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# CADE issues new guidance on associative agreements

Leonardo Rocha e Silva, Daniel Costa Rebello and Raul Nero Perius Ramos examine what's in store for associative agreements in Brazil, following CADE's publication of new guidelines


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# CADE ISSUES NEW GUIDANCE ON ASSOCIATIVE AGREEMENTS

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examine what's in store for associative agreements in Brazil, following CADE's publication of new guidelines

On October 25, 2016, the Administrative Council of Economic Defense ("CADE") published Resolution No. 17/2016, which established a new definition for "associative agreements," bringing the Brazilian competition rules closer to the ones adopted in other jurisdictions. Associative agreements are among the "economic concentration acts"[1] that, under Law No. 12,529 of 2011 ("Brazilian Competition Act"), must be submitted to CADE's review whenever one of the economic groups involved in the merger deal posted revenues above 75 million reais ($22.1 million) and the other, above 750 million reais ($221 million), both in the Brazilian market.

Under Resolution No. 17/2016, as from November 24, 2016 an agreement cumulatively containing the following characteristics will be treated as an "associative agreement" (and, as such, subject to mandatory notification if the turnover threshold has been met):

- duration of two (2) years or more;
- creation of a joint undertaking (*empreendimento comum*) to pursue an economic activity;
- sharing of the risks and results of the underlying economic activity; and
- execution between parties (or economic groups) that are competitors in the relevant market involved.

Resolution No. 17/2016 expressly defined "economic activity" as "acquiring or offering goods or services in the market, even on a non-profit basis, provided that, in the latter case, the activity may at least in theory be run by a private company seeking a profit." Therefore, Resolution No. 17/2016, which repealed Resolution No. 10/2014, points to CADE's intention to maintain prior notification of certain research and development agreements, for example.

Moreover, Resolution No. 17/2016 also clarifies that an associative agreement will only qualify for mandatory notification if the parties have agreed on a specific and direct mechanism for sharing the risks and results of the economic activity. Consequently, a tolling agreement between competitors, for instance, will only be submitted to CADE's review if the risks and results directly arising from the agreement are shared (for example, by sharing the profits from the end product). Indirect sharing (such as an increase in revenues from a higher volume of sales by the resulting company), as a rule, will not trigger the mandatory notification rule.

**Resolution No. 17/2016 signals CADE's resolve to constantly improve its role by eliminating surplus administrative procedures**

Resolution No. 17/2016 also establishes that only the agreements entered into between parties (or economic groups) that are competitors in the relevant market concerned will qualify for compulsory notification. This is the major innovation as compared to the repealed Resolution No. 10/2014. Agreements that do not result in corporate restructuring and do not involve a purchase and sales of assets need no longer be submitted to CADE's prior review, when executed between companies that are not competitors in the market involved.

Resolution No. 17/2016 adequately made clear that "vertical agreements" (distribution, supply, manufacturing contracts, etc.), notably those containing an exclusivity clause, need no

longer be submitted to CADE's review unless they involve an economic activity in which the companies are competitors. Therefore, if the parties are competitors, but the agreement relates to supply of inputs or distribution of goods, for instance, the corresponding contract will not qualify as an associative agreement, pursuant to Resolution No. 17/2016.

Potential competition problems from vertical agreements are not exempt from CADE's review, since they may be investigated by CADE via the so-called "repressive control" (i.e. repression where CADE understands that an anticompetitive conduct has derived from those agreements).[2] Nevertheless, CADE has positively excluded such vertical agreements from the list of transactions qualifying for prior notification and review. The notification and review procedures for vertical agreements under the revoked Resolution No. 10/2014 oftentimes translated into unnecessary costs (such as the filing fee of 85,000 reais, or $25,100 at current rates) and legal uncertainty to market players, without a comparable benefit for competition, insofar as only a few vertical agreements submitted to CADE's prior review generated competition concerns. Besides, it is hardly possible to state beforehand that a vertical agreement will bring competition concerns.

Finally, CADE removed from Resolution No. 17/2016 the 20 percent market-share threshold once applied to associative agreements between competitors. Under Resolution No. 10/2014, an associative agreement was held to exist between companies when their joint share in at least one of the relevant markets potentially affected by the agreement reached 20 percent or above. The new wording excluded this threshold for being unnecessary vis-à-vis the new definition of associative agreements.

On one part, the new regulation is more objective and coherent, as an agreement may evolve into a significant joint undertaking regardless of the market share of the parties. Besides, defining the relevant market and preparing market-share estimates are not always a trivial task for the companies, which raises doubts about the need for compulsory notification of certain deals. On the other part, however, the new rule removed an important threshold (20 percent market share) that could avoid the notification of associative agreements that would not increase the market power of contracting parties and, consequently, should raise no competition concerns.

Resolution No. 17/2016 represents a major leap forward vis-à-vis Resolution No. 10/2014, and signals CADE's resolve to constantly improve its role as a competition watchdog by eliminating administrative procedures that generate transaction costs for market players without bringing relevant benefits to society as a whole. ■

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## Footnotes

1 Under article 90 of the Brazilian Competition Act, "a concentration act occurs when: I. there is a merger involving two (2) or more companies that were independent until then; II. one (1) or more companies directly or indirect acquire – by purchase or swap of shares, membership units (quotas), securities or share convertibles, or tangible or intangible assets, by operation of contract or through any other means or ways – the control over or parts of one or more companies; III. one (1) or more companies absorb another company or companies; or IV. two (2) or more companies enter into an associative, consortium or joint venture agreement."

2 Under article 36 of the Brazilian Competition Act, "any act intended or otherwise able to produce the effects listed below, even if any such effects are not achieved, will be deemed an anticompetitive practice, regardless of fault: I. to limit, restrain or in any way harm open competition or free enterprise; II. to control a relevant market of a certain product or service; III. to increase profits arbitrarily; and IV. to abuse of a dominant position."