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THE RELATIONSHIP BETWEEN COMPETITION AUTHORITIES AND SECTORAL REGULATORS

Contribution from Brazil

-- Session II --

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THE RELATIONSHIP BETWEEN COMPETITION AUTHORITIES AND SECTORAL REGULATORS

1. The actions of regulatory agencies are centralised in specific sectors that have great social interest. Rules are developed by the agencies within the limits required by Brazilian Legislative Power and with public policy character. Furthermore, these agencies are responsible for monitoring the fulfillment of their rules. On the other hand, Brazilian antitrust authority (CADE) does not have the prerogative of couching rules but of applying those that have already been established. Besides, CADE prospect is general to Brazilian economy, which means that it is not limited to one or another sector. Its main objective is to make sure that the rules established in the Brazilian antitrust legislation come being fulfilled.

2. The application of Law 8.884/94 in all sectors of the Brazilian economy is defined in its article 15: “This Law applies to individuals, public or private companies, as well as to any individual or corporate associations, established *de facto* and *de jure* – even on a provisional basis – irrespective of separate legal nature, and notwithstanding the exercise of activities regarded as a legal monopoly.”

3. Admitting both activities need to be executed by different organisms, it does not mean that these organisms will work in an isolated way. Actually, they must be integrated enough to enhance cooperation and convergence in more effective antitrust enforcement, taking advantage of each other’s expertise¹.

1. Brazilian System of Competition Defence

4. The authorities responsible for the defence of competition in Brazil are the Administrative Council of Economic Defence (CADE), the Secretariat for Economic Law (SDE), within the Ministry of Justice and the Secretariat for Economic Monitoring (SEAE), within the Ministry of Finance.

5. CADE is an adjudicating authority that decides whether or not the defendants committed an infraction against competition. CADE also judges the legitimacy of legal acts – mergers, incorporation or any kind of horizontal integration – that might restrain or eliminate competition. The SDE is responsible for the initiation and instruction of administrative proceedings. SDE is also responsible for issuing opinions about the competition aspects of mergers to be judged by CADE. SEAE has the task of emitting technical opinions regarding the economic aspects of mergers and, also, at its discretion, issuing opinions on administrative proceedings that investigate behaviours against the economic order. These organisations compose the Brazilian System of Competition Defence – SBDC.

2. Brazilian Regulatory Agencies and CADE

6. The attributions relative to the execution of the antitrust rules belong to the competition authorities. The regulatory agencies give technical opinions when requested and should notify the existence of infractions, although they don’t have decision attributions.

7. Most of regulatory agencies legislation includes provisions that establish the necessity of the promotion of competition in the regulated sector. In spite of being general, these clauses show that the regulatory agencies are aware of the importance of the willingness to reach a competitive environment in

¹ As the OECD has already concluded in the document entitled “Relations between Regulators and Competition Authorities”, antitrust attributions must be done by the antitrust agencies. Whenever necessary, on those regulated sectors, regulatory agencies activities must be driven by the technical, economic and market accessibility objectives. The document also appoints cooperation and coordination as an important way to avoid waste of resources and to make sure that competition will not be restricted by the regulation rules

the sector. Having this in mind, the cooperation with CADE becomes a great instrument to face this challenge as the Brazilian antitrust agency is used to dealing with it in all sectors of the economy. At the same time, CADE can take advantage of getting access to the expertise and market knowledge of the regulatory agencies.

8. As the majority of regulatory agencies legislation does not define specific procedures for promoting competition and interaction with CADE, agreements have been celebrated between these organisms in order to institutionalise cooperation in the actions involving antitrust analyses. In addition to that, practical actions have been adopted to reach the objective of interaction. So, these Agreements establish the continuous exchange of publications, deliberations and all kind of instruments about the antitrust subject between these organisms as well as exchange between technical bodies. They establish also the promotion of services like consulting, training, researches as well as courses and workshops about competition protection. Are also included in the Agreements the uniformity of concepts and procedures of applying Brazilian Antitrust Law and the specific regulatory law.

9. The tendency is the evolution of the agreements in order to provide specific procedures to reach the maximum cooperation between regulatory agencies and CADE. The idea is to include in these agreements different and special programs to interact with merger control and anticompetitive conducts analyses.

10. In merger control, the formulation of technical opinion by the regulatory agencies will be settled obligatorily or not. It will depend on each agreement, establishing a stated period to the delivery of the document. Once done, the agency technical opinion will be sent to SDE as the same way that SEAE technical opinion is. After that, the habitual procedures will be continued.

11. In anticompetitive conducts analyses, SDE and SEAE will be able to request information to agencies as well as logistic support for investigations. When regulatory agencies perceive indications of competitive infractions, they must warn SBDC about it. The obligation to the agencies opinion will depend on each agreement.

12. CADE is not obligated to follow the agencies technical opinions. Besides, these opinions have confidential character when necessary. The agreements will include also the body responsible for the promotion of cooperation.

13. Some of regulatory agencies have already established on their legislation more specific clauses. One of them is National Petroleum Agency - ANP legislation (Law nº 9.478/97):

“Article 10. When, in its attributions, ANP becomes aware of a fact that can be an indication of competitive infraction, must communicate it immediately to CADE and SDE - linked to the Ministry of Justice - in order for them to take the proper steps, in accordance to the pertinent legislation scope.

Sole Paragraph. “Independently of the communication established in the *caput* of this article, CADE will notify ANP of the content of its decision whenever it applies a sanction against economic infractions committed by firms or any individuals in the exercise of any activity related with the national oil supply, within the maximum stated period of 24 (twenty four) hours after the publication of the respective decision, in order to the regulatory agency adopt the legal steps under its attribution.”

14. The intention is to extend clauses like the one described above to all agencies using the agreements, while proper regulatory agencies legislation has not been enacted.

15. Nowadays, a Law Project (n° 3.337/2004) to reform all the regulatory agencies is in National Congress. In this legislative bill, there is a whole chapter concerning the interaction between the regulatory agencies and the SBDC in order to reduce institutional conflicts between them.

16. The law project establishes the duty of collaboration in its articles 15 and 16 and removes attributions linked to the antitrust subject from the regulatory agencies:

“Article 15. Following the promotion of competitiveness and the effective implementation of antitrust legislation in the regulated markets, antitrust authorities and regulatory agencies should act in cooperation, privileging the exchange of experiences.”

“Article 16. In their attributions, the regulatory agencies should monitor and follow the market acts of the regulated sector agents, in order to assist the antitrust organisms in their fulfillment of the antitrust legislation, in accordance to Law 8.884/94, June 11th 1994.

Paragraph 1. The antitrust organisms are responsible for the application of antitrust legislation, charging them, in accordance to Law 8.884/94, the analyse of mergers and the instauration of preliminary investigations and administrative proceedings in order to select economic infractions, under the charge of CADE, as judicial organism, to emit final decision about the mergers and anticompetitive conducts.

Paragraph 2. In the analyse and instruction of mergers and administrative proceedings, the antitrust organisms will be able to request technical opinions to the regulatory agencies that will be used in these analyses and instructions.

Paragraph 3. The regulatory agencies will request opinions from the antitrust organism linked with Ministry of Finance about rule drafts, before they become available to public consultation, concerning the eventual impacts on the competitive conditions of the regulated sector within the stated period of 10 days.”

17. Concerning about economic infractions, the project establish:

“Article 17. The regulatory agencies, when, in their attributions, become aware of a fact that can be an indication of competitive infraction, must communicate it to the antitrust organisms to they take the proper steps.

Sole Paragraph. Will be restored administrative proceedings by the organism responsible for the instruction in the Brazilian System of Economic Defence whether the analyse of preliminary investigations concluded by the regulatory agency or by that Secretariat show enough indications of anticompetitive practice.”

18. The project law also includes that CADE will notify the agencies about the content of its decisions about conducts adopted by firms or any individual in the regulated activities, as well as mergers that have been judged.

3. National Agency of Telecommunication (ANATEL) and CADE

19. As any other regulatory agency legislation, there are general clauses in ANATEL legislation objecting the promotion of competition in the sector:

“Article 5. In the economic relationships within the telecommunications industry, the following constitutional principles shall be observed: national sovereignty, social role of property, free initiative, free competition, consumer protection, reduction of regional and social disparities, restraint of economic power abuse, and continuity of service rendered under the public system.”

“Article 6. The telecommunication services shall be organized based on the principle of free, ample and fair competition among all providers, having the Government to act towards promoting them, as well as to correct the effects of imperfect competition and to repress violations against economic order.”

20. The ANATEL legislation and its relation with CADE are exceptions within the cooperation between regulatory and antitrust subjects. While the rest of the agencies do not have the prerogative of imposing decisions to CADE, ANATEL legislation establishes attributions to instruct the cases:

“Article 7. General protection rules to the economic order are applicable to the telecommunications sector, when same do not conflict with this law.

Paragraph 1. The acts involving a telecommunications service provider, under public or private system, aiming at any form of economic concentration, either through merger or incorporation of companies, establishment of holding companies to control enterprises or any form of partnership conglomerate, shall be subject to controls, procedures and conditions provided in the general protection regulations to the economic order.

Paragraph 2. The acts provided in the preceding paragraph shall be submitted to the appraisal of CADE - Administrative Council of Economic Defence, by means of the regulatory organ.”

21. And continues:

“Article 19. The Agency shall take the necessary measures to satisfy the public interest and for the development of telecommunications in Brazil, acting independently, impartially, legally, impersonally and publicly, and especially:

XIX - to exercise legal authority in connection with telecommunications, in the control, prevention, and repression of violations against the economic order, except for the authority belonging to the Economic Defense Administrative Council – CADE.”

22. The actual jurisprudence of CADE shows that ANATEL has the same attributions of SDE, implementing the instruction of proceedings of mergers as well as anticompetitive conducts analyses.

4. Brazil’s Central Bank and CADE

23. Brazilian Central Bank (BACEN) has claimed the authority to approve mergers and to investigate conducts. The point of view of Brazilian Antitrust Authorities, however, is that it is very possible to conciliate both laws, meaning that BACEN would remain, with exclusivity, with the regulation duties and CADE would take care of the antitrust defense. In other words, the analysis of the mergers will be made effective by BACEN, that will take into account regulatory and social aspects, and by CADE, that will observe a most generic perspective of competition defense.

24. Presently, there is a Law Project being analyzed by the Congress, which will settle some of the controversial points concerning attribution problems between CADE and BACEN. The principal points of the legislative bill are those establishing that the merger control involving financial institutions is about to

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be reviewed by SBDC only in cases not involving systemic risks. When mergers in the bank sector can affect the good function of the financial system, the jurisdiction in these cases will belong only to BACEN. The Law Project also establishes that only CADE will sanction the anticompetitive conducts.