COMPETITION AND ANTITRUST

MININUM FREIGHT PRICE TABLES AND APPLICATION OF THE ANTITRUST EXEMPTION

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The opinion of the Administrative Council for Economic Defense (Cade) on freight price tables, issued on June 17, brought to light an important discussion that goes beyond the limits of this concrete case: the application of the antitrust exemption.

Presidential Decree No. 832/2018, which instituted the Policy of Minimum Prices for Road Transportation of Cargo in response to the crisis generated by the truck drivers' strike, was the target of harsh criticism from the Brazilian business community for a variety of reasons, including reduction of competition in the sector. In a statement presented to the Brazilian Federal Supreme Court (STF), Cade expressed the understanding that, although the establishment of minimum prices does not benefit the market or consumers, the agency would not have the authority to discuss the merits of the public policy adopted by the federal government for that industry.

The Brazilian Competition Law (Law No. 12,529/2011) applies to acts carried out by individuals or legal entities, whether public or private, national or foreign, regardless of the sector of economic activity involved. The law does not prevent Cade from punishing any practice that could harm free competition, even if the conduct is encouraged or sanctioned by state agencies.

However, Cade recognizes that, in order to achieve certain public policies, the State may exercise its regulatory power over the economic order in a way that leads to reduction of competition in a given sector. It further recognizes that in such cases, the antitrust authority cannot impose fines or non-pecuniary penalties on those who acted within the bounds set by regulations.

The success, at Cade level, of a defense based on the antitrust exemption theory depends on whether three criteria are met in the specific case. The first one concerns the degree of autonomy the company had in relation to the conduct. Has it acted in accordance with the regulatory rule, or could it have acted differently? If there was an alternative less harmful to competition, the regulation could be used as a mitigating factor in the calculation of the penalty, but not to prevent the application of the penalty. The second criterion is the effective supervision by the regulator, who should be able to supervise and punish companies that do not comply with the rule. The last criterion concerns the existence of a clear industry policy of antitrust exemption, which should be a public policy decision made to ensure that the benefits aimed by the regulation outweigh the harm resulting from the reduction or elimination of competition in the industry.