

## IP Licensing In Brazil: Brazilian Antitrust Watchdog Reviews Its Rules On Agreements Subject To Prior Approval

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**I**t will come into force next Thursday (November 24, 2016) a new resolution issued by CADE (Conselho Administrativo de Defesa Econômica), the Brazilian antitrust authority, that redefines the rules for the submission of “associative contracts” for prior approval.

According to the Brazilian Antitrust Law, once other legal premises are met, such as annual revenue standards, “associative contracts” must be previously notified to and approved by CADE before being performed by the parties. Despite that fact, the 2011 Antitrust Act does not clarify the meaning of “associative contracts”, which were only defined in 2014 by CADE's Resolution no 10. This resolution helped to eliminate the former legal uncertainty on which kinds of commercial agreements had to be submitted to CADE – a doubt that used to reach intellectual property licensing agreements – but it had also established some confusing criteria, such as different market share minimum standards and the existence of exclusivity provisions.

The new resolution confirms the conception of “associative contracts” as those (a) whose term are equal to or exceeds two years and (b) features risk or revenue sharing between the parties for a common economic endeavor. On the other hand, the new rule restricts its scope to horizontal cooperation agreements (where the parties are direct competitors) in the relevant market, thus removing vertical cooperation agreements (where the parties stand at different levels of the same market chain) from its range.

The rule according to which any agreement whose term is under two years must be submitted to CADE upon its renewal remains in force.

Although the new resolution intends to make the criteria simpler, some questions persist. Since the majority of vertical cooperation agreements does not have implications on competition, the exclusion of them will certainly reduce the number of agreements submitted to CADE. Nevertheless, whether Intellectual Property agreements between competitors fall within the criteria of common economic enterprise setting forth risk or revenue sharing has to be studied on a case-by-case basis.

Hence, it is advisable to reassess the background of every agreement made with competitors that were not sent to CADE and that will complete two years in force, after which, to be on the safe side, those that could potentially meet the new standard shall be send to CADE's scrutiny in order to become enforceable.

The penalties in Brazil for the noncompliance with the antitrust legislation vary according to the gravity of the conduct. Among other, the law sets forth the following sanctions: nullity of the association contract, prohibition to contract with the Public Administration for at least five years, minimum penalty of 60 thousand BRL and a possible penalty of 0.1% to 20% of the annual gross revenue of the infringer.

In order to have more information please feel free to contact us, whether in written or by phone, directly to your usual contact within our office or to [rafael.aguillar@kasznarleonardos.com](mailto:rafael.aguillar@kasznarleonardos.com).