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**THE OBJECTIVES OF COMPETITION LAW AND POLICY
AND THE OPTIMAL DESIGN OF A COMPETITION AGENCY**

-- BRAZIL --

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BRAZIL

THE OBJECTIVES OF COMPETITION LAW AND POLICY AND THE OPTIMAL DESIGN OF A COMPETITION AGENCY WITHIN THE OVERALL GOVERNMENT– THE BRAZILIAN CASE¹

Even though the Brazilian Competition Authority is established by means of statute (namely, the Competition Act of 1994), one will find in the Federal Constitution a general (and non-self-executing) duty, mandated by the Framers of the Constitution upon the Congress and the President, to formulate and enforce antitrust policies. The Federal Constitution sets forth, in its article 170, the following principles:

Title VII – The Economic and Financial Order,

Chapter I – The General Principles of the Economic Activity.

Article 170. The economic order, founded on the appreciation of the value of human work and on free enterprise, is intended to ensure everyone a life with dignity, in accordance with the dictates of social justice, with due regard for the following principles:

- I. national sovereignty;
- II. private property;
- III. the social function of property;
- IV. free competition;
- V. consumer protection;
- VI. environment protection;
- VII. reduction of regional and social differences;
- VIII. pursuit of full employment;
- IX. preferential treatment for small enterprises organised under Brazilian laws and having their head-office and management in Brazil.

Sole paragraph - Free exercise of any economic activity is ensured to everyone, regardless of authorisation from government agencies, except in the cases set forth BV laws.

It should be noticed that such principles do not solely apply over antitrust matters, but instead are fundamentals to the economic order seen from a broad perspective. However, Article 173 of the Constitution refers specifically to the control of the exercise of economic power:

Article 173. With the exception of the cases set forth in this Constitution, the direct exploitation of an economic activity by the State shall only be allowed whenever needed to the imperative necessities of the national security or to a relevant collective interest, as defined by law.

Paragraph 4 - The law shall repress the abuse of economic power that aims at the domination of markets, the elimination of competition and the arbitrary increase of profits.

The Brazilian Competition Act (Federal Law 8.884/94), which is the statute that addresses competition issues in Brazil, establishes in its first article that:

Article 1. - This statute sets out antitrust measures in keeping with such constitutional principles as free enterprise and open competition, the social role of property, consumer protection, and restraint of abuses of economic power.

¹ Carlos Mauricio Sakata Mirandola and Elizabeth Kathleen Daniel Almeida helped me to revise this paper.

Evidently, principles are generic formulae, incapable of a clear definition of the boundaries within which their applicability will arise. For instance, it is possible to find, amongst the many clauses inserted in the statute, other legislative goals, either conditioning or mitigating the direct application of the above mentioned principles. For example, if we consider the mergers appraisal procedures set forth by the Article 54 of the same statute, a point to be noted is the exception under which more objective economic criteria allows the antitrust authority to approve concentrations: they set standards that clarifies the rationale present in the legislation:

Article 54. - Any acts that may limit or otherwise restrain open competition, or that result in the control of relevant markets for certain products or services, shall be submitted to CADE for review.

Paragraph 1. - CADE may authorise any acts referred to in the main section of this article, provided that they meet the following requirements:

- I. they shall be cumulatively or alternatively intended to:
 - (a) increase productivity;
 - (b) improve the quality of a product or service; or
 - (c) cause an increased efficiency, as well as foster the technological or economic development;
- II. the resulting benefits shall be rateably allocated among their participants, on the one part, and consumers or end-users, on the other;
- III. they shall not drive competition out of a substantial portion of the relevant market for a product or service; and
- IV. only the acts strictly required to attain an envisaged objective shall be performed for that purpose.

Paragraph 2. - Any action under this article may be considered lawful if at least three of the requirements listed in the above items are met, whenever any such action is taken in the **public interest or otherwise required to the benefit of the Brazilian economy**, provided no damages are caused end-consumers or -users.

However, it is certainly clear that, by means of Regulations (guidelines, especially the one passed with Regulation 15 of 19/08/1998) as well as the precedents, the Brazilian System of Economic Defence (formed by the tripod Secretariat of Economic Law – SDE; Secretariat of Economic Monitoring – SEAE, both government bodies responsible for the inquiries and production of evidences; and the Administrative Council for Economic Defence – CADE, the agency with adjudicative functions in the competition field within the administrative branch) has established a methodology of analysis and interpretation of the principles and goals, which confers a higher degree of certainty to the criteria used in the appraisal of concentrations. Even the exception contained in the above mentioned Paragraph 2 of the Article 54 has never been invoked or applied in any past case, constituting, more than ever, a theoretical escape valve.

As we observe from the extract, admitting the exceptional clause is conditioned to the inexistence of damage to consumers. Truly, precedents and Regulations, which consolidate and explain the methodology used either by the support technical bodies or by the CADE (mostly exposed in the SEAE's Ordinance 39 of 29/06/1999) emphasise exactly the same goals contemplated in law².

² The Ordinance affirms that “The protection of competition is rather an end in itself but instead a means of creating an efficient economy. Within an efficient economy, consumers enjoy the widest range of products for the smallest prices possible. In such a context, individuals enjoy a maximum level of economic welfare. The goal of antitrust is to promote the maximum level of economic welfare the Brazilian economy can achieve.”

Despite the fact that it is hard to rank such goals, I believe the imperatives of fostering competition do assume a key position when compared with a paradigm of sole efficiency. It is worthy to insist that, under the Brazilian law does not set hierarchies amongst them, leaving to the adjudicating body's discretion (in this case, the CADE) the task of balancing and pondering them.

Nonetheless, one should not confuse what has just been said with affirming that such criteria are subjective. The role of the guidelines and the intense reference to precedents (including those referring to international case law) is to establish objective parameters that would apply and respond to the goals the CADE has been seeking. For this reason, the guidelines set by CADE play a first and important role in modernising and perfecting the Brazilian antitrust system.

Despite the fact that the Competition Act of 1994 contemplates the sheer possibility of taking into consideration arguments related to values like full employment, economic development, as well as national interest to approve mergers and acquisitions otherwise deemed harmful to competition, these escape clauses have been solemnly ignored in the current practice. Notwithstanding, some Consent Decrees (“Compromissos de Desempenho”) issued by the CADE as means of barring harmful effects of concentrations have included measures aiming at such values, although they have not been determining conditions for the clearance.

Another point to be stressed is that the CADE has jurisdiction over all the sectors of the economy, without any exception.³ Nonetheless, recently this point has been the subject of controversy, particularly in cases related to the financial sectors. In the leading case Banco Finasa (Concentration Act n° 08012+006762/2000-09), a split CADE decided for recognising its jurisdiction over concentrations involving financial institutions. This was not, however, the prevailing understanding among the two other legs of the tripod: the SEAE and the SDE found that financial institutions regulations precluded their jurisdiction over the matter, thus foreclosing to them the possibility of issuing legal opinions. Under Presidential orientation, the two bodies were prohibited from taking part in the judgement and all the issues concerning financial institutions were deemed to be left to the Central Bank's scrutiny.

One important outcome of the conflict was the emergence of a new factor to be considered in the appraisals of mergers that occur within the financial sector: the existence of systemic risk issues. Another was that the struggle between the SBDC and the financial regulator revealed the need for a bill to rule out doubts about the limits of CADE's and the Central Bank's jurisdiction *vis-à-vis* the control of concentrations and the repression of anticompetitive practices. Such a bill was referred to Congress; the compromise reached recognised exclusive jurisdiction of the Central Bank only in cases involving systemic risk – in all the other hypotheses, including the control of anticompetitive practices and ordinary mergers appraisal, were left to the SBDC. This solution confers greater certainty and transparency over the steps one should follow while applying the antitrust legislation to financial sectors; moreover, it clarifies the differing goals of the competition policy, as it draws a line between prudential regulation – carried out by the Central Bank – and the fostering of competition – which is the task of the SBDC. In light of the degree of consensus resulting from the process of discussion and negotiation, Congress is expected to adopt the bill without extended delay; notwithstanding, the results of the federal elections could mean some setbacks in the legislative process.

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Textually, the Article 15 of the Competition Act states that:

“**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 a separate legal nature, and notwithstanding the exercise of activities regarded as a legal monopoly.”

A second initiative to modernise Brazilian competition laws brings about important breakthroughs to the institutional framework. It preserves one of the best features of CADE's existing independent status as an administrative court entrusted with the jurisdiction over concentrations and anticompetitive practices. Currently, the CADE enjoys a widely recognised high degree of autonomy, as its Board Members are appointed by the President to a two-year term that has to be approved by the Senate. Even the CADE's General-Attorney benefits from the same guarantee, which insulates him from political interference. Furthermore, the bill aiming at improving the SBDC also proposes many modifications, such as the adoption of a pre-merger notification system, enlarged staff and augmented powers to collect and produce evidences – all changes which confer more efficiency and effectiveness to the pro-competitive policies. Additionally, the terms of the CADE's Board Members would be extended to a five-year period, so as to allow greater stability and certainty to jurisprudential understandings.

Although SEAE and SDE are formally government bodies (incorporated within the Ministry of Finances and Ministry of Justice, respectively), they have been acting with considerable independence from any political interest other than the protection of competition, as social and industrial policies. Notwithstanding, the exiting presidency proposed a bill creating the National Agency of Competition (“Agência Nacional da Concorrência” – ANC) in substitution of the two government bodies, consenting more autonomy to the technical personnel. The ANC would take the form of an independent agency that integrates the SEAE and the SDE's functions, having as internal organs a Collegiate Directory, composed by a Director-General and three other Directors; the Attorney-General Office; and the Internal Auditing Unit.

The Directors would be appointed by the President and approved by the Senate to a four-year term; likewise, re-appointment would be allowed. Moreover, consumer's interests would be better represented in the decision-making process; the Agency's Director-General would play the role of “competition prosecuting attorney” before the CADE – besides the parties and their lawyers, the Director-General would be allowed the right of audience before the Administrative Court, as a guarantee of isonomic treatment of interests.

Lastly, to provide the ANC with financial resources, its activities would be funded by procedural fees charged over the analysis of concentrations, as well as part of the revenues from fines and governmental appropriations.