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Corporate Law

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I. Application by analogy of the clientele compensation framework to commercial concession agreements – Summary of Case Law Uniformization Ruling 6/2019 of the Supreme Court of Justice, of November 4, 2019

The Supreme Court of Justice, through ruling 6/2019, of November 4, 2019, has adopted a uniform position to apply, by analogy, the clientele compensation framework for commercial agency agreements to commercial concession agreements.

➢ COMMERCIAL CONCESSION AGREEMENTS AND AGENCY AGREEMENTS

Concession agreements are defined as framework agreements under which the grantor agrees to sell certain products to the concessionaire, which is obligated to (i) purchase and resell them, and (ii) comply with certain obligations arising from its integration into the grantor's distribution network (particularly the pricing and promotion policies for the products to be resold).

In Decree-Law 178/86, of July 3, agency agreements are defined as those under which one of the parties (the commercial agent) agrees to promote and enter into agreements, on the principal party's behalf (for a fee), with potential customers for the purchase of the principal party's products. Unlike the concessionaire, the agent does not purchase the principal party's products and is not a party to the agreements between the principal party and the customers the agent obtains. Therefore, the principal party always enters into those agreements in its own name and at its own risk.

➢ CLIENTELE COMPENSATION

Agency agreements are subject to clientele compensation, which the principal party must pay to the agent once the agency agreement has been terminated. This compensation corresponds to the benefit the principal party or its new distributor will continue to receive, even after the termination of the agreement, because of the agent's efforts while the agreement was in force, as well as for future agreements between the principal party and the customers acquired by the agent.

Under article 33(1) of Decree-Law 178/86 of July 3, 1986, agents may only claim this compensation if they are able to prove that they have met all the following requirements:

- The agent has acquired new customers for the principal party or has substantially increased the turnover with existing customers (cf. paragraph a)).
- The principal party will benefit considerably, after the termination of the agency agreement, from the agent's activities (cf. paragraph b)).

- The agent no longer receives any remuneration for the agreements negotiated or entered into with the customers it acquired during the duration of the agency agreement, once it has been terminated (cf. paragraph c)).

This compensation must be based on equitable grounds and must not exceed an amount equivalent to an annual compensation, calculated based on the average annual remuneration the agent received over the past five years. If the agency agreement was in force for a shorter period, the average remuneration during the period the agreement was in force must be considered.

As concession agreements are atypical agreements and are not subject to specific legal regulations, the majority of scholars, as well as case law, advocate in favor of the application, by analogy, of the legal framework applicable to agency agreements to concession agreements - including the application, by analogy, of the clientele compensation framework to the termination of concession agreements.

However, there is a wide divergence on how the clientele compensation requirements established for agency agreements should be applied to concession agreements. There are even divergent rulings of the Supreme Court of Justice regarding whether the requirement established in article 33 (1) (c) of Decree-Law 178/86 is applicable to concession agreements.

The uniformization ruling dealt with the specific issue of whether this requirement should apply to the assessment of whether concessionaries are entitled to clientele compensation.

➢ UNIFORMAZATION APPROACH

The uniformization ruling under analysis stated, "[t]he application, by analogy, of article 33 of Decree-Law 178/86 of July 3, 1986, as amended by Decree-Law 118/93, of April 13, 1993, to the commercial concession agreements, includes its respective subparagraph c), adapted to such agreement type."

The Supreme Court of Justice has reinforced the application, by analogy, of the clientele compensation framework established for agency agreements to concession agreements. It has also established that the concessionaire will only be entitled to claim clientele compensation if, in the specific case, not only the requirements established in article 33 (1) (a, b) are met, but also the requirement set out in subparagraph c) of article 33, as adapted to concession agreements.

Under this ruling, the concessionaire, unlike the agent, does not receive any remuneration for exercising its activity during the concession agreement. Instead, the profit or benefit deriving from its activity is the profit margin obtained from reselling the products acquired from the grantor. The concessionaire will lose this profit with the termination of the concession agreement, and it will in turn be received by the grantor by engaging directly with the customers acquired by the former concessionaire.

Under this ruling, the requirement established in article 33 (1)(c) must be adapted when applied to concession agreements, as concessionaires will only be entitled to claim clientele compensation once they have proved that, after the concession agreement has ended, the former concessionaire no longer earns any income from its previous activity.

If the former concessionaire earns any income from its previous activity (i.e., if, after the concession agreement has ended, the former concessionaire continues to resell the former grantor's products to customers acquired while the concession agreement was in force, earning profits from this activity), that compensation will be excluded.

To conclude, this ruling interprets the requirement established in article 33 (1)(c) literally. If, after the concession agreement has ended, the former concessionaire continues to obtain profit from its previous activity (even if this profit is reduced considerably), it will not be entitled to claim any amount due as clientele compensation.

II. EU law

Directive (EU) 2019/2121 of the European Parliament and of the Council of November 27, 2019

Amends Directive (EU) 2017/1132 by adjusting the rules applicable to crossborder mergers and establishing the framework for crossborder conversions and divisions, which had not yet been regulated.

This directive establishes the following rules applicable to these operations:

- Obligation for the company's administrative and management body to draw up the draft terms of the crossborder operation and a report for the company's members and employees.
- Obligation to disclose the documents regarding the transaction, making them publicly available in the register of the Member States of the company or companies carrying out the crossborder operation.
- Protection of shareholders and creditors, as well as the information, consultation and participation of the employees.
- Confirmation of the legality of crossborder operations by a court, notary or other competent authority or authorities of the Member States of the company or companies carrying out the crossborder operation. This competent authority must issue a pre-conversion, pre-merger or pre-division certificate. The competent authorities of the Member State of the company or companies resulting from the crossborder operation should not approve this operation without this certificate.

Council Directive (EU) 2019/1995 of November 21, 2019

Amends Directive 2006/112/EC relating to the provisions on the tax burdens of distance sales of goods and certain domestic supplies of goods.

III. National law

Decree-Law 157/2019 - Diário da República 203/2019, Series I of 2019-10-22

Establishes the form of the act of institution and the framework for the registration of foundations. This decree-law entered into force on January 1, 2020.

Decree-Law 150/2019 - Diário da República 195/2019, Series I of 2019-10-10

Establishes the Electronic Clearing System (ECOMPENSA), integrated by accredited electronic platforms, to voluntarily set off credits held by natural or legal persons who have adhered to them. This decree-law entered into force on January 1, 2020.

IV. National case law

Opinion 20/2019 of the Attorney General's Office - Diário da República 220/2019, Series II, 2019-11-15

Legal and tax frameworks for share capital operations with the cancellation of share quotas

This opinion concludes that the gain that may be obtained by shareholders whose shareholdings are redeemed with a share capital decrease is considered income. It also concludes that this income is taxable as a capital gain. Also, the share capital decrease operation carried out through cancelling the share quotas held by a company in return for remuneration, made in Brazil, is subsumed to the concept of redemption of shares through a share capital decrease, as established in article 46 (5) (f) of the Corporate Income Tax Code.

The ruling also concludes that, to determine capital gains, the value resulting from redeeming shares through a share capital decrease corresponds to the market value of the shareholdings that were delivered as consideration for the redemption, and not their nominal value. When shareholdings are listed on a regulated market, the value corresponds to the respective exchange quotation on the date the consideration for the redemption of shares through a share capital decrease is delivered.

Ruling of the Constitutional Court 622/2019, of 03-12-2019

This ruling has found unconstitutional the rule established in article 236 (2) of Act 83-C/2013 of December 31, in conjunction with article 8 (16) of the legal framework applicable to Closed Real Estate Investment Funds for Housing Rental and to Real Estate Investment Companies for Housing Rental, in the version resulting from the amendments made to Act 83-C/2013. According to these amendments, the property transfer tax and stamp duty exemptions established in article 8 (7) (a) and (8) will expire if the property was acquired before Act 83-C/2013 entered into force and was sold within three years from January 1, 2014, for infringing the principle of protection of legitimate expectations, which is provided under article 2 of the Constitution.

Ruling of the Constitutional Court 774/2019, of 17-12-2019

This ruling declared that the rule set out in article 398 (2) of the Companies Code, approved by Decree-Law 262/86, of September 2, is unconstitutional, with general binding force. The court declared it unconstitutional because, under it, employment contracts are automatically terminated if they are entered into less than one year before the employee under that contract is appointed as a director of the company

The court has considered that this rule materially qualifies as employment law and has declared it unconstitutional, as its approval did not involve the prior participation of employees' representative organizations, breaching the provisions of article 55 (d) and article 57 (2) (a) of the Portuguese Constitution, in the version in force on the date the rule was published (Constitutional Law 1/82, of September 30).

The effects of the declared unconstitutionality only came into force from the date which this ruling was published.

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