MORAIS LEITÃO, GALVÃO TELES, SOARES DA SILVA
& ASSOCIADOS
SOCIEDADE DE ADVOGADOS

NEWSLETTER

ISSN 1647-272
NO. 20
DECEMBER 2014

EU AND COMPETITION LAW

IN THIS EDITION

ARTICLES

SPECIAL CONTRIBUTION: MATTOS FILHO

The new European Commission

Carlos Botelho Moniz / Luís do Nascimento Ferreira
cmoniz@mlgts.pt / lnferreira@mlgts.pt

Introduction

The Juncker Commission started its term of office on 1 November 2014. Between the innovations of the election process that preceded its entry into operation, the new rules of collegial functioning enacted by the current President of the Commission and a few controversies that marked the first month of activity, there are a number of novelties concerning the new composition of the executive body of the European Union and also high expectations as to its performance.

Greater democracy at the origin is always a good indicator but entails also added responsibility

For the first time, there was a direct link between the outcome of the European Parliament elections and the appointment of the President of the European Commission. This evolution is the result of a long-standing call from the European Parliament, which follows from Article 17(7) of the Treaty on European Union in the wording of the Lisbon Treaty.

This is also the first time that a European Commission takes office on time since the European Parliament hearings were introduced in 1994 under the Jacques Delors Commission. Based on a proposal submitted by the European Council Jean-Claude Juncker was elected by the European Parliament and, following the approval of the remaining college of Commissioners by this latter body, it can be justly said that the new Commission President corresponds also to the candidate chosen by the European Parliament.

> For the first time, there was a direct link between the outcome of the European Parliament elections and the appointment of the President of the European Commission

Juncker has been making a point of stressing the particular democratic legitimacy of the process that led him to his new functions and, consequently, of the mandate of the new Commission. In his very first opening statement before the European Parliament in the debate to retain the office of Commission President, he presented his Political Guidelines for a future political agenda named 'A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change'.[1]

In the mission letters addressed to the new Commissioners, Juncker highlighted that the Commission's relationship with the European Parliament is the source of the former's democratic legitimacy. Hence it calls upon the members of the Commission to take an active part in meetings of the European Parliament and even in debates held by national parliaments anytime there are discussions on Commission proposals.

A new way of working

One of the key components of the new Commission is to cautiously select its areas of activity. Juncker's agenda is focused on 10 policy areas deemed as strategic for the future of Europe: jobs, growth and investment, digital era, energy union, strengthening of the industrial base, deeper economic and monetary union, free trade agreements with the USA, initiatives in the area of justice and fundamental rights, policy on migration, stronger foreign policy and improvement of democratic actions.

> Juncker calls upon the members of the Commission to take an active part in meetings of the European Parliament and even in debates held by national parliaments anytime there are discussions on Commission proposals

Beyond this perimeter, effective responses are left to the initiatives of the Member States in line with the principles of subsidiarity and proportionality. One of the mottos of the Commission now is, in the words of its President: '*we cannot and should not do everything: I want the European Commission to be bigger and more ambitious on big things, and smaller and more modest on small things*'.

To facilitate this, the new Commission was organised in a different and singular fashion. Responsibility for the key areas of the Political Guidelines is now entrusted primarily to the Commission Vice-Presidents, which shall work closely with the Commissioners handling the relevant matters. It follows that the members of the Commission shall carefully coordinate among each other on the issues they are responsible for, under the supervision of the sectoral Vice-Presidents, who can draw on any service of the Commission whose work is relevant for their area of action in liaison with the relevant Commissioner.

In practice, the Vice-Presidents are empowered to act on behalf of the President and are competent to assess the extent to which the initiatives of the remaining Commissioners make sense from a political viewpoint. According to the guidelines of President Juncker: '*As a general*

[1] Available at http://ec.europa.eu/about/juncker-commission/docs/pg_en.pdf.

rule, I will not include a new initiative in the Commission Work Programme or place it on the agenda of the College unless this is recommended to me by one of the Vice-Presidents on the basis of sound arguments and a clear narrative that is coherent with the priority projects of the Political Guidelines'[2].

For instance, in the case of Commissioner Margrethe Vestager, responsible for competition, her mission letter[3] provides that projects in this field will be steered and coordinated by the Vice-President for Jobs, Growth, Investment and Competitiveness, the Vice-President for the Digital Single Market, and the Vice-President for Energy Union, whilst in the past the competition portfolio had autonomous and significant weight within the Commission. Former Commissioner Almunia was in fact one of the Vice-Presidents of the Commission presided by Durão Barroso and someone who led the work in this area with relative independence vis-à-vis the remaining Commissioners.

The new composition and organisation is likely to boost the Commission's action as a true collegial body and a team with better focus and more tuned to important priorities. Notwithstanding, with the introduction of the 'political threshold' of the Vice-Presidents and the need to foster cooperation between Commissioners with different areas and sensitivities, it is also possible that the decision process may become heavier and more complex.

As an illustration, and bearing again in mind the competition area, it suffices to confront the Political Guidelines presented by Juncker to the European Parliament with some recent initiatives taken by the Directorate-General for Competition to anticipate the potential sensitivity of a few future options. For example, in the energy field the Political Guidelines

THE NEW COMMISSION WAS ORGANISED IN A DIFFERENT AND SINGULAR FASHION. RESPONSIBILITY FOR THE KEY AREAS OF THE POLITICAL GUIDELINES IS NOW ENTRUSTED PRIMARILY TO THE COMMISSION VICE-PRESIDENTS, WHICH SHALL WORK CLOSELY WITH THE COMMISSIONERS HANDLING THE RELEVANT MATTERS

contain the idea that '*we need to strengthen the share of renewable energies on our continent. (…)* ***I therefore want Europe's Energy Union to become the world number one in renewable energies***' (emphasis in the original text); conversely, the Commission's Guidelines on State aid for environmental protection and energy for the period 2014-2020 provide, as a general principle, for a significant reduction of incentives (and the public instruments available) in favour of such technology, which inevitably works – as reality shows in several Member States – as a deterrence for investment in this field.

It might also be seen as ironic (or maybe not) that President Juncker selected as one of his competition priorities for the Commission's new term to fight against tax evasion,[4] just a few days ahead of notices of the alleged implementation of aggressive corporate tax avoidance schemes in Luxembourg (that would have apparently caused large losses in potential tax revenues to other Member States) supposedly approved during a period in which Jean-Claude Juncker held the office of Prime Minister in that country. In this regard, the Commissioner for Competition publicly confirmed that the Commission is conducting tax State aid investigations on this matter against Luxembourg and other Member States.[5] This situation also caused a motion of censure on the Commission, moved by a number of members of the European Parliament less than one month before the Commission took office, which ended up by being rejected by a strong majority.

Final remarks

With the presidency and composition of the Commission backed up by the European Parliament, this time in a manner that is particularly straight, Juncker's team is in favourable political conditions to perform a mandate that matches the expectations going forward at a time of fiscal consolidation of both public and private debt and growth promotion.

The new way of structuring the European executive body places important challenges in terms of the decision process. It is important that Commissioners are not held hostages of the Vice-Presidents in the technical areas of their portfolios. At the same time, in the Commission's activity that enables room for initiatives of a political nature, practice will have to show if the layering of the decisional proceedings and the concentration of power in several Vice-Presidents will not hamper the progress of the European Project. Ultimately, only time can assert if behind a new way of thinking there is indeed a new effective approach. ■

[2] Letter addressed to the European Parliament clarifying certain aspects on the role of the Commission Vice-Presidents, 25.9.2014, available at http://www.europarl.europa.eu/document/activities/cont/201409/20140930ATT90229/20140930ATT90229EN.pdf.
[3] Available at http://ec.europa.eu/commission/sites/cwt/files/commissioner_mission_letters/vestager_en.pdf.
[4] Mission letter to Commissioner Vestager, cit., p. 4.
[5] http://europa.eu/rapid/press-release_STATEMENT-14-1480_en.htm.

Choice and Innovation in Modern Food Retail

Joaquim Vieira Peres / Inês Gouveia
vieira.peres@mlgts.pt / igouveia@mlgts.pt

In the period between 2004 and 2012, choice increased across all Member-States and local markets analysed

Introduction

The European Commission made public in October 2014 the conclusions of a study titled "The economic impact of modern retail on choice and innovation in the EU food sector".[1], This study presented a comprehensive and exhaustive analysis of the EU retail food sector during the last decade. The study aimed at providing the Commission with solid quantitative data that is representative of the reality of the sector in order to allow it to adequately frame and assess an ongoing set of complaints and concerns relating to potential distortions in the food supply chain (in particular, alleged abusive behaviour in negotiations), which were not, however, backed by appropriate data regarding impact on the market.

Goals of the study and main conclusions

The study intended, in short, to analyse and measure the evolution of two realities: on one hand, choice, a concept covering both food choice – the number of references or "EANs" available in shops, the variety of packaging sizes, the variety of prices and alternative suppliers – as well as shop choice, measured by the alternative number of shops available to a consumer within a normal distance; on the other hand, innovation, a concept strictly covering product innovation and measured both in terms of new EANs introduced, range extensions, packaging innovations, new formulations and re-launch. The study further sought to qualify and assess the main drivers of choice and innovation, in particular, whether retailer and supplier concentration and the ratio between the two were important drivers of choice and innovation and what other drivers could be identified and measured.

In order to obtain a comprehensive and representative data sample, data were collected over an extended period of time (2004-2012) and covering different geographic areas – EU, Member-states and local level. The study comprised 105 pre-defined local markets (or "consumer shopping areas") across 9 Member-states (including Portugal), 23 product categories and 343 shops within the 3 typical modern retail food shop types: hypermarkets, supermarkets and discounts stores.

The study showed that, in the period between 2004 and 2012, choice (in all relevant dimensions except for price variety per product category) increased across all Member-States and local markets analysed, even though the annual growth rate was higher in the pre-crisis period (2004-2008) than afterwards (2008-2012).

Apart from aspects with an obvious impact on choice such as the characteristics of the shop (shop type and size), **the main drivers of choice were found to be the level of prosperity in the region where the shops were located (GDP/capita), the national turnover in the product category and local competition dynamics via a new shop opening in the local area (which was found to influence positively the choice available in pre-existing shops)**.

[1] Undergoing public consultation until 30.01.2015.

On the contrary **there was no evidence that the concentration of modern retail has influenced the level of choice available to consumers, even though some case studies suggested that the (concentrated) structure of modern retail can have a positive impact on choice. There was also no evidence that the concentration of suppliers has been an economic driver of choice.** Consistent with the above, there was no clear evidence that the measure of imbalance between modern retailers and suppliers had an impact on choice.

As for private labels, no evidence was found that a larger share of private labels (at the national or local level) curbed choice. On the contrary, up to a moderate penetration rate, private labels are associated with more choice (except for choice in terms of product price dimension) and only beyond a certain level (which varies depending on the product category) may a higher share of private label penetration be associated with less product variety.

As for innovation, the number of new EANs available in shops increased from 2004 to 2008 (+3,8%) but decreased thereafter (-1,2% in 2008-2010 and -5,3% in 2010-2012). The same trend was observed from 2008 on with the percentage of innovations in the total number of products available in shops. The scenario varied depending on the characteristics of the local markets and between Member States. In Portugal, for example, the number of innovations grew until 2008 and slightly decreased thereafter, even though the decrease was less than in other countries in the sample. In Spain, the trend for growth in innovation was consistent for all the relevant periods analysed (pre and post-crisis). Between 2004 and 2012 a modification in innovation trends could be observed, with new products or range extensions decreasing as the percentage of the total amount of innovations to the benefit of innovations of another kind.

The main drivers of innovation – other than shop characteristics - were found to be the level of employment in the region, retailers business expectations and the product category turnover at the national level. Other relevant drivers included competition in the form of new shop openings.

It is important to note that the econometric analysis was not fully conclusive regarding the existence of a negative correlation between greater retailer concentration and less innovation both at the local level (where the negative effects detected were sporadic or not significant) as well as at the national level.

As for concentration amongst suppliers, a negative impact was found between greater supplier concentration and less innovation, which is consistent with the idea that the pressure to innovate is stronger when competition is stronger.

In terms consistent with what is stated above, it can be observed that the **imbalance of concentration levels in favour of retailers is generally associated with more innovation, contrarily to what occurs in the opposite scenario (whenever suppliers are more concentrated than retailers)**.

Lastly, it could not be demonstrated that a larger share of private labels at the local or national level curbed innovation as the negative impacts verified were too small. However, beyond a certain level (which varies depending on the product category) a higher share of private labels seems to be associated with fewer innovative products being offered.

Comment

The study puts a complex reality into perspective and demonstrates that choice and innovation in modern food retailing are influenced by a multitude of different factors (macro-economic and others) **clearly contradicting the initial perception that the increase in retailers concentration or the potential imbalances of retailers towards suppliers causes a reduction in choice and in innovation**.

At the same time, the importance of drivers such as new entries at the local level, the characteristics of shops (type and size) and suppliers' concentration may serve as an indication of the areas likely to catch the Commission's or another enforcer's attention in the context of competition law enforcement (for example, merger control involving suppliers in concentrated procurement markets or merger control leading to concentrated local markets at the retail level) or in other legal contexts (as may be the case with legislation aiming at removing legal barriers to shop openings). ■

European Court of Human Rights determines that antitrust inspections at company's premises by competition authorities are subject to judicial authorisation

Eduardo Maia Cadete / Dzhamil Oda
maiacadete@mlgts.pt / d.oda@mlgts.pt

The European Court of Human Rights, in the case *Delta Pekárny a.s. vs. the Czech Republic*, registered under application No. 97/11, by ruling of 2 October 2014[1], condemned the Czech Republic for breach of Article 8 of the European Convention on Human Rights (***ECHR***), regarding the right to respect for private and family life, home and correspondence[2].

The applicant company before the European Court of Human Rights, Delta Pekárny a.s., is a limited company under Czech law with its registered office in Brno (in the Czech Republic).

This case appraised by the Strasbourg Court concerned an inspection carried out at the referred company's premises on 19 November 2003 in the context of administrative antitrust proceedings which were opened by the Czech National Competition Authority (***NCA***) on the same date and concerned an alleged breach of competition rules by the company.

According to the NCA's inspection report, the grounds for and purpose of the search at the premises were to examine documents in the context of those administrative proceedings. During the inspection NCA officials obtained access to certain letters from the company's representatives and, according to the report, were provided with copies of several documents. The applicant company was subsequently fined for refusing to allow an in-depth examination of its business data. Further, it judicially challenged the NCA decision, arguing, among other points, that the NCA carrying out an inspection without having received prior judicial authorisation was contrary to domestic law and to the ECHR. All of the appeals lodged by the applicant company in the Czech jurisdiction, including a constitutional appeal in 2009, were dismissed.

> This judgement of the European Court of Human Rights is particularly relevant, as it indirectly signals that EC Regulation 1/2003, *maxime* Article 20, which grants the European Commission the power to conduct inspections at company's premises without any prior judicial control, can be deemed incompatible with the European Convention on Human Rights; and possibly will lead the European Union legislature to amend the provision

The applicant company before the European Court of Human Rights claimed in particular that the executed inspection of its premises without any *ex ante* judicial supervision had amounted to a breach of its rights as protected by Article 8 of the European Convention on Human Rights. In this setting, the Czech Government sustained in the proceedings before the European Court that the domestic legislation (indirectly establishing in its motion a parallelism with Article 20 of EC Regulation 1/2003[3], regarding the European Commission's powers in the setting of companies' inspections) allowed the inspection to be carried out without any prior judicial authorisation, thereby granting the NCA the power to access and review the company's business documents.

The European Court of Human Rights in a October 2014 judgement establishes that absence of prior judicial authorisation for the NCA inspection and, as a consequence, lack of effective judicial control of the necessity of inspection measures do not offer adequate guarantees against arbitrariness; thus considered such administrative interference in the applicant's right as disproportionate *vis-à-vis* the aim pursued by the NCA and, therefore held that Article 8 of the European Convention on Human Rights had been breached by the Czech Republic.

This judgement is particularly relevant, as it indirectly signals that EC Regulation 1/2003, *maxime* Article 20, which grants the European Commission the power to conduct inspections at company's premises without any prior judicial control, can be deemed incompatible with the European Convention. Further, and as since the entry into force of the Lisbon Treaty, which provides in Article 6 that Fundamental Rights, as guaranteed by the European Convention on Human Rights, constitute general principles of European Union law, Article 20 of EC Regulation 1/2003 should be modified by the European legislature, *de jure* establishing an *ex ante* judicial control on companies inspections performed by the European Commission. ■

[1] Ruling accessed and available at http://www.echr.coe.int/Pages/home.aspx?p=home&c=.
[2] ECHR Article 8, under the title "Right to respect for private and family life", states: "1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."
[3] EC Council Regulation No. 1/2003, 16 December 2002, on the implementation of the rules on competition laid down in Articles 101 and 102 of the Treaty on the Functioning of the European Union.

EU Directive provides incentive for actions for damages resulting from competition infringements

Gonçalo Machado Borges
gmb@mlgts.pt

On 5 December 2014, Directive 2014/104/EU of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (the "Directive") was published. The Directive, which must be implemented by 27 December 2016, seeks to encourage the private enforcement of competition law by making it easier for those injured by competition infringements to bring actions for damages in order to ensure full compensation.

The Directive introduces several important innovations which, in the case of many Member-States, may require amendments to procedural and substantive rules of national law. The Directive is especially relevant in the context of the following issues: disclosure of evidence; binding effect of final decisions by national competition authorities; limitation periods; joint and several liability of the infringers; and a presumption of harm in the case of cartel infringements.

Regarding the ***disclosure of evidence***, the national courts may order the disclosure by defendants or third parties, of specified items or categories of evidence that are relevant. However, disclosure must be limited to what is proportionate and in addition the claim for damages must be plausible. Furthermore, the categories of evidence must be defined as precisely and narrowly as possible, in order to avoid "fishing expeditions".

Evidence included in the file of a competition authority is covered by special rules. In the case of certain types of documents, such as *leniency statements and settlement submissions, disclosure is not permitted under any circumstances*, which seeks to protect the effectiveness of the leniency regime as a means of uncovering and investigating cartels (although this protection does not extend to pre-existing documents submitted with a leniency statement, for instance, which may raise practical issues).

An important aspect of the Directive is that it confers a ***binding effect on final infringement decisions*** by national competition authorities – that is to say, before the national courts, an infringement of Articles 101 or 102 of the Treaty on the Functioning of the European Union ("TFEU") is hereby deemed to be "irrefutably established". In the case of decisions by competition authorities of other Member-States, these are to be accepted as *prima facie* evidence of the infringement.

Regarding the ***limitation period*** that applies to a claimant's right to compensation, the Directive determines that this period does not begin to run (i) before the infringement has ceased and (ii) before the claimant knows (or can reasonably be expected to know) of the infringement. In addition, the limitation period for bringing an action for damages *must not be less than 5 years* and should be suspended during the course of the investigation by the competition authority (the suspension shall only end, at the earliest, one year after the proceedings are terminated).

Two other innovations introduced by the Directive stand out: on one hand, the introduction of ***joint and several liability*** by the infringers in cartel cases for the compensation in full of the harm caused (with the exception of immunity recipients, who benefit from a substantial limitation to their liability) and, on the other, ***a rebuttable presumption of harm*** in the event of cartel infringements (presumption which, understandably, does not extend to the quantification of the harm suffered).

These and other measures introduced by the Directive are certain to bring an added incentive to claimants to resort to actions for damages, seeking compensation for harm caused by infringements to the competition rules (Articles 101 and 102 TFEU), encouraging the private enforcement of competition law based on equivalent solutions regarding access to the courts in the various Member-States. ■

Evidence included in the file of a competition authority is covered by special rules. In the case of certain types of documents, such as leniency statements and settlement submissions, disclosure is not permitted under any circumstances

Farminveste/Pararede - First Settlement for Gun-Jumping in a merger case

Pedro de Gouveia e Melo / Miguel Cortes Martins
pgmelo@mlgts.pt / mcmartins@mlgts.pt

Under the settlement procedure, the defendants received a 33% reduction of the fine originally imposed, in compensation for confessing the facts and waiving their right to a judicial appeal

In a press release of August 2014, the Portuguese Competition Authority ("AdC") announced its first settlement in an infringement procedure for the early implementation of a concentration subject to mandatory filing ("gun-jumping"), in violation of the stand-still obligation of the Competition Act. Under the settlement procedure, the defendants received a 33% reduction of the fine originally imposed, in compensation for confessing the facts and waiving their right to a judicial appeal[1].

The case

The case goes back to January 2013, when the AdC imposed a fine of 150,000 Euro on the Portuguese Pharmacies Association (*Associação Nacional de Farmácias*, "ANF") and two of its subsidiaries, for the early implementation of the concentration *Farminveste/Pararede*, a transaction subject to mandatory filing under the previous Competition Law (18/2003), without waiting for the AdC's approval.[2] This decision was however annulled on appeal by the Court of Competition, Regulation and Supervision in September 2013. The court found that the AdC violated the defendants' rights of defence for not conducting a hearing on the implications of new facts taken into account in the final decision (although such facts were brought to the AdC's knowledge by the defendants themselves).[3] The case was sent back to the AdC, which elected to close it by means of a settlement procedure.

The settlement procedure

The settlement procedure was introduced in 2012 by the new Competition Act (19/2012). Although destined primarily to cartel cases, the settlement procedure in Portugal is in theory applicable for all infringements to the Competition Law, and has advantages both for the AdC and the defendants: the Authority is able to close and decide cases more quickly (thereby allocating resources more efficiently to new cases), while the defendants, besides benefitting from a reduction in the fine, will also save time and costs that would be incurred in a lengthier procedure and in a subsequent judicial appeal.

Farminveste/Pararede is only the second settlement decision taken by the Authority. The first settlement decision dates from June 2013 and concerns the *Polyurethane foam* cartel.

---

[1] Press Release 11/2014, of 7 August 2014
[2] See [March 2013 Newsletter - hyperlink] [http://www.mlgts.pt/xms/files/Publicacoes/Newsletters_Boletins/2013/EUROPEU_DIR_270313_PT_2P.pdf]
[3] See article "Farminvest/Glintt sequel – more than it meets the eye", published in International Law Office, on 23October 2014, available at http://www.mlgts.pt/xms/files/Publicacoes/Artigos/2014/Farminveste_Glintt_sequel___more_to_it_than_meets_the_eye_-_International_Law_Office.pdf

Settlement and leniency

Despite the advantages inherent to the settlement procedure, this procedure may collide with the so-called "leniency" regime, under which companies involved in cartels may benefit from immunity from fines, or reduction in a fine that would be otherwise be imposed, for cooperating with the AdC. Immunity is granted to the first company that reports an unknown infraction (or that presents evidence that proves its existence), whereas reductions (up to 50%) are given to the companies that strengthen the AdC's case by submitting evidence of significant added value.

The two instruments are supposed to be complementary, as they have different purposes. The leniency regime is intended to incentivize the disclosure of cartels that would otherwise remain secret, while the settlement procedure only aims at obtaining procedural efficiencies and ensuring a swift conclusion of a case.

Under Portuguese law the AdC is entitled to determine the amount of the settlement discount on a case-by-case basis. However and as acknowledged by the Authority, granting a settlement reduction which is equivalent to, or higher than, the reduction granted to a leniency applicant could undermine the effectiveness of the leniency mechanism. With the prospect of obtaining at any rate a high discount for settling the case, fewer companies would apply for leniency, thereby jeopardizing the discovery of new cartels.

In this regard it is important to note that in the *Polyurethane foam cartel* decision, the first case settled by the Authority, the reduction in the fine was between 38% and 40% of the original fine, whereas the defendants in *Farminveste/ Pararede* received discounts of 33%. These reductions are significantly higher than the fixed 10% reduction defined by European Commission for settlement procedures at the European level, and which, according to AdC, may be used as a *first reference*.

Comment

The challenge facing the AdC therefore resides in finding values that make the settlement procedure viable, but not to the extent of depriving the leniency regime of its meaning, since at present leniency is recognised as the main investigation mechanisms at the AdC's disposal to find new cartels.

As *Farminveste/Parade* shows, the AdC strongly encourages the use of settlement for all infractions to the Competition Act (cartels, abuse of dominance or merger control infringements), if it is deemed appropriate. It is therefore likely that the use of this instrument will become more frequent in the future. ■

The challenge facing the AdC resides in finding values that make the settlement procedure viable, but not to the extent of depriving the leniency regime of its meaning, since leniency is recognised as the main investigation mechanisms at the AdC's disposal to find new cartels

MATTOS FILHO > Mattos Filho, Veiga Filho, Marrey Jr e Quiroga Advogados

SPECIAL CONTRIBUTION MATTOS FILHO ADVOGADOS

CADE stipulates pre-merger control rules for collaboration agreements

www.mattosfilho.com.br

On 5 January 2015 a new regulation issued by the Administrative Council for Economic Defence (CADE) providing guidelines on what types of collaboration/association agreements shall be subject to merger control in Brazil came into force. CADE Resolution No. 10 sheds more light on the definition of "collaborative/associative" agreements and stipulates in which cases these contracts must be submitted to CADE for review. Before the new rules, the issue had not been addressed by CADE and raised questions among several companies doing business in Brazil.

Under Law No. 12,529, dated 2011, collaborative agreements must mandatorily be filed with CADE whenever the parties involved meet the turnover thresholds found in the law – i.e., at least one of the economic groups involved in the transaction recorded gross revenues in Brazil in excess of BRL 75 million (approximately € 26 million) and one of the other groups involved recorded gross revenues of BRL 750 million (approximately € 261) in the fiscal year immediately prior to the transaction.

However, Brazilian law did not provide a clear definition of what these collaborative agreements are. In the absence of such definition, questions on which agreements should be filed were frequently raised. In order to avoid risks associated with failure to submit transactions to CADE for review, which include fines and having the transaction declared null and void, many companies would file transactions that raised no antitrust concerns, such as supply agreements, distribution agreements, or non-exclusive technology licensing contracts. CADE Resolution No. 10 was issued exactly with the purpose of filling this gap.

According to the new rules, agreements set to last more than two years and that lead to an interdependent relationship between the parties must be filed with CADE. Agreements fall within this definition if (i) the parties are competitors in the market that is the subject matter of the agreement, as long as their combined market share is in excess of 20%; or (ii) the transaction gives rise to a vertical link between the parties in relation to the subject matter of the agreement, provided that (a) at least one of them has 30% market share or more in one of those markets; and (b) exclusivity obligations arise from the agreement, or, at least, profit/loss sharing clauses are contained therein.

Transactions that raise no competitive concerns are still caught by the regulations. The new rules are however a step forward in relation to the previous scenario, since they bring more clarity and objectivity to the definition of the agreements that must be filed with CADE. ■