

Newsletter

Divergences involving the condemnation for cartel practice of individuals not holding management position

In a judgment held last Wednesday (02.03.2021), the Administrative Council for Economic Defense (Cade) condemned two companies and three individuals for the practice of cartel in the electronic components market for telecommunications, imposing a total fine on individuals in the amount of approximately R\$1.4 million.

The fine was imposed based on article 37, item II, of Law No. 12,529/2011¹, under the argument that any individual who is directly involved in an anticompetitive conduct is subject to the fine set forth in this rule.

And although the administrative court has followed Cade's consolidated position regarding the application of the aforementioned legal provision, Cade's commissioner Sergio Costa Ravagnani, in his vote, presented a position different from that held by Cade, which main arguments are summarized below.

The dissenting position

In the opinion of Cade's commissioner Sérgio Ravagnani, *"any fine for an individual related to a legal entity can only be based on item III of article 37 of Law No. 12,529/2011², proven negligence or willful misconduct, and valuation of the fine within the limits established in this item. Item II, on the other hand, can only be used as grounds for a fine to an individual dissociated from a company or a non-legal entity listed in the same item II, and under the legal regime of strict liability."*

Consequently, in the legal system in force, in his view, there is no rule establishing the penalty of individuals for acts committed as an employee of a company or legal entity.

¹ Art. 37. A violation of the economic order subjects the ones responsible to the following penalties:

(...)

II – in the case of Other individuals or public or private legal entities, as well as any association of persons or de facto or de jure legal entities, even if temporary, incorporated or unincorporated, which do not perform business activity, not being possible to use the gross sales criteria, the fine be between fifty thousand reais (R\$ 50,000.00) to two billion reais (R\$ 2,000,000,000.00);

² Art. 37. A violation of the economic order subjects the ones responsible to the following penalties:

(...)

III – if the administrator is directly or indirectly responsible for the violation, when negligence or willful misconduct is proven, a fine of one percent (1%) to twenty percent (20%) of that applied to the company, in the case set forth in Item I of the *caput* of this article, or to legal entities, in the case set forth in item II of the *caput* of this article.

In order to substantiate his position, the Cade's commissioner maintains that the application of the sanction provided for in item II of article 37 to employees would not be logical from the systematic point of view of the antitrust legislation, since *"while for the condemnation of the officer is required the evidence of negligence or willful misconduct and there is no legal provision for a minimum amount for the fine in absolute values, for the individual non-officer the evidence of negligence or willful misconduct is not necessary and the amount of the fine starts at R\$50,000.00."*

In addition, he brings in his vote a thorough investigation of the legislative history and the intention of the legislator during the drafting of the rule in analysis, in order to demonstrate that in all stages of the formulation of the rule the legislator did not wish to subject individuals who are non-company administrators to be punished with a fine.

For example, he mentions Bill No. 3,712/1993 of the Brazilian Congress, authored by the Executive Branch, which provided for liability with a fine to controllers, officers, and managers when they applied for the wrongdoing practiced in behalf of the company, but such text was rejected, reaching the wording contained in item III of article 37 of Law No.12,529/2011.

Furthermore, he points out that the fine provided for in item III for officers makes express reference to the companies or legal entities listed in items I and II, and the direct correlation between the act of the officer and the condemned company is essential. On the other hand, in his view, the fine in item II entails the opposite, that is, the absence of a principal-agent relationship, since the individuals or legal entities indicated in this standard are all principal as agents capable of altering market variables, and not agents of another legal entity.

For these reasons, Cade's commissioner understands that the legislator was technical enough in drafting the legal provision in order to exclude individuals employed by companies from the penalties provided for in article 37 of Law No.12,529/2011, and thus cast his vote in the sense of closing the procedure in relation to the company's employee, as he did not have management powers in the company condemned by the cartel.

And despite the fact that Sérgio Ravagnani's vote was rejected in the trial, we highlight the fact that he revisited discussions on a topic that apparently had already been overcome.

Our Competition Law team is available for further clarifications on this matter.

Competition Law