

**Competition Law**

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## Cade and the virus

It is not necessary to describe the crisis caused by coronavirus, not only in the healthcare industry, but also in the economy and the functioning of government agencies. The recommendation is to avoid close physical contact, especially agglomerations, which may facilitate the dissemination of the virus. Many courts have simply ceased their activities, thus suspending deadlines and maintaining only emergency services.

In view of this, how does the Administrative Council for Economic Defense (CADE) stand in the middle of it all? MLex publication disclosed that CADE's Tribunal will continue to function (almost) normally, maintaining its trial sessions until further notice. Nevertheless, only lawyers directly involved in the proceedings at trial may attend them. We have also seen news saying that in-person meetings between lawyers with commissioners or other authorities are now taking place by videoconference.

What we want to analyze here is not the judgment of convenience and expediency that guides such measures, being the will and determination to conduct the competitive issues well, but rather their own legality, in relation to the right of defense of the parties involved. At the current time, there are no reports of complaints regarding the conduct of the proceedings. The conferences, whether by telephone or video, have obtained satisfactory responses, and the processes are moving forward. This is not the issue.

In fact, in cases that are conducted before CADE, in both concentration acts and administrative proceedings, it is common to have confidential data, to such an extent that we often see the same petition in two different versions, one public and one confidential, the second version with restricted access. It is not possible for one party, through his lawyer and often his economist, to handle confidential matters at a conference that may be recorded or worse yet, done so illegally.

In this case, if CADE determines not to accept a in-person meetings, the right of defense will be curtailed, since part of the arguments cannot be discussed.

However, in-person meetings can also cause problems, this time not of illegality but of improper treatment of parties and lawyers. Many of them travel from other cities to Brasilia, where CADE is located, having to go through airports, planes, elevators, taxis, and cafes. Therefore, they are obligated to have exactly the contact that the health authorities recommend avoiding. This time we are within the judgment of convenience and expediency.

On the same level, in order to meet deadlines imposed by CADE, lawyers have to go through various meetings, contacts with parties, possible expert investigations, and possible witnesses, which again exposes them to the virus in multiple ways that the health authorities recommend avoiding. Once again, the judgment of convenience and expediency is present.

Another interesting point is the prohibition of lawyers being present at trial sessions of other lawyers, unless they are the representatives of the parties involved. It is common for lawyers who are not involved in the cases at trial to attend the sessions to follow the development of certain topics that are of the interest of their clients or even for their own updating. There is transmission of these over the internet, but those who are active in the field know that the internet has flaws. A dry official report is one thing, and yet it is quite another thing to find out at the time of the events.

It is widely known that the epidemic is temporary, although its complete timing is not yet known. It is not possible to say when the curve will start to decrease and what damage will occur until then. In light of the crisis that is currently spreading across the country, claiming to need to meet goals or the speed being of utmost importance is irrelevant when confronted with the greater good, which is the protection of the lives and health of the people, not to mention the very employees of CADE.

There is no legal impediment to the proposed measure because article 10, IV, of Law 12.529/2011 states, "The President of the Tribunal shall (...) call sessions to organize the corresponding ruling." The possibility of suspending the deadlines is not included within the powers of the Plenary or of the President, yet there is the discretion that is expressed in the judgment of convenience and expediency.

The processes will be speed up again in time; they will return to their normal velocity again as quickly as CADE can print - soon after the end of the epidemic. In the case of meetings by videoconference, they can only take place when there are no confidential subjects to be dealt with. As for sessions, it is understood that they should not be maintained because of the announced isolation restrictions, and in view of the potential damage the virus can cause.

It is worth pointing out that the coronavirus has already had procedural effects. On the 18<sup>th</sup> of this month, CADE initiated an investigation to determine whether hospitals, laboratories, pharmacies, and industries in the medical and pharmaceutical sectors have increased prices for their products in an abusive manner after the epidemic started. For example, one may consider that the health crisis implies voluntary closure of companies, with evident competitive imbalances,

or that companies mentioned in the recent investigation might propose partnerships or enter into concentrations to maximize production, related to the pandemic.

In all of these cases, CADE's actions will be necessary (inasmuch as the companies exceed the turnover thresholds foreseen by law) and inevitable, without a doubt. CADE cannot come to a halt, especially at this time. Although, it must guide its actions in defense of competition in a virus-free environment, including viruses of illegalities and limitations to the right of defense.

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