COMPETITION AND ANTITRUST

CONSORTIUM FORMATION BETWEEN COMPETITORS

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The recent and unprecedented decision of the Administrative Council of Economic Defense (Cade) to hold three competitors in the telecommunications sector liable for an antitrust violation (concerted practice) due to the formation of a bidding consortium caused surprise and raised several doubts.

The formation of consortia is permitted in Brazil not only by the Public Procurement Law but also by the Antitrust Law – which provides that bidding consortia are not subject to subject to merger control. Consortia among competitors are also authorized in several public bidding notices. Against this background, why did Cade consider it illegal for competitors to form a consortium?

In summary, the agency pointed out that the formation of a bidding consortium between competitors can undermine the competitive nature of the tender when:

- the market share jointly held by the consortium members is high (under the Antitrust Law, dominant position is presumed when the undertaking or group of undertakings controls 20% or more of the market, such threshold may vary depending on the characteristics of the market involved);
- the members do not provide different services that are complementary for the purposes of participation in the tender;
- there is no evidence that a member alone would not be able to carry out the contract individually; and
- there is no evidence of efficiencies associated with the consortium (the discount in relation to the previous contract signed with the public body would not be sufficient to show that the formation of the consortium would have enabled the provision of services more efficiently and less costly).

Cade is analyzing at least one additional case on bidding consortium among competitors, launched in 2019, which investigates the formation of a consortium between companies in a tender for lease of port areas for the handling and storage of fuel.

The risk that consortia could reduce rivalry in public tenders is not a concern only of Cade. In the European Union, the draft revised Horizontal Guidelines published by the European Commission, which will enter into force in 2023, has brought guidance on the formation of consortia from a competition standpoint, which are closely related to Cade's recent decision.

According to the Horizontal Guidelines, there may be restrictions on competition if it cannot be ruled out that the parties to the bidding consortium could each compete individually in the tender (or if there are more parties than necessary in consortium). The analysis of the compatibility of consortia with competition law should be made on a case-by-case basis, based on elements such as competitive environment, rationality and efficiency gains. A consortium may be pro-competitive if joint participation allows the members to submit a more competitive tender than they could if they participate individually (in terms of price/quality/variety), and if the benefits to the public body offset the restrictions on competition arising from the consortium. The Horizontal Guidelines stress that efficiency gains should be passed on to consumers. Gains that benefit only the consortium members are considered insufficient.

In this context, the following cautions should be taken by companies that intend to form a consortium with competitors to participate public tenders:

- assess the market share of the companies involved, as well as whether there are other viable competitors;
- evaluate the reasons that would prevent the individual participation of the potential consortium members (such as insufficient financial and technical resources);
- evaluate the reasons that allow companies to submit a more competitive proposal in consortium than individually (such as complementarity of performance – geographical or products/services – or integrated service that would be unfeasible individually);
- assess the efficiency gains of the consortium (such as best price, quality and/or variety and whether they bring positive reflexes to consumers);
- if the exchange of competitively sensitive information between the o the consortium members is required, it shall be limited to what is strictly necessary to participate in the tender and the members should adopt cautions such as the preparation of a clean team agreement, so that this information is not used in future dealings or other businesses of the companies; and
- keep records of the assessment, including the clean team agreement and emails, opinions, memoranda and

presentations demonstrating the justifications and pro-competitive motivation of the companies at the time of the consortium formation.