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QUESTIONNAIRE ON THE CHALLENGES FACING YOUNG COMPETITION AUTHORITIES

Contribution from Brazil

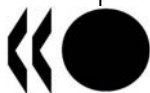
-- Session III --

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QUESTIONNAIRE ON THE CHALLENGES FACING YOUNG COMPETITION AUTHORITIES

--Brazil--

1. Countries that have been actively enforcing a competition law for a relatively short time

In 1994, the Law #8884 was enacted and turned the Council for Economic Defense (CADE) into an independent agency¹. That law also improved the regulation of competition in Brazil in several other issues. The institutional changes expected with the law were consolidated during the last decade. Although the aforementioned Law has also shaped the Brazilian Competition Policy System competencies in competition matters, this questionnaire refers exclusively to Cade experience.

1.1. Organising your agency and preparing for work

This is a unique point in the life of a competition agency – creating a new organisation and preparing it to enforce a new law. Necessary tasks include recruiting senior officials and professional and administrative staff, obtaining office space and equipment, setting goals and priorities for the initial months and years, establishing internal procedures and creating regulations and guidelines implementing the new law.

1. Describe how you conducted this organisational phase. What went well, and what didn't?

First of all, it is worth mentioning that Law # 8884/94 states that the Executive Power should had drafted a Bill on CADE's permanent staff (number, examination) within 60 days of its approval. However, it has never been drafted and this issue was only addressed in a recent Bill (pending approval) which restructures the BCPS.

In the first two-years of existence under Law # 8884/1994, CADE's structure was precarious. It was headquartered inside the building of the Ministry of Justice and had a very short staff. It was only in 1996 that CADE rented a new building for its exclusive use and obtained additional staff from the Ministry of Planning, Budget and Public Management. These two measures were paramount to the restructuring of CADE.

CADE's President at the time set a group of general and interdependent objectives ("the pentagonal strategy") to help building the institutional framework of the Brazilian competition policy. These objectives were: (i) timely decision-making (ii) promotion of competition culture, (iii) development of an international agenda (FTAA, Mercosur, bilateral agreements), (iv) harmonisation with public policies, and mainly (v) capacity building, including the formation of the CADE's Public Attorney Office.

The Internal Regulation was enacted in 1998, based upon the learning of the first years of CADE experience. It was completely reformulated in 2007.

The aforementioned objectives (ii) and (iv) were not satisfactory reached in the first years. For this reason, in 2008 specific measures were launched in order to pursue them.

¹ CADE was created in 1962 and had different attributions, considered the interventionist period in Brazil.

1.2. Competition culture and competition advocacy

Establishing a competition culture in a country new to competition enforcement – creating in the public awareness of and support for competition policy and the work of the competition agency – is vital to the success of a competition policy. In countries new to competition policy such a culture does not exist, and the competition agency performs an important educational role in helping to create it.

2. Describe the efforts that your agency made in its first years in promoting a competition culture in your country. Did you have any measurable success? What resistance did you encounter?

Promoting competition culture was one of the targets set in 1996, as mentioned in question 1. Some of the actions taken in this regard were: (i) the establishment of the Permanent Forum for Competition Policy, (ii) the creation of CADE's website, (iii) the creation of a permanent program for students, (iv) the edition of the Brazilian Journal of Economic Law organised and published by CADE, (v) the lectures given by Cade staff, (vi) the publication of CADE's jurisprudence, (vii) the issuance of an annual report, and (viii) the issuance of "warning letters" to the business community regarding non-notified mergers.

Relative resistance was encountered (mainly after the first complex divestiture imposed by the Board) due to the long period of interventionist state and closed economy in the country.

The outcomes of these actions were positive. In five years of existence CADE stepped forward to improving competition awareness within the government, business community and society.

1.3. Conduct cases and investigations – abuse of dominance and restrictive agreements

Prosecuting conduct investigations and cases can be difficult at first. Both the competition agency and the business community are unfamiliar with the legal and evidentiary standards that the law has created, and investigators lack important experience in developing cases of this kind. The investigation tools (fact gathering) and sanctioning powers (fines and remedial orders) provided by the new law may not be adequate for the task. Case handling procedures may be cumbersome and inefficient.

It is worth mentioning that Cade is not in charge of carrying out investigations. The Secretariat of Economic Law, linked to the Ministry of Justice, and the Secretariat for Economic Monitoring, linked to the Ministry of Finance, are the agencies in charge of carrying out investigation either in conduct cases or in merger review within the Brazilian Competition Policy System.

In the early years, however, there was no Leniency Program, an important tool for cracking cartel cases. It was only in 2000 that the Law # 10149 was enacted in order to allow Leniency Agreements and search and seizure procedures, factors that have contributed to successful outcomes, sound procedures and decisions, and richer evidences.

At the same time, the Secretariat of Economic Law has developed several advocacy programs also important for the success of competition policy in Brazil.

3. What problems did you encounter in investigating and prosecuting abuse of dominance and non-cartel restrictive agreements in your early years, and how did you address them? What were your successes, and what factors can you identify that contributed to those successful outcomes?

As mentioned above, CADE is not responsible for investigating and prosecuting.

4. What difficulties did you encounter in developing an anti-cartel programme, and how did you address them? How long did it take for your anti-cartel programme to begin to show results?

As mentioned above, CADE is not responsible for investigating and prosecuting.

1.4. Mergers

Some countries, especially those with small economies, elect not to incorporate merger control into a new competition law. They conclude that it would require too many resources compared to the benefits to competition that could result. They may plan to begin merger control at a later time. Most countries do adopt merger control at the beginning, however. For some the initial phases of this programme proceed relatively smoothly. Others, however, encounter problems associated with inefficient review procedures, over-inclusive notification regimes or uncertain application of substantive rules.

5. If your new law did not provide for merger control, have you encountered any problems because you don't have this power? What are the benefits to you, if any, of not having merger control?

N/A.

6. If you have merger control, did it cause resource problems for you in your first years of operation, that is, requiring you to spend more resources on merger review than you thought efficient? If so, what did you do about it? If not, how did you avoid this problem? 7. If you have merger control, was it an important and useful part of your agency's activity in its early years? What were your successes in implementing your merger control programme? Your problems?

Yes, CADE used to spend more resources than though efficient in merger control.

As mentioned in question 1, timely decisions (rapid and efficient decision-making procedures), was one of the objectives set in 1996. In this regard, the Board enacted some Regulations aiming to reduce the merger review period in order to better allocate resources.

Recently, in 2003, the "Fast-Track System" for simple cases has been introduced, which freed up resources. Currently, 75% of the caseload is being reviewed under this simplified procedure, allowing for additional resources for more complex cases. Moreover, the Commission has made consistent efforts to narrow the mandatory merger review, so as to avoid the notification of cases with negligible probability of competition harm. For instance, in 2004, the Brazilian authorities modified the interpretation of the law so that the turnover criteria that triggered the mandatory merger control (R\$ 400million, or approximately US\$200 million) started being verified only in connection to the parties (and respective economic groups) activities in Brazil. Until then, the worldwide turnover was considered. As a result, there has been a substantial reduction in the number of mandatory merger review cases.

7. If you have merger control, was it an important and useful part of your agency's activity in its early years? What were your successes in implementing your merger control programme? Your problems?

Although merger control was the most time consuming activity in its early years, the main problem in implementing it was related to the lack of awareness of the society.

Promoting competition and the reduction of merger review period were important tools for the success of the programme.

1.5. Judicial appeals

In most countries decisions of the competition agency can be appealed to the courts. Judicial systems vary across countries. In some, competition cases are appealed, at least in the first instance, to a court having special jurisdiction, perhaps extending only to competition cases or more broadly to commercial cases. In others, competition cases are heard by courts of general jurisdiction. While in some countries the judicial process proceeds relatively smoothly and predictably, in others judicial review has proved to be a major impediment to the efficient and effective enforcement of the competition law. Judges may be unfamiliar with the principles of competition analysis. The competition agency may find itself losing an unacceptable number of its cases in court. The judicial process may take much too long, effectively frustrating enforcement of the law.

8. Can decisions of your agency be appealed to the courts? If so, have you been satisfied with your rate of success in court cases? With the amount of time that it takes for cases that reach the courts to be finally decided? If you have encountered problems, what are the reasons for them, in your opinion? To the extent that you have experienced success, what factors contributed to it?

Cade decisions can be appealed to the courts.

The Brazilian Competition Policy System is an administrative system whose acts and decisions are subject to judicial review. Indeed, the constitutional warranty that no harm or threat to rights shall be barred from judicial review empowers the parties to take any issue to be reviewed by the judiciary.

Approximately 65% of court cases are favourable to Cade, which is a fairly satisfactory rate of success. The major problem with judicial review, though, is related to the delay of merger notification and, as a consequence, the effectiveness of Cade's decision.

The average time that it takes for the cases that reach the courts to be finally decided is 10 years. (if we consider preliminary orders and injunctions, the average decrease roughly 7 years) As a matter of fact, it is an effectiveness issue to be dealt with in Brazil.

Preliminary order granted to parties in order to suspend a decision is also an issue. These examples demonstrate that private interest can apparently prevail over public interest based on the idea of existing "*periculum in mora*". However, the Public Attorney Office has been succeeding in reducing the judicial average time as well as it has been achieving better results in court.

The success is due to some actions taken by the General Attorney and his staff. The Public Attorney Office underwent restructuring, became more proactive and is investing in the credibility of the Office by means of advocacy actions.

9. Did your agency develop a programme for interacting with judges and helping them to become familiar with competition analysis? If so, please briefly describe.

CADE has organised seminars as well as dedicated two editions of the Antitrust Law Journal (the Journal issued by CADE) to topics related to "competition and the courts", which were distributed to judges in charge of deciding on competition matters.

1.6. Resources

Every competition agency encounters budget problems. A new competition agency may be especially vulnerable in this regard, as those who set its budget probably do not fully understand or appreciate the agency's mission.

10. Did your agency have sufficient resources, financial and personal, to begin your enforcement activities? Did it have resources to grow in subsequent years? If you felt that your budget was inadequate what strategies did you employ to try to increase it?

In the first years, Cade's resources were scarce. Cade's President and some key-advisors at that time organised the Cade's Annual Report, and presented it to the Congressmen as a strategy to increase its budget. Currently, the budget is 5-6 times bigger than it was in 1996.

1.7. Independence

A competition agency should be independent as much as possible from other parts of government and from special interests, whether in terms of budget, management or law enforcement.

11. As a new agency, did you feel that you had sufficient independence? If not, what were the reasons, in your opinion, and what did you do about it?

Cade has sufficient independence. Two organisational features were particularly important to grant independence to Cade since its early years. First, Commissioners, once appointed, cannot be withdrawn by the executive branch during their term. Second, Cade procedures are absolutely transparent, making it less vulnerable to the pressure of any particular interest group.

1.8. Conclusion

12. State (a) the five most important actions that you would recommend to a new competition agency to ensure a successful start, and (b) the five pitfalls that a new competition agency should avoid.

Recommendations

To ensure a successful start a new competition agency might count on a permanent staff. A permanent staff not only contributes to maintain the agency memory after ending the chairman's and commissioners' mandate, but also gets more experienced over the years. The decision-making person (chairman and commissioners), however, should possess a mandate and be pointed as technically as possible (less political and more technical nominations). Mandate guarantees independence from special interests. The independence might also concerns to budget and management.

The law enacted might state the procedures for administrative revision of agency's decision.

Besides, some actions might be taken in order to promote competition within the judiciary and society in order to avoid enforcement shortcomings.

At last, case prioritisation is important in a new agency in order to better allocate the scarce resources.

Pitfalls

Although the international experience may be of great importance, a new antitrust agency should refrain from applying foreign doctrine and precedents without understanding the differences between

the respective economies, markets and institutional framework. Different environments may require different approaches towards similar questions.

Under no circumstance the due process of law may be disregarded. It would compromise not only the enforceability of a specific decision, but the very credibility of the agency.

New antitrust agencies should not be tolerant with anticompetitive behaviour or mergers due to the absence of an “antitrust culture”. The strict enforcement of the law is essential for the construction of such a culture.

Antitrust authorities should not surrender to political pressure in order to benefit specific groups of interest and, obviously, corruption would be abominable.

Finally, a new antitrust agency must attempt to avoid being isolated within the Government structure. Interaction with other bodies and agencies may have as much impact on the dissemination of competition values (for instance, specific rules on sector regulations) as the decisions of the antitrust agency themselves.