



## EU AND COMPETITION LAW

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# Draft Proposal for new Competition Act under public consultation

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THE GOVERNMENT BELIEVES  
THAT THE NEW LEGISLATION  
WILL FOSTER A MORE  
COMPETITIVE ECONOMY  
AND BOOST CONFIDENCE  
AMONG ECONOMIC OPERATORS

 In November 4, 2011, the Council of Ministers approved a draft proposal for a new Competition Act ("Proposal") later submitted to public discussion. The proposal is part of the commitments that Portugal has made to the European Union, the European Central Bank and the International Monetary Fund under the agreement on Portugal's international financial assistance programme.

The government believes that the new legislation will foster a more competitive economy and boost confidence among economic operators as the Portuguese economy needs a Competition Policy that helps the country to recover.

MLGTS accepted the challenge and submitted a document with observations to the Proposal, pointing out some key-issues, at both formal and substantive levels, that, in our view, require further analysis. This update briefly summarises some of the main features of our observations.

At the formal level, two comments on the structure of the Proposal. First, the reasons why competition and clemency regimes are presented as annexes to the law are not clear, considering that these are in essence the regimes under review. There are clear advantages of having both regimes in the same legislative text, in particular, coherence and easy interpretation of

law. In fact the structure as presented in the Proposal renders more difficult and complex the citation and referral of rules with unnecessary difficulties in the application of law.

At the substantive level, the shift from the principle of legality to the principle of opportunity in matters of **promotion and defense of competition** linked to investigative powers given to the Portuguese Competition Authority ("PCA") is worth some comments.

Article 6 of the Proposal gives the PCA discretionary powers to decide by itself with no appeal to a court of law which complaints should or not be investigated. The PCA should be provided with the means and resources to better perform its duties regarding restrictive practices in accordance to priorities internally defined. However equilibrium between these concerns and the rights of the complainants is vital. The law should clearly establish the criteria according to which an investigation may not be opened pursuant to a complaint and impose upon the PCA an obligation to state the reasons that led to such decision.

The amendments presented in the Proposal about **restrictive practices** clearly throw out of balance the powers of investigation, decision and sanction given to the PCA, on one side, and the defense rights of the undertakings, on the other.

And this imbalance is evident in various matters, among which we highlight: a general rule that reduces to five working days the time limit for the defendants to exercise their procedural rights, and to ten working days the time limit to present their defense to the accusation, which are manifestly insufficient to the effective exercise of the defense rights and contrast with the absence of any time limit

imposed upon the PCA to conclude the investigations; the increased investigative powers to conduct searches and seize documents without parallel in any other national misdemeanor regime; the possibility conferred to the PCA to present a new accusation after the production of evidence that may include a change of the facts and juridical qualification of the facts first alleged.

The legal recognition of suspensive effect to **appeals** against condemnatory decisions for restrictive practices (replacing the devolutive effect) raises serious doubts of its compatibility with the Portuguese Constitution, in particular with the principle of presumption of innocence (*in dubio pro reo*). In addition, there is no comparison between this legislative option and any other punitive regime in Portugal, penal or misdemeanor.

If the Proposal's goal is to avoid dilatory pleading, there are other ways, less severe and that do not breach constitutional principles, to achieve that same end. The Proposal itself presents the most effective mean to deter an abusive use of the appeal mechanism: the *reformation in pejus*.

In addition, the legal recognition of suspensive effect to appeals against decisions which are not final but may include accessory sanctions such as the prohibition to participate in public tenders or the obligation to divest seems totally inadequate. What if the decision is reversed by the judicial court? What if the financial

THE REFORM MOMENTUM  
SHOULD ENSURE THAT  
CONSTITUTIONAL RIGHTS  
OF THE UNDERTAKINGS  
ARE RESPECTED



sanctions awarded are annulled or reduced by the judicial court? Are those sanctions refunded to the undertaking? What is the time frame? Are interests paid in those cases? Or maybe a monetary correction is done? The fact that the Proposal does not present a single answer to these questions strongly suggests that more reflection is required.

Related to restrictive practices, the Proposal proposes amendments in matters of **studies, inspections and audits** (Articles 61° and 62°) that do not, in our view, properly guarantee the rights of defense of undertakings. Once more the PCA is given powers similar to sanction powers (notably in matters of the search and seizure of documents) when performing inspections or audits without any jurisdictional control, which is not acceptable.

In matters of **merger control**, we highlight some features of the Proposal that should be, in our view, improved. Firstly, it is vital to clarify the scope of Article 36 regarding the criteria to notify a concentration. The wording of the Proposal is unnecessarily confusing, in particular the wording of the market share criterion.

The test for ascertaining the impact of a concentration on competition should include the criteria that both prohibit and authorise a concentration, and different from these two a third criterion to open phase 2 of the procedure. In this context, the criterion of “serious doubts” as established in the European regulation seems more appropriate. Moreover, the maintenance of the suspension of the time period for the PCA to decide whenever a request for information is sent to the notifying party(ies) as a general rule does not seem the best solution. We suggest an approximation to the European regime (which makes a distinction between simple requests for information and requests resulting from a formal decision)

to induce more discipline and celerity for both PCA and undertakings. Finally, concerning the conduct of the procedure, legal certainty (element of importance to undertakings) and the flexibility required for the PCA to conduct the procedures more efficiently should be made compatible in the Proposal.

Finally, in matters of **infractions and sanctions**, it is our opinion that further analysis is required and should be performed. Particular relevance should be given to three aspects of the Proposal. First, the Proposal should clarify that fines applied by the PCA are calculated on the basis of the Portuguese turnover. Secondly, the regime established in the Proposal to association of undertakings deviates from the European regime, the national law, and, more importantly, from the national jurisprudence thus requiring further analysis. Lastly, the Proposal extends the statue of limitation which in some cases becomes longer than established by penal law, which is excessive and disproportionate. ■

THE WELCOMED OBJECTIVE  
OF DISCOURAGING  
ANTI-COMPETITIVE BEHAVIOURS  
THROUGH AN EFFECTIVE  
AND FAST APPLICATION  
OF COMPETITION RULES  
DOES NOT LEGITIMATE ALONE  
SOME OF THE RULES DRAFTED  
IN THE PROPOSAL

#### FINAL COMMENT

The public consultation is a unique opportunity for all interested parties to participate in the revision process of such important legal regime, particularly, at the economic level, and which the government intends to change so dramatically. It is also an opportunity for the government to receive opinions from undertakings, academia and legal professionals regarding the difficulties and concerns of over eight years of effective application of the current Competition Act.

The reform momentum should however ensure that constitutional rights of the undertakings are respected, in particular through an effective jurisdictional control,

if the legislator wishes to strength the powers already conferred to the PCA.

The welcomed objective of discouraging anti-competitive behaviours through an effective and fast application of competition rules does not legitimate alone some of the rules drafted in the Proposal, as previously stressed. For these reasons, we believe to be of utmost importance to perform an additional thorough analysis of some key points of the Proposal. It is expected that the government openly review the document accordingly, at least in some matters, and ensure equity and legal certainty to all undertakings.



# European Court of Human Rights confirms that antitrust procedures have a *criminal* nature for the purpose of Article 6 of the European Convention of Human Rights regarding the right to a fair trial

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## INTRODUCTION

**T**he European Court of Human Rights (ECHR) in the judgment rendered in September 27, 2011, case *Menarini Diagnostics S.R.L. vs. Italy*, complaint 43509/08, confirmed the application of Article 6(1) of the European Convention of Human Rights (*Convention*), regarding the right to a fair trial in criminal cases, in competition law procedures.

The Court has interpreted Article 6 broadly in terms of its respective application to sanctionary procedures (including disciplinary and administrative proceedings), on the grounds that the provision entails a fundamental importance to the operation of democracy: “In a democratic society within the meaning of the Convention, the right to a fair administration of justice holds such a prominent place that a restrictive interpretation of Article 6 (1) would not correspond to the aim and the purpose of that provision.”<sup>1</sup>

## CASE BACKGROUND

Menarini is an Italian pharmaceutical company based in Italy. In 2001 the *Autorità Garante della Concorrenza e del Mercato (AGCM)*, the independent Italian competition authority, investigated

the company for the alleged breach of antitrust rules. In a decision of 30 April 2003, AGCM fined the company 6 M€ for price fixing and market sharing in the national diabetes diagnosis test market. All the defendant company’s appeals against that decision were rejected. Relying on the referred article of the Convention, regarding the right to a fair trial, Menarini submitted a complaint before the ECHR stating that in the Italian jurisdiction it had no access to a court with full jurisdiction, as the national court review was apparently restricted to verifying the legality of the AGCM decision. Thus, under this legal and factual framework, the company maintained in the complaint that Italy had breached Article 6 of the Convention.

## THE COURT CONFIRMS THE APPLICATION OF ARTICLE 6 TO ANTITRUST PROCEEDINGS

The decision of the ECHR of September 27, 2011, confirmed that the procedure against Menarini in the Italian jurisdiction had a “criminal nature” for the purpose of Article 6 of the Convention. The elements taken into account by the court to determine whether the procedure had a criminal nature, based on settled case law, were: (i) the classification of the infringement by the national legislation; (ii) the nature of the offence; and (iii) the nature and severity of the applied penalty.

The infringement was formally qualified by the domestic legislation as having an administrative nature and not criminal, but this criterion was not determinant for the ECHR. In relation to the nature of the infringement, the court stated that the application of competition rules by a competition authority affecting the general interests of economic agents has already been held to be *criminal* for the purpose

Article 6. In addition, the amount of fine applied to Menarini and the respective deterrent effect led the ECHR to determine that the sanction had a *criminal nature*.

In this context, we recall what the ECHR has stated in the case of *Engel and others v. the Netherlands* for the purpose of applying Article 6: “If the Contracting States were able at their discretion to classify an offence as disciplinary instead of criminal, or to prosecute the author of a “mixed” offence on the disciplinary rather than on the criminal plane, the operation of the fundamental clauses of Articles 6 and 7 would be subordinated to their sovereign will. A latitude extending this far might lead to results incompatible with the purpose and object of the Convention.”<sup>2</sup>

Notwithstanding the fulfillment of the admissibility criteria regarding the complaint – as Article 6 of the Convention was considered applicable to Menarini’s case –, the European Court of Human Rights considered that the Convention had not been infringed by Italy, as the Menarini case was assessed at the national level by a judicial court with full jurisdiction to review the administrative decision. ■

## COMMENT

The “Menarini” ruling of the European Court of Human Rights paves the road to a material and significant enhancement of a company’s rights of defense in antitrust cases based on Article 6 of the Convention and on the respective seminal case-law of the European Court of Human Rights which materializes in a detailed manner the principles associated with the due process of law.

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AND THE RESPECTIVE  
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A CRIMINAL NATURE

<sup>1</sup> *Delcourt v. Belgium*, 17 January 1970, § 25.

<sup>2</sup> *Engel and others v. the Netherlands*, 8 June 1976, § 81.

# Best practices: the European Commission reforms procedures in antitrust cases

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**I**n October 2011, the European Commission agreed a package of measures concerning the investigation of cartels and abuses of dominant position, and adopted recommendations aimed at enhancing transparency and increasing the predictability of cases.

A Commission notice was approved on the best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, published in the Official Journal on 20.10.2011<sup>1</sup>: This notice consolidated certain guidelines that were already followed by the Commission and introduced some important features as the result of a public consultation during 2010.

Best practices to be implemented in the course of antitrust proceedings include measures such as: (i) making public the opening of proceedings, through a press release and publication on the DG Comp website; (ii) holding State of Play meetings between the Commission and the parties subject to the proceedings at key stages (including the possibility of 'triangular meetings', inviting the parties and, eventually, the complainants and/or third parties); or (iii) providing the parties, at the early stages of an investigation, with access to a non-confidential version of the complaint (or of other "key submissions" in the file, such as economic studies, for example).

The notice further incorporates several measures to strengthen the publicity and transparency of proceedings initiated by the Commission, with emphasis on: (i) providing the parties, in the statement of objections, with the main elements relevant to the calculation of possible fines (including the relevant sales figures and

years to be considered); and (ii) publication on the DG Comp website of decisions to reject complaints (if the complaints are not withdrawn following the Commission's preliminary negative conclusion).

In addition to this best practices notice, a Decision was also adopted widening the scope of the Hearing Officer's functions<sup>2</sup>, in the context of its duty to safeguard the effective exercise, by the parties subject to proceedings and other interested parties, of their procedural rights in antitrust cases.

The hearing officer's functions cover a wide range of matters, including the power to: (i) resolve issues concerning legal professional privilege and the confidentiality of attorney-client communications; (ii) assess situations where the addressee of a request for information refuses to reply to questions invoking the privilege against self-incrimination; or (iii) decide on requests for an extension of the time limits for replying to a decision requesting information.

Furthermore, from now on, the hearing officer will have additional powers in the preparation and organization of oral hearings in cases concerning Articles 101 and 102 TFEU and in merger proceedings, and will also be required to prepare an interim and a final report on the effective exercise of the procedural rights of the undertakings involved.

These changes brought about by the Commission seek to reinforce the parties' rights of defense in antitrust cases, encouraging their participation throughout the proceedings and contributing to greater transparency. ■

THE EUROPEAN COMMISSION  
AGREED A PACKAGE  
OF MEASURES CONCERNING  
THE INVESTIGATION OF CARTELS  
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PREDICTABILITY OF CASES

<sup>1</sup> 2001/C 308/06.

<sup>2</sup> Decision of the President of the European Commission of 13 October 2011 (2011/695/EU).





## Member States subject to financial penalties for not recovering illegal State aid

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A recent judgment of the European Court of Justice has for the first time imposed financial sanctions on a Member State for the failure to recover State aid previously declared to be incompatible with European Union (EU) law.

In case C496/09 *Commission v Italy (II)*, of 17 November 2011, the Italian Republic was ordered to pay both a lump sum of Euro 30 million and a substantial penalty payment (calculated by multiplying a basic amount of Euro 30 million by the percentage of the incompatible aid not yet recovered) for not complying with a Court ruling of 2004, pursuant to which Italy was bound to recover aid previously declared to be incompatible with EU law by the European Commission.

### THE DUTY TO RECOVER INCOMPATIBLE STATE AID

When the European Commission concludes that a notified State aid measure is incompatible with EU law, the Member State concerned cannot put the measure into effect. The Treaty provides for a stand-still obligation until a final Commission decision is adopted, and if the incompatible State aid was not notified, or it was meanwhile put into effect, the Member State should recover the aid from its beneficiaries, with interest. If the Member State does not comply with this decision, the Commission may refer the matter directly to the Court of Justice.

### COMMISSION V ITALY II

This case goes back to 1999, when the Commission decided that certain aid granted by Italy to promote employment (by a reduction of the social security contributions paid by companies by recipient companies) were incompatible with the Internal market, and ordered its immediate recovery. As Italy did not comply with the decision, the Commission in 2002 initiated infringement proceedings

in the Court of Justice, which declared on 1 April 2004 that Italy had failed to fulfill its obligations (*Commission v Italy (I)*).

The Treaty requires Member States to take immediately the necessary measures to comply with a judgment of the Court. In 2009, considering that Italy had still not adopted the necessary measures to recover the incompatible aid, the Commission started a second infringement case (*Commission v Italy (II)*), where it asked the court to impose both a lump sum and a penalty payment until full compliance with the 2004 Court judgment.

In this second case, the Court started by observing that, on the reference date (1 April 2008), the aid that had been wrongly paid had not been fully recovered by the Italian Authorities. Italy invoked a temporary absolute impossibility of recovering the incompatible aid because of the large number of recipient undertakings and of the non-availability of information necessary to quantify the sums to be recovered. This argument was summarily rejected by the Court, noting that, under settled case-law, neither internal difficulties nor the need to examine the individual situation of each recipient can justify a failure to comply with a Court judgment. The Court therefore declared the infringement as requested by the Commission.

### HEAVY FINANCIAL SANCTIONS FOR THE NON-RECOVERY OF ILLEGAL AID

The failure by Italy to comply with the 2004 judgment led the Court to impose for the first time heavy financial sanctions on a Member State for the non-recovery of wrongly paid aid. A penalty payment was found to be an appropriate measure by which to encourage Italy to take the necessary measures to put an end to the infringement. According to the Court, the Treaty rules on competition, in particular

those have a “vital nature” and “are the expression of one of the essential tasks with which the EU is entrusted. The failure to recover wrongfully paid aid therefore was a serious infringement, and the Court imposed a penalty of an amount calculated by multiplying the basic amount of Euro 30 million by the percentage of the unlawful aid not yet recovered, for every six months of delay.

The seriousness of the infringement also led the Court to apply, cumulatively, a lump sum payment of Euro 30 million, as a deterrent measure, in order to effectively prevent the future repetition of similar infringements of EU law. The Court considered relevant that was a ‘repeating offender’, as it had already been the subject of a number of judgments for its failure to recover wrongly paid State aid.

### FUTURE IMPLICATIONS FOR MEMBER STATES

*Commission v Italy (II)* reminds Member States that the granting of State aid without previous notification and approval by the Commission may entail serious financial consequences. It also emphasizes the importance of full compliance by Member States with the duty to recover incompatible State aid from the recipient undertakings.

Recovery operations are frequently complex and difficult to implement, especially when recipients are numerous, amounts granted are small and recovery decisions are challenged in the national courts. Such difficulties however, even if significant, do not justify non-compliance with a ruling of the Court of Justice. Considering that the Commission and the Court have shown willingness to penalize heavily the non-recovery of aid, national authorities have increased incentives not to grant State aid without first ensuring that it is compatible with EU law. ■

# General ban on Internet sales found in contradiction with competition law – the “*Pierre Fabre*” case

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**T**he Court of Justice of the European Union (CJEU) has recently ruled on the (in)admissibility, under EU competition law, of a general ban on Internet sales imposed in the context of a selective distribution system.<sup>1</sup>

## MAIN FACTS

Pierre Fabre Dermo-Cosmetique SAS (“Pierre Fabre”), distributes its cosmetics and personal care products (Avène, Klorane, Galénic and Ducray brands) under selective distribution agreements that include an obligation that such products be sold exclusively on a physical space and in the presence of a qualified pharmacist (the “contended clause”). Such requirements are, in practice, equivalent to a general ban on Internet sales for all of the referred products.

Pierre Fabre justified the contended clause on the grounds of the specific nature of the products at stake (healthcare products involving the risk of allergic reaction), which imposed a specialist’s personal advice, based on a direct observation of the client. It further argued that the on-line sales ban was necessary to prevent the risks of counterfeit and free riding between the different authorised outlets.

The company was fined by the French Competition Council, which considered that the contended clause had the object of restricting competition (no assessment of effects being required) and disputed, furthermore, its ability to benefit from the block exemption of Regulation (EC) n.º 2790/1999 (which confers a presumption of liability to the agreement) or to an individual exemption (under which potentially anti-competitive agreements can be justified if they lead to an overall net competitive effect). The Council further ordered Pierre Fabre to modify its distribution agreements.

Pierre Fabre appealed the fining decision to the “Cour d’Appel de Paris” (the “referring court”), which in turn, decided to stay the proceedings and to address the CJEU a set of questions related with the interpretation of the applicable legal provisions.

## THE QUESTIONS ASSESSED BY THE CJEU

(i) Does the contended clause have as object a restriction of competition?

In the present case, an answer to this question would depend on whether or not the qualitative requirements imposed upon the Pierre Fabre authorised retailers (which, as referred, resulted in practice in a prohibition of on-line sales) constituted admissible qualitative requirements, in particular, if they were necessary to assure the adequate distribution of the products at stake (taking into account the product’s quality and appropriate use).

With a purpose of providing the referring Court with the points of interpretation of EU law, the CJEU began by referring to previous case-law relating to state measures that prevented the on-line sale of over-the-counter medicine sales and contact lenses. Such case-law states that justifications based on the need to provide individual advice to the customer and to ensure its protection against the incorrect use of products were not valid justifications for state measures that breach the EU principle of free movement of goods. Despite the difference in legal backgrounds between the present case and the evoked case-law, the Court’s reference suggests that the need to provide individual advice or to assure the product’s proper use are not a legitimate justification for restriction on the on-line sales of cosmetics.

The CJUE further refused Pierre Fabre’s argument that the prohibition of on-line

## THE NEED TO PROVIDE INDIVIDUAL ADVICE TO THE CUSTOMER AND TO ENSURE ITS PROTECTION AGAINST THE INCORRECT USE OF PRODUCTS ARE NOT VALID JUSTIFICATIONS FOR RESTRICTION ON THE ON-LINE SALE OF COSMETICS

sales was necessary to preserve the image of prestige of the products at stake.

The Court concluded – without solving the underlying question – that the dispute clause would amount to a restriction by object where, following an individual and specific examination of the content and objective of that contractual clause and the legal and economic context of which it forms part, the referring court finds that, having regard to the properties of the product at issue, the clause is not objectively justified.

(ii) The possibility of benefiting from a block exemption or from an individual exemption

A divergent interpretation on the provisions of Regulation n.º 2790/1999 was on the basis of the dispute regarding the possibility to benefit from the block exemption: Pierre Fabre argued that the prohibition of on-line sales was the same as prohibiting a member of its selective distribution system to operate from a “non-authorised place of establishment” (which is permitted by the regulation); the CJEU considered such an interpretation was incorrect insofar as the reference to a “place of establishment” referred only to points of sale for direct sales. The CJEU further refused the possibility of a broad

<sup>1</sup> Case C-439/09, judgment of Court of the European Union of 13.10.2011.



interpretation of the concept, as intended by Pierre Fabre.

For the CJEU, the restrictions imposed should qualify as “restrictions of active or passive sales imposed upon end users by members of a selective distribution system operating at retail level...” which excluded the application of the regulation (and therefore, of the underlying presumption of legality conferred on the distribution agreements).

Finally the CJEU acknowledged that even in the absence of a presumption of legality referred to above the parties in the agreement should be able to claim and prove the requirements laid down in n.º 3 of art. 101º TFUE and, as a result thereof, to benefit from an individual exemption. Such an individual exemption is however to be assessed by the referring court. ■

#### COMMENT

Until the issuance of this judgment and to the best of our knowledge, the CJEU had never been asked to assess the admissibility of a general ban on Internet sales in the context of a selective distribution system, in particular in light of competition law rules. The conclusions reached by court did not come as a surprise. The guidance given to the referring court however, was minimal and further elaboration on some key points would have been welcomed (considering the past practice on selective distribution in general and the novelty of the “Internet issue” in this context).

The adoption, in the meanwhile, of a new set of Guidelines of the European

Commission<sup>2</sup> provide companies with more detailed and updated indications on the possibilities and limitations they face in relation to the use of the Internet.

Reading through the Guidelines, it is now clear that a supplier cannot prevent its distributors from using the Internet to sell their goods, even though the supplier may impose certain requirements to such use, in particular, when necessary to comply with the core aspects of the distribution system at stake (following a *rationale* similar to that which justifies restriction on offline distribution) as well as require that the distributor also operates physical outlets.

<sup>2</sup> Which accompany Regulation (EU) No 330/2010 that replaced Regulation (EC) no. 2790/1999 without however introducing substantial changes to the relevant issues here.

## Best practices on cooperation between national competition authorities in multijurisdictional merger cases

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MULTIPLE FILINGS ENTAIL  
CONSIDERABLE CHALLENGES  
FOR NCAs AND BUSINESSES  
ALIKE, PARTICULARLY IN TERMS  
OF LEGAL CERTAINTY,  
COSTS AND TIME DELAY

**C**on 8 November 2011 the national competition authorities of the European Union (‘NCAs’) have agreed among themselves a set of guidelines for the review of the so-called ‘multiple filings’, *i.e.*, mergers that do not have a Community dimension within the meaning of the EC Merger Regulation but are subject to notification in more than one Member State<sup>1</sup>.

Cross-border mergers that require clearance by several NCAs often entail considerable challenges for NCAs and businesses alike, particularly in terms of legal certainty, costs and time delay. The recently adopted best practices intend

to alleviate the difficulties arising from multiple filings, identifying the type of cases in which NCAs should cooperate, the stages at which they should do so and the information they may share.

These best practices do not envisage cooperation in all multijurisdictional mergers. NCAs retain the power to decide on a case-by-case basis whether the review of a certain merger should benefit from closer cooperation. The general principle for triggering the cooperation mechanism is the existence of similar or comparable issues of a jurisdictional or substantive nature in two or more Member States in respect to a given merger. The best



practices present several examples where such cooperation would be advisable at different stages: at the notification phase, to help NCAs decide if a certain transaction qualifies for notification or investigation in their respective countries; at the review level, when a merger affects competition in more than one Member State; and at the time of the decision, in relation to the design, testing and implementation of remedies in different Member States.

The procedure for enhanced cooperation provided in the best practices starts like the normal cooperation procedure applicable to all types of multijurisdictional mergers, that is, NCAs reviewing multiple filings inform the other NCAs of such fact and exchange basic non-confidential information in relation to the notification<sup>2</sup>. In cases – such as those referred to in the preceding paragraph – where an in-depth cooperation is necessary or appropriate, NCAs will encourage the merging parties to waive confidentiality with regard to the merger concerned as soon as possible, so that the competent NCAs may liaise with one another and keep one another informed of their analysis at key stages of their investigation (at least in the end of phases I and II and in any remedies discussions) and with respect to key issues (e.g., market definition, assessment of competitive effects, efficiencies, theories of competitive harm).

The guidelines serve a useful purpose and deliver important solutions to help NCAs and companies reach more convergence in problematic multijurisdictional mergers. However, they do not resolve all inconveniences related to multiple filings.

First, as is expressly recognized in the guidelines, NCAs are only expected to follow them to the extent they are consistent with their enforcement priorities.

Second, a large deal of the success of this mechanism depends on the goodwill and cooperation of the merging parties, because NCAs will require their permission to

exchange confidential information, and it lies within the parties' discretion to do so or not.

Third, whilst it is true that the cooperation system deals with some of the inconveniences associated with multiple filings – for instance, in helping NCAs reach informed and consistent (or at least non-conflicting) outcomes in their procedures – the scope of the mechanism is necessarily limited and it does not tackle other important issues in these types of mergers, e.g., costs and time delays.

Last, there is a confidentiality question. Even if merging parties authorize the swap of information between NCAs, confidential information and business secrets exchanged by NCAs are protected in accordance with the national law of the jurisdictions involved. In most cases, this should mean that this data will not be used for any purpose other than the review of the relevant merger. However, it is possible that some national laws allow NCAs to use the information and documents concerned for other purposes, even if they may be detrimental to the merging parties.

For all these reasons, we think that, whenever such alternative is available, the system of case referral provided in the EC Merger Regulation may, in some circumstances, prove to be better for companies engaged in cross-border mergers. The handling of the transaction by the European Commission alone (the one-stop-shop review) normally increases administrative efficiency, avoids duplication and fragmentation of enforcement efforts and potentially incoherent decisions and reduces the costs and burdens arising from multiple obligations and procedures.

Thus, unless it appears that multiple NCAs would be in a better position to assess the transaction and the respective impact in all affected markets, fragmentation of cases may not be the best solution for merging parties. ■

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WHENEVER SUCH ALTERNATIVE IS AVAILABLE, THE SYSTEM OF CASE REFERRAL MAY, IN SOME CIRCUMSTANCES, PROVE TO BE BETTER FOR COMPANIES ENGAGED IN CROSS-BORDER MERGERS

<sup>1</sup> The guidelines concerned may be found at [http://ec.europa.eu/competition/ecn/nca\\_best\\_practices\\_merger\\_review\\_en.pdf](http://ec.europa.eu/competition/ecn/nca_best_practices_merger_review_en.pdf).

<sup>2</sup> This normal procedure takes place in accordance with the 2002 procedure guide on the 'The Exchange of Information between Members on Multijurisdictional Mergers', available at [http://ec.europa.eu/competition/ecn/eca\\_information\\_exchange\\_procedures\\_en.pdf](http://ec.europa.eu/competition/ecn/eca_information_exchange_procedures_en.pdf).



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## SPECIAL CONTRIBUTION MATTOS FILHO

# The new Brazilian Competition Law

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### THE NEW LAW PROMOTES AN INSTITUTIONAL RESTRUCTURING OF THE BRAZILIAN ANTITRUST AUTHORITIES

**T**he new Brazilian Competition Law (Law No. 12,529/2011) was published on December 1 and will enter into force on May 29, 2012 (180 days counted from the date of its publication).

The most significant change brought by the new law is the introduction of a pre-merger control regime. The new law also lays out new filing thresholds, creating a sole two-prong turnover threshold; the market share threshold set forth in the current Brazilian merger control regime no longer exists under the new law.

The new law also promotes an institutional restructuring of the Brazilian antitrust authorities, which to date comprise three agencies: the Secretariat of Economic Monitoring of the Ministry of Finance ("SEAE"); the Secretariat of Economic Law of the Ministry of Justice ("SDE"); and the Administrative Council for Economic Defense ("CADE"). Under the new law, SDE and CADE will merge to create the new CADE, which becomes the sole agency in charge of both merger control and antitrust

investigations. SEAE shall no longer be part of the review process of antitrust matters; its responsibility will be limited to competition advocacy.

The structure of the new CADE shall be as follows:

- The Administrative Tribunal for Economic Defense ("Tribunal");
- The General Superintendence; and
- The Department of Economic Studies.

Below we summarize other significant changes brought about by the new Brazilian Competition Law:

- **PENALTIES FOR GUN JUMPING:** the parties must remain independent from each other until they are able to obtain CADE's approval to the transaction. Fines for gun jumping may range from R\$60,000 to R\$60 million (approximately US\$32,000 to US\$32 million) and the parties may become exposed to a formal investigation into their behavior prior to obtaining antitrust approval;

#### • FILING THRESHOLDS:

- At least one of the groups involved in the transaction had gross revenues in Brazil of at least R\$400 million (approximately US\$220 million) in the preceding fiscal year; and
- At least one of the other groups involved in the transaction had gross revenues in Brazil of at least R\$30 million (approximately US\$16 million) in the preceding fiscal year.

- **REVIEW PERIOD:** CADE shall have up to 240 days to issue its final decision on the notified transaction. This review period may be extended for an additional period of 60 days, if requested by the parties, or for an additional period of 90 days, by means of a justified order issued by the Tribunal. President Dilma has rejected the proposed provision which set that a given notified transaction would be automatically approved if the review period elapsed before CADE's final decision. We expect CADE to issue the necessary regulations foreseeing the consequences for not complying with the total review period established by the new law, as well as rules for expedite procedure and shorter review periods for simple transactions.

#### THE NEW LAW INTRODUCES SPECIFIC CHANGES WITH RESPECT TO ANTITRUST INVESTIGATIONS

- **REMEDIES:** the notifying parties are allowed to negotiate remedies with CADE to expedite the process. CADE shall issue regulations setting forth the rules for remedy discussions within the following months.

Additionally, the new law introduces specific changes with respect to antitrust investigations. The most important one is that the basis for the calculation of fines for antitrust infringements (including cartels) is now restricted to gross revenues generated in the line of business where the offense occurred. The concept of "line of business" may be interpreted broadly, which leads to a high degree of uncertainty for defendants and therefore will require a careful look on a case-by-case basis. The level of the fines, on the other hand, shall be reduced: 0.1%-20% for companies; and 1%-20% of the fine imposed on the company for directors and officers found guilty for the infringement. ■



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