

Unclassified

DAF/COMP/LACF(2009)17

Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development

03-Sep-2009

English - Or. English

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

DAF/COMP/LACF(2009)17
Unclassified

LATIN AMERICAN COMPETITION FORUM

-- Session IV: Competition Issues in Telecommunications --

Contribution from Brazil

9-10 September 2009, Santiago, Chile

The attached document from Brazil is circulated to the Latin American Competition Forum FOR DISCUSSION under session IV of its forthcoming meeting to be held in Chile on 9-10 September 2009.

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JT03269004

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**LATIN AMERICAN COMPETITION FORUM
- 9-10 September 2009, Santiago, Chile -**

Session IV: Competition Issues in Telecommunications

Contribution from Brazil

1. Introduction

1. The Brazilian telecommunications sector remained a state monopoly until 1995, when Amendment No. 8 to the Constitutional text allowed the privatization of the sector. State monopoly over telecommunications was thereby extinct.

2. In 1997, with the enactment of Law No. 9.742 (General Telecommunications Law - GTL), the State turned from service provider to regulator of the telecommunications sector, implementing policies to make the market environment more attractive to private investment and fostering the development of the telecommunications field. The State also started supporting competition and consumer welfare in a market environment. Twenty six mobile operators and twenty seven fixed-line operators have been privatized in this process. The GTL founded the National Telecommunications Agency (ANATEL), an autonomous regulatory body, with the role of supervising and regulating the sector.

3. In April 02, 1998, Law 2.534 (the “General Granting Plan” - PGO) – was approved. It determined the separation of telecommunications concessions into four regions in Brazil: region I – Southeast (except the state of São Paulo), part of the North and Northeast of Brazil; region II – Central-East, part of the North and South; region III – São Paulo; region IV – national (long-distance calls). This model established a duopoly in each region, composed by privatized companies and new companies (the so-called “mirror-operators”) to mirror the services offered by the former and thereby establish competition in the sector of fixed-line telecommunications.

2. Legal provisions of the GTL on the interaction between telecommunication and competition policies in Brazil

4. The existing system establishes clear competences between CADE and ANATEL for the protection of competition, which contributes for the prevention of conflicts between these agencies.

Moreover, the current rules settle common goals for both authorities in the field of competition and the complementation of their roles. This promotes an interaction between the procedures and initiatives adopted by the Brazilian telecommunications and competition agencies.

5. In this regard, a close relationship between the telecommunications regulator and competition authorities has been created by the GTL, as it determines the protection of competition as one of the competences of ANATEL.

6. ANATEL has been assigned legal authority to control, prevent and curb violations of the economic order in the telecommunications sector (section 19 of the GTL). As a result, ANATEL is in charge of merger analysis, as well as the instruction and investigation of anti-competitive behaviors, in an equivalent role to that of the Secretariat for Economic Monitoring in the Ministry of Finance - SEAE and the Secretariat of Economic Law in the Ministry of Justice - SDE, two of the Brazilian competition authorities.

7. On the other hand, the GTL expressly determines that the competence of ANATEL in the field of competition does not include the powers vested in CADE by Law 8.884/94 (Brazilian Competition Law). This means that, after the telecommunications regulator (ANATEL) concludes its investigation and analysis, the case has to be submitted to CADE for adjudication of competition issues in the administrative sphere. It has to be noted that CADE has discretion to request SDE or SEAE (or both) to provide supplementary technical opinions in merger cases falling within ANATEL's competence, as well as in conduct cases that SDE and SEAE had not investigated. For this purpose, CADE invokes Article 7, IX, of Law 8.884/94, which authorizes the agency to "request information from individuals, agencies, authorities and other public or private entities" in furtherance of its statutory duties.

8. In its turn, section 7 of the GTL determines that competition rules are applicable to the telecommunications sector as far as they do not conflict with the rules of the GTL. The actions of telecommunications service providers aiming towards economic concentration are subject to controls, procedures and conditions established by rules for the protection of the economic order (the 1988 Brazilian Constitution established competition as a key feature of "economic order"), and therefore have to be submitted by ANATEL to CADE for analysis. In complete consonance to the Brazilian Competition Law, the GTL also considers actions that may limit, restrain or in any way injure open competition or free enterprise as violations against the economic order.

9. Another important aspect of the competition in the telecommunications market respects telecommunication networks as a base for the supply of telecommunication services. As far as telecommunication networks are concerned, GTL established three basic systems for organizing networks as "integrated paths allowing the free circulation of information and contents of user interest": (i) the obligation of interconnexion; (ii) the duty of ensuring the integrated operation of networks; and (iii) the dependence of property rights to networks on the accomplishment of their social role. These principles ought to be utilized to regulate telecommunication networks and to enable new operators access to the market.

10. The GTL also determines the competence of ANATEL to promote competition in general (art. 127, II) and to determine cases and conditions in which sharing networks is essential for the development of competition. In addition, the Law also assigns the agency the power to regulate public service – which involves prerogatives to unilaterally establish the conditions for the delivering of services, under certain conditions. The network essential infra-structures are those linked to the delivery of the public service. Finally, ANATEL Resolution 437 expressly recognizes the promotion of free competition as one of its goals.

3. Administrative proceeding n. 53500.005770/2002 and the interactive role of ANATEL and CADE

11. The interaction between competition and telecommunications policies in Brazil and their mutual implications is not limited to legal texts. A representative example on the complementation of the roles of ANATEL and CADE in the implementation of competition policy is provided by the Administrative Proceeding n. 53500.005770/2002, where both agencies have resorted to instruments for the protection of competition without the occurrence of a conflict of competences.

12. In this case, the telecommunications company EMBRATEL, active in region IV (national long-distance calls) has requested ANATEL to issue a precautionary measure against alleged anticompetitive practices by TELESP, a telecommunications company active in region III (state of São Paulo). According to EMBRATEL, TELESP was charging discriminatory tariffs for accessing its network.

13. EMBRATEL also submitted a copy of this request before CADE. SDE and SEAE agreed that the conduct was likely to be discriminatory. In sequence, in 2003 CADE issued a precautionary measure following their recommendations, determining that TELESP should offer non-discriminatory prices for access to its network and transparency in relation to prices determined in its contracts.

14. In 2005, ANATEL established a settlement agreement with TELESP in the aforementioned conduct case, whereby the latter committed itself to cease the investigated practice immediately, to offer isonomic prices and discounts for access to its network, to submit bianual reports to both ANATEL and CADE and to make all prices available in its website, among other determinations. As a result, after the signature of the settlement agreement between ANATEL and TELESP, the administrative proceeding was forwarded to CADE. The adjudication of the case by the latter has been suspended during the period of compliance of the settlement agreement, and would be resumed in case of noncompliance. Finally, it was left for CADE to decide whether it would maintain or revert the precautionary measure issued prior to the settlement agreement.

15. In the case above described, where both ANATEL and CADE adopted measures for the protection of competition, there was a potential ground for a positive conflict of competences. However, both CADE and ANATEL recognized the complementarity of their measures and moved away from a potential conflict. CADE considered that the duties undertaken by TELESP in the settlement agreement it had signed with ANATEL, once complied with, were sufficient to remove the anticompetitive practices characterized under Law 8.884/94.

4. Debate promoted by CADE on technological convergence and its implications for competition and the future of regulation on telecommunications

16. Another example of convergence and cooperation between competition and telecommunications authorities in Brazil is the series of debates on technological convergence promoted by CADE in its headquarters in 2008¹, motivated by an economic environment characterized by an increasing technological convergence of telecommunications services.

17. The background for the debates was the recent evolution in the field of telecommunication services, which led to the so-called convergence of services. Thanks to Internet Protocol networks, multiple services (combining voice, data and video) may be offered anytime, anywhere. In Brazil, the demand for convergent services has substantially grown; services supporting the conveyance of diverse

¹ *Revista de Direito da Concorrência*, n. 19, pp. 53-63.

contents, including mobile telephone services, broad band Internet access and telephone services via IP are thriving.

18. In the second half of the 2000's, Brazil began promoting debates on technological convergence, its consequences over market delimitation, and the challenges for CADE in the study of possible future circumstances regarding this subject. The debate was triggered by concentrations submitted to the appreciation of ANATEL and CADE, therefore arousing the need for a closer review of the impacts over regulation and competition.

19. Brazilian legislation in the telecommunications field gives independent treatment to each of the telecommunication segments. This implies that distinct treatment is given to companies that operate in distinct segments, even though these companies, due to technological evolution, have in recent years begun to offer identical services. Therefore, technological convergence has brought about a number of challenges to the current organization of the telecommunications sector, reflecting on the competition environment in Brazil. As far as competition is concerned, Brazil's telecommunications structure is in a process of transformation, leading Brazilian authorities to discuss alternatives for implementing changes so as to adapt existing regulations to the new scenario.

20. Therefore, in the face of the new convergent environment, CADE promoted an extensive debate among competition defense authorities, regulatory agencies, academic publications and economic agents on the means to guarantee that companies which traditionally offered services bearing distinct characteristics and business models - and that nowadays compete against each other - may operate in a competitive environment.

21. In this respect, on the occasion of adjudication of a merger case in the telecommunications sector (Concentration Act No. 53500.019422/2004), CADE promoted 12 Public Hearings (from April 26 to September 13, 2008) on the impacts of technology convergence over competition defense. Business representatives, concessionaries directors, academics, regulatory agencies (ANATEL included) and representatives from other government agencies were invited to expose their thoughts and to answer questions on the impact of that process over the competition environment. The debates, while involving major public and private actors operating in the Brazilian market, delivered a vast overview of the hazards brought by this process to the economic order.

22. The display of the economic agents from the information and communication industry showed that both the telephone companies and the subscription TV companies have embraced the strategy of inserting themselves in the convergent market.

23. The available data shows that the process of technological convergence will lead to an increase in economic concentration, since companies supplying integrated services will be better positioned in the market, compared to independent companies. On the other hand, concentration is a global trend, and one cannot evaluate only the negative effects of this process. There are clear gains in efficiency, due to growing scale yields, the reduction in operational costs, national and international covering of services, the development of innovative solutions, and so forth. Therefore, one may expect that the convergence impacts on final costs benefit the consumer and produce an increase in competition among integrated services and products.

24. In the Brazilian case, there is a tendency towards the existence of a few but strong agents acting in a national scale. The observed pattern will be that of an oligopoly competition accompanied by strong rivalry, which will lead to product diversity and competitive pressure on prices. In this scenario, apart from the performance of regulatory agencies, an incisive performance of the competition defense agencies will be needed.

25. A few effects of the increase in competition, even in such a concentrated market, are expected. Among these effects, a greater spread of paid TV - so far restricted to high income households - is expected.

26. The entrance of telecommunications operators in the “package” market must not be considered harmful to competition *a priori*. In European countries, the entrance of telephone operators in the market of subscription TV did not produce anti-competition effects.

5. Conclusion

27. Competition and regulation in the telecommunications sectors are closely associated in Brazil. Not only the existing legal framework promotes a complementarity between these areas and their respective authorities, but cooperation and coordination between the latter can also be found in administrative proceedings where there has been a concurrent analysis of competition issues by each authority. This setting is also favored by the promotion of a continuous dialogue between the Brazilian telecommunications and competition authorities, the strongest example of which is the series of debates on technological convergence hosted by CADE in 2008.