns the concept of discounts directly and exclusively related to the transaction of the products at stake and in what concerns the conditions for taking the *rappel* into account when calculating the effective purchase price. ■

The judgment establishes a clear, precise and unequivocal dividing line between what is and is not permissible when calculating the effective purchase price. The SCJ distanced itself from an excessively formal approach to the legal prohibition of sales below cost, paving the way for an implementation of said prohibition more in line with economic reality, within the existing legal framework

Statute of the Competition Regulatory Authority of Mozambique

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It is advisable that undertakings having activities in Mozambique consider carefully the impact of the Competition Law, both in taking strategic decisions as well as in their ordinary course of business in the market in order to mitigate the risk of any incompatibility with the new Mozambican competition system

A step further towards the implementation of competition law in Mozambique was taken recently with the publication of the Statute of the Competition Regulatory Authority of Mozambique (*Autoridade Reguladora da Concorrência*) on 1 August 2014.[2] Once operational, the Competition Authority will be responsible for the application of the new Competition Law of Mozambique of 2013,[3] which is currently still in need of regulation regarding several aspects.

The Authority, endowed with administrative, patrimonial, financial and technical autonomy, will be an independent and impartial entity in the performance of its duties. As already stated in the Competition Law, statutes provide wide regulatory, supervisory and sanctioning powers to the Authority, similarly to the Portuguese Competition Authority (whose statutes inspired the Mozambican legislator) and other national competition authorities in many jurisdictions worldwide.

The Competition Authority will be in charge of investigating and deciding on sanctioning procedures with regard to restrictive competition practices (such as cartel agreements and abuses of dominant position), as well as clearing or prohibiting concentrations between undertakings that are subject to mandatory notification in Mozambique. The Statute determines that the Authority's decisions may be appealed in court, namely to the Judicial Court of the City of Maputo in the case of procedures leading to the application of fines and other sanctions, and to the Administrative Court with regard to merger control procedures and requests for exemptions relating to restrictive agreements. The Statute also establishes a duty of cooperation on the part of undertakings and other entities subject to the activities of the Competition Authority in order to ensure the adequate performance of the Authority's duties.

Recently a proposal for a regulation implementing the Competition Law was made public,3 which, among other topics, further defines the subjective and material scope of the prohibitions under the Competition Law and determines the legal criteria for mandatory notification of concentrations to the Competition Authority with regard to the market shares and turnover of the parties. Specifically, pursuant to the referred proposal, notification is mandatory of undertakings having a market share equal or superior to 20% and an annual turnover over 100 million meticals (approximately EUR 2.5 million and USD 3.3 million).

Even though the application of the rules on merger control is dependent on the approval of the new regulation, when the new Competition Authority starts functioning, the provisions on prohibited practices restrictive of competition shall be fully applicable, and the violation of such rules subjects the undertakings concerned to fines up to 5% of the turnover of the preceding year, as well as other negative procedural consequences.

It is therefore advisable that undertakings having activities in Mozambique consider carefully the impact of the Competition Law, both in taking strategic decisions as well as in their ordinary course of business in the market in order to mitigate the risk of any incompatibility with the new Mozambican competition system. ■

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[2] Cf. Decree no. 37/2014, 1 August. Cf. article "The New Competition Law of Mozambique" in the newsletter of June 2013.
[3] Law no. 10/2013, 11 April
[4] Cf. Proposal of Regulation of the Competition Law of the Ministry of Industry and Commerce of Mozambique, 11 June 2014.

Court of Justice confirms the European Commission's decision on MasterCard's multilateral interchange fees

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The European Commission by its decision of 19 December 2007 considered that the multilateral interchange fees (***MIF***) applied within the MasterCard payment system breached EU antitrust rules. As a rule, MIF are equivalent to a proportion of the price of a payment card transaction that is retained by the card-issuing bank. The cost of the MIF is charged to merchants in the more general context of the costs which they are charged for the use of payment cards by the financial institutions which acquire their transactions (***acquirers***).

The Commission, following complaints lodged *inter alia* by EuroCommerce, established that the MIF had the effect of setting a floor under the costs charged to merchants and thus constituted a restriction of price competition. The Commission also noted that it had not been demonstrated that the MIF could generate efficiencies capable of justifying their restrictive effect on competition. On the basis of those findings, the Commission ordered MasterCard and the companies representing it (MasterCard Inc. and its subsidiaries MasterCard Europe and MasterCard International Inc.) to bring the infringement to an end by discontinuing the MIF within six months. MasterCard judicially appealed the Commission's decision and the EU's General Court, by a judgment rendered on 24 May 2012, dismissed on the merits the appeal lodged by MasterCard, thereby confirming the Commission's decision. MasterCard afterwards then brought an appeal before the Court of Justice by which it sought to have the General Court's judgment set aside.

The Court of Justice by its recent ruling of 11 September 2014, "MasterCard Inc. *et al* vs. European Commission", case C-382/12 P[1], dismissed MasterCard's appeal and confirmed the decision of the *a quo* court.

As regards the question whether the MIF are objectively necessary for the MasterCard system, the Court reasons that the adverse consequences that could affect the functioning of the MasterCard system in the absence of the MIF do not, in themselves, mean that the MIF must be regarded as being objectively necessary, as the *a quo* court duly found that the system was still capable of functioning without those fees.

In terms of appraisal of the anti-competitive effects of the MIF, the Court of Justice considers that the General Court confirmed the Commission's hypothetical analysis according to which some of the problems created by elimination of the MIF could be resolved by prohibiting *ex post* pricing (a solution pursuant to which issuing and acquiring banks are prohibited from defining the amount of the interchange fees after a purchase has been made by a cardholder). In this setting, the Court of Justice found that the General Court should have ascertained, in the context of its analysis of the effects of the MIF on competition, whether that situation was likely to arise otherwise

The Court of Justice ruling in the MasterCard case, which supports the European Commission decision aimed at decreasing the collection of MIFs by card issuers apparently to benefit merchants, may encompass non-negligible negative consequences for end consumers, inter alia through a substantial reduction of the benefits currently granted to cardholders by payment card systems

[1] Court's judgement accessed at http://curia.europa.eu/juris/document/document.jsf?text=&docid=157521&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=82755. Court of Justice press release available at http://curia.europa.eu/jcms/upload/docs/application/pdf/2014-09/cp140122en.pdf.

THE ONLY OTHER OPTION WHICH PRESENTED ITSELF AT FIRST INSTANCE AND WHICH WAS CAPABLE OF ENABLING THE MASTERCARD SYSTEM TO OPERATE WITHOUT MIF WAS A SYSTEM BASED ON A PROHIBITION OF *EX POST* PRICING

than by means of a regulatory intervention. Still, the Court of Justice reasoned that that such error of law does not have a bearing on the analysis of the competitive effects of the MIF carried out by the General Court, since the *a quo* court was in any event justified in relying on the Commission's hypothesis. The only other option which presented itself at first instance and which was capable of enabling the MasterCard system to operate without MIF was in fact the hypothesis of a system based on a prohibition of *ex post* pricing.

The Court also dismissed the argument of the appellants pursuant to which the General Court did not sufficiently address the competitive effects of the MIF and emphasized that the *a quo* court performed a detailed examination in its judgment in order to determine in particular whether the MIF limit the pressure which merchants can exert on acquirers of payment card transactions when negotiating the costs charged by those acquirers. In this setting, the Court confirmed the General Court conclusion that the MIF had restrictive effects on competition.

Equally, the Court established that the General Court took into account the two-sided nature of the system, since it analysed the role of the MIF in balancing the 'issuing' and 'acquiring' sides of the MasterCard system, while recognising that there was interaction between those two sides. Furthermore, in the absence of any proof of the existence of appreciable objective advantages attributable to the MIF in the acquiring market and enjoyed by merchants, the General Court did not examine the advantages flowing from the MIF for cardholders, since such advantages, per Court's reasoning cannot, by themselves, be of such a character as to compensate for the disadvantages resulting from those fees. This reasoning is, from our standpoint, a major set-back for consumers, as the Court, albeit in a setting of a two-sided market, did not ponder the advantages of MIF for consumers, specifically those currently provided to cardholders by card payment systems.

In the week that the Court of Justice confirmed the European Commission decision in the MasterCard MIF antitrust file, the General Court annulled, by its judgment of 9 September 2014, in case T-516/11[2], the European Commission decision which impeded Mastercard's access to a study elaborated by a third party to the Directorate-General for Competition of the European Commission on the costs and benefits to merchants of accepting different payment methods. ■

[2] Judgement available at http://curia.europa.eu/juris/document/document.jsf?text=&docid=157442&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=84616.

"Groupement des Cartes Bancaires" Judgment: European Court of Justice reduces the scope of anticompetitive infringements *by object*

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Article 101(1) of the Treaty on the Functioning of the European Union ("TFEU") prohibits agreements or concerted practices between undertakings which have as their *object* or *effect* the prevention, restriction or distortion of competition. The anti-competitive object or effect are alternative requirements, and this distinction has an impact on infringement proceedings conducted by the European Commission (or by the national competition authorities), namely regarding the burden of proof.

In cases where there is an anti-competitive object, the competition authority in question does not have to demonstrate that the agreement or concerted practice has restrictive effects on competition in the affected markets. If there is no anticompetitive object (i.e., goal), then the competition authority has the burden of proving that the agreement in question has a significant negative effect on competition. In these circumstances, the Commission or the national authority has to conduct a more detailed analysis of the agreement or practice in order to demonstrate the effects of its implementation, taking into account its economic context, the products and services involved and the structure of the affected market(s).

Consequently, the qualification of an anti-competitive practice as an offense *by object* makes the competition authorities' task regarding evidence much easier which has led to a trend, in some of the recent decision-making practices, to expand this legal concept.

However, in a judgment of 11 September 2014, in the *Groupement des Cartes Bancaires*[1] case, the European Court of Justice ("ECJ") has halted that trend and confirmed that the notion of anti-competitive infringement by object must be interpreted in a restrictive manner in order to cover only the most serious anticompetitive practices.

In December, 2002, *Groupement des Cartes Bancaires*, an association that brings together the main French banks and manages the payment system with bank cards, notified the Commission regarding the introduction of a set of measures including: (i) a mechanism for "regulating the acquiring function", in which the members acting predominantly or exclusively as card issuers would pay a higher contribution than the members also performing acquisition activities; (ii) an increase in the membership fees charged to new members; (iii) a "wake-up" fee for "dormant members" intended to encourage the acquisition of cards.

The Commission considered that these measures constituted a decision by an association of undertakings with an anticompetitive object that sought to limit competition between the member banks and exclude competition by new operators (such as retail and distribution outlets, online banks and foreign banks), a conclusion that was validated by the General Court ("GC").

The ECJ, however, opposed what it considered to be an excessively flexible application of the legal concept of restriction of competition by object, having judged that this concept should be interpreted restrictively in order to cover only those types of business conduct that are, by their own nature, sufficiently harmful to competition (such as horizontal price fixing by cartels).

According to the ECJ, "The concept of restriction of competition "by object" can be applied only to certain types of coordination between undertakings which reveal a sufficient degree of harm to competition that it may be found that there is no need to examine their effects, otherwise the Commission would be exempt from the obligation to prove the actual effects on the markets of agreements which are in no way established to be, by their very nature, harmful to the proper functioning of normal competition." (see paragraph 58 of the judgment).

As a result, the ECJ quashed the decision under appeal and referred the case back to the GC for this Court to analyse whether the measures under review had as their effect a restriction of competition under Article 101(1) TFEU.

This recent judgment is likely to have an impact on the conduct of future investigations by the Commission and national competition authorities, discouraging them from relying too easily on the concept of an *object* restriction and probably leading to a more careful assessment of the facts of each case in order to identify whether an agreement has actual detrimental effects on competition. ■

[1] Procedure C-67/13, Groupement des Cartes Bancaires v. Commission

Competition authority has new statutes

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Introduction

The competition authority has new statutes, following the recent entry into force on 1 September of Decree-Law No. 125/2014, 18 August. This act brings about a number of changes vis-à-vis the previous statutes — defined by Decree-Law No. 10/2003, 18 January — but, as one would expect, does not detract too far from the legal discipline of the framework law on independent administrative authorities, approved by Law No. 67/2013, 28 August, still under the scope of the economic and financial assistance program. It is worth analysing carefully some of the main changes.

Internal organisation

In respect to the Authority's administrative bodies and staff, the most relevant modifications arise essentially as a result of the adjustments that were made to comply with the new rules of the framework law of regulatory authorities.

Firstly, in a welcomed effort of accountability, the appointment of members to the Authority's board is now subject to a set of formal and substantive requirements that strengthen the legitimacy and independence of those who are entrusted with these important functions.

In practical terms, these members shall be chosen from persons with recognized integrity, technical competence, ability, professional experience and adequate training. The appointment proceeding includes a preliminary parliamentary hearing and is completed with the respective nomination by means of a reasoned decision from the Council of Ministers. In case of simultaneous designation of two or more board members, the term of their respective mandates must be staggered by at least six months, with a view to accommodate different sensitivities and experiences at the Authority's highest level of governance. Another innovation is the need to ensure that the function of chairman of the board is alternatively performed by persons of each gender and that the remaining functions of member of the board are ensured a minimum representation of 33% of each gender.

The mandates of the members of the board of the Authority shall have a non-renewable duration of 6 years. In the current mandates, the duration is 5 years, renewable once. Under the new statutes, the current mandates shall remain in force for the term initially set, but there is no possibility of renewal.

The second organisational aspect which, in our view, deserves closer scrutiny concerns a feature that has been significantly amended vis-à-vis the previous statute.

Under the by-laws of 2003, in the two years following the term of their mandate, board members could not establish any ties or enter into any professional relationship, whether compensated or not, with entities that during their mandate had participated in concentrations subject to the Authority's jurisdiction and had been subject to proceedings arising from anticompetitive behaviours. As a way to compensate for this impediment, such members were entitled to an allowance, precisely in the two years following the termination of their mandate, equivalent to two thirds of their respective remuneration. This compensation would cease from the moment they were hired or appointed to any remunerated public or private post or function.

In the framework of the new statutes, the range of incompatibilities and impediments was significantly strengthened, not only at the level of the board, but also with regard to the remaining staff (directors or equivalents and employees), to an extent that may be questioned from the perspective of the proportionality of the solutions at stake vis-à-vis other conflicting rights.

For instance, all the Authority's staff (board members, directors or equivalents and employees) is now prevented from holding, for the entire period in which they exercise their functions, any shareholdings or interests in any company or association of companies. In theory, this constraint might make sense in the case of sectoral regulatory authorities, especially if the ban is directed against the regulated companies in the sector concerned. However, in the particular case of the Authority — that is not even a real classical regulatory authority — the practical implications of this rule, if enforced in all its extension, appear to go considerably beyond what would be necessary, appropriate and proportionate to meet the requirements of independence and impartiality.

In the framework of the new statutes, the range of incompatibilities and impediments was significantly strengthened, to an extent that may be questioned from the perspective of the proportionality of the solutions at stake vis-à-vis other conflicting rights

All the more, there is a considerable disparity that is hardly comprehensible between the regime of incompatibilities and impediments as applied to the members of the board and that imposed on the remaining staff. The framework law on regulatory authorities provides that the incompatibilities and impediments at stake will only apply to the members of corporate bodies that shall be appointed under the framework law. This means that such constraints are not immediately applicable to ongoing mandates of the Authority's board members. Conversely, for directors or equivalents and employees the

same framework law determines that, should there be a mismatch or an impediment as a result of the amendments brought about in this field, this group of employees will have to put an end to such situations within 6 months or to terminate their contracts.

Similarly, in the period after the termination of service, the prohibition to establish professional or contractual relationships with companies that had participated in cases conducted by the Authority is now also extended to directors or equivalents (unlike the previous statutes, where this impediment only caught board members). With regard to the board members, the law still provides for a compensation equivalent to 50% of their previous monthly salary during the 2-year moratorium, but the directors or equivalents are not awarded a similar prerogative. This seems to be an unjustified solution, likely to constitute a deterrence to attract qualified and experienced staff for senior management positions.

In any event, the Authority's statutes ultimately did not replicate the penalty that the framework law on regulatory authorities foresees for breaches of this ban by directors or equivalents, which is the obligation to return all net remunerations perceived in the performance of the previous functions, up to a maximum of 3 years. In respect to board members, the statutes contemplate a serious penalty in case of non-compliance with the ban, consisting in the obligation to refund the amount equivalent to all net remunerations received during the period in which they exercised functions.

The provision of the current statutes that governs this extraordinary appeal was slightly amended with the purpose of strengthening the atypical feature of the measure

Again, and taking solely into account the situation of the Authority (public body with jurisdiction over all companies that carry out an economic activity with some degree of connection with the Portuguese territory), the outcome appears to be inadequate from the viewpoint of the standards of quality and professionalism that are required to attract top experts.

Extraordinary appeal in the merger field

Similarly to the previous statutes, Decree-Law No. 125/2014 kept, as an historical remnant, the possibility of the Government to overcome a block decision of a concentration issued by the Authority within some constraints. This is an exceptional expedient inspired by the German merger control regime, which has only been used once in Portugal against a decision by the Authority when in 2006 the former Minister of Economy approved the acquisition of Auto-Estradas do Oeste and Auto-Estradas do Atlântico by Brisa.

The provision of the current statutes that governs this extraordinary appeal was slightly amended with the purpose of strengthening the atypical feature of the measure. Hence, it now follows more clearly from the wording of the law that the reverse decision can only be taken 'exceptionally'. The grounds for the decision of the Government remain the existence of benefits resulting from the merger for the attainment of fundamental interests of the national economy capable of overriding the competitive shortcomings resulting from its implementation. The addition of the (somehow tautological) requirement that such interests, apart from being fundamental, need also to be 'strategic' can only serve the useful purpose of 'tightening' the conditions for approval of this type of operations.

The new statutes take an important step to deepen the effort of transparency in the Authority's actions

From a procedural point of view, the extraordinary authorisation decision is now up to the Council of Ministers, upon proposal by the Minister of Economy, when previously this decision was solely incumbent upon the latter. In the previous wording of the statutes, the Government was given the option to subject the clearance decision to conditions and obligations aimed at mitigating the negative impact of the transaction on competition. Under the new version, it seems that the imposition of such conditions and obligations is mandatory, and the same goes for the requirement of full publication of the decision in the official gazette.

Transparency of the Authority's action

A final note to point out is that the new statutes also take an important step to deepen the effort of transparency in the Authority's actions, which is a key element to spread and consolidate a culture of competition, compliance, and legal certainty.

For example, there are now specific provisions 'legalising' the best practice to conduct public consultations prior to the adoption or amendment of any regulation having external effectiveness, in principle for a period of not less than 30 days. Also, the electronic page of the Authority must provide, on a continued and updated basis, a wide range of legislative, regulatory and administrative elements, as well as administrative and judicial decisions, which are essential for an accurate advocacy of the 'rules of the game'. ■

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The new Brazilian Anti-Corruption law

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IT IS RECOMMENDED THAT COMPANIES ADOPT COMPLIANCE PROGRAMS IN ACCORDANCE WITH THE BEST INTERNATIONAL PRACTICES, IN ORDER TO INHIBIT THE PRACTICE OF CONDUCT THAT MAY EXPOSE THEM TO RISKS OR THAT MAY BENEFIT THEM

On 29 January 2014 Law No. 12,846, 1 August 2013 ("Anti-Corruption Law") entered into force. This law mandates civil and administrative strict liability for legal entities for activities performed against the national or international public administration's assets.

The Anti-Corruption Law provides a non-exhaustive list of activities deemed harmful to public administration that are typified as criminal acts. Among the regulations listed in the law, there are (i) the offering of any undue advantage to a public agent, directly or indirectly; (ii) the commission of fraud or manipulation in bids and contracts with public entities; and (iii) financing, funding or sponsorship of any harmful acts under the Anti-Corruption Law.

The practice of any of these acts may give rise to sanctions in administrative and civil spheres. In the administrative sphere, harmful acts to public property may result in a fine between 0.1% and 20% of the gross sales recorded by a company in the year prior to the launch of an investigation. In cases where it is not possible to estimate the revenues, the fine is fixed at between BRL6,000 and BRL60 million. There is also the possibility of an extraordinary publication of the decision in newspapers.

In civil proceedings, the person or entity involved in an illicit activity can be sentenced to full compensation for damages caused to public property. Other applicable penalties are: (i) loss of assets, rights or values obtained from the illicit

activity; (ii)) partial suspension or prohibition of activities,; (iii) compulsory dissolution of the legal entity; and (iv) prohibition against the receipt of donations, grants, subsidies or funding from public entities and financial institutions, during a period from one to five years.

The Anti-Corruption Law provides for the application of these penalties to Brazilian companies, associations and foundations and foreign legal entities with headquarters, a branch or representation in Brazil for the practice of certain illicit activities. The Law considers that parent companies, subsidiaries, affiliates or consortiums and successor companies in the case of a merger, the merger and joint venture (within the limits of the value of the transferred assets) are jointly liable for the fines and the repair of damages.

Individuals also are liable for illicit conduct. Officers, directors, directors, managers, employees are directly responsible for their involvement in corruption. Furthermore, the Anti-Corruption Law also provides for the possibility of piercing the corporate veil used to facilitate, conceal or disguise the practice of harmful acts proscribed by law.

Legal entities shall be subject to penalties even if (i) they do not obtain gain by practicing acts of corruption; (ii) if agents or employees acted without higher authorization; or (iii) if the illicit conduct is committed by an intermediary person or entity.

The Anti-Corruption Law provides for the possibility of entering into leniency agreements, in which the author of illegal conduct collaborates with the investigation in exchange for reduced penalties. In order to enter into a leniency agreement, certain requirements must be fulfilled: (i) the corporation shall be the first to express interest to cooperate in the investigation of an illegal act; (ii) the corporation shall cease its involvement in the investigated offense; and (iii) the corporation shall admit its involvement in the illicit act and fully cooperate with the investigation.

By signing the leniency agreement, the legal entity shall be exempt from the penalties of an extraordinary publication of the decision and restrictions on the receipt of donations, grants, subsidies or funding from public agencies and financial institutions, and may also qualify for a reduction in the amount of the penalty by two thirds.

The Anti-Corruption Law also provides internal compliance procedures – such as audits, codes of ethics, and incentives for whistle blowing – that will be considered to modulate the sanctions. Regulations on the requirements that such compliance programs must fulfill to be considered in reducing any penalties are still pending. However, it is recommended that companies adopt compliance programs in accordance with the best international practices, in order to inhibit the practice of conduct that may expose them to the above mentioned risks or that may benefit them. ■

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