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## **Global Forum on Competition**

### **COMPETITION POLICY, INDUSTRIAL POLICY AND NATIONAL CHAMPIONS**

#### **Contribution from Brazil**

-- Session I --

*This contribution is submitted by Brazil under session I of the Global Forum on Competition to be held on 19 and 20 February 2009.*

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## **THE RELATIONSHIP BETWEEN COMPETITION POLICY, INDUSTRIAL POLICY AND NATIONAL CHAMPIONS**

### **-- Brazil --**

#### **1. Introduction**

1. The interaction between industrial and competition policies in Brazil is recent and derives from the change of perspective that has occurred in the nineties within the eternal dispute between interventionists and liberals. Indeed, although the main objective of competition policy is not to help companies to increase their competitive power, it can foster competition working in convergence with the industrial policy.

2. Said connection between competition and industrial policies is feasible and based on the institutional and legal convergence, as much as on the economic literature. Therefore should not be taken as a tension between policies, as it is many times alleged. This discussion is again been stimulated due to the financial crisis as much as the debate on the national champions and on the industrial policies based on vertical intervention.

3. In Brazil, industrial policy has been being implemented for many years while competition policy is relatively young.

4. Apart from their respective specific objectives, industrial and competition policies have the common goal of enhancing dynamic competitive advantages in markets increasingly integrated. Notwithstanding, the Brazilian experience shows that competition plays an important role to industrial policy although it may not be a sufficient mechanism to achieve all its goals. This interaction depends on facing competition as a dynamic process towards a highly competitive environment. The Brazilian Government is working on a policy model that fosters the convergence between industrial policy and competition policies, as per described in this paper.

#### **2. The historical context**

5. From the end of the Second World War to the beginning of eighties, Brazil started an industrialisation process based on import substitution and the alliance between national and foreign private capital. For the first time, industrialisation entered the political and economical agenda in Brazil. New political actors came to the scene, as industrial and labor associations, and the economic policy reflected this new political perspective. The nationalist development and the state interventionism prevailed, amalgamating political forces to economical objectives of the industrialising project.

6. These interventionist policies created state owned companies in order to foster economic activities considered essential to the national development. These companies turned into national champions as Petrobras (the Brazilian oil producer with refineries, production and exploitation areas, pipelines, and terminals), CSN (the Brazilian Steel Company), Vale do Rio Doce (the Brazilian mining company) among other champions that were always promoted as being necessary for strengthening the national sovereignty and security.

7. In 1988 a new Constitution was launched “founded on the appreciation of the value of human work and on free enterprise, (and) is intended to ensure everyone a life with dignity, in accordance with the dictates of social justice” as much as established that the “free exercise of any economic activity is ensured to everyone, regardless of authorization from government agencies, except in the cases set forth by law.”<sup>1</sup>

8. Therefore, the end of the eighties and the nineties symbolized a change from direct interventionist policies towards indirect intervention based on regulation, what represented a transformation to the development standards in Brazil.

9. This transformation happened not only on the industrial policy orientation, but also on all the public policies. Through this perspective, social policies were redrafted, inflation was controlled, economy was opened, companies were privatised and governmental agencies were created in order to regulate some sectors (telecommunications, electricity, petroleum, etc).

10. The “Collor Plan”<sup>2</sup>, a collection of economic reforms which combined fiscal and trade liberalisation with radical inflation stabilisation measures carried out between 1990 and 1992, was launched among other programs, as the privatisation one, the "National Privatization Program" (“PND”), and the industrial and foreign trade reform program, the “Industrial and Foreign Trade Policy” (“PICE”), which aimed to stimulate the entry of foreign companies; meanwhile, innovation was motivated by commercial opening through non-tariff barrier reduction, targeting oligopolised sectors of the economy.

11. Later on, still with the selective protection of certain key industries and the fail of the stabilisation strategy and the presidential impeachment, inflation and fiscal problems appeared again. A new plan was launched in 1994, the “Real Plan”, and represented a milestone to the economic development standards in Brazil, that was influenced by the guidelines established on the Washington Consensus. The Real Plan proposed a new fiscal strategy, a monetary reform and continued to envision the economy opening, managing to decrease inflation.

12. Among with the aforementioned changes promoted in 1994, Law #8.884/94 was enacted and changed the Administrative Council for Economic Defense (CADE) into an independent agency<sup>3</sup>, regulated other antitrust measures, and aimed to create a competition culture between producers and consumers in which competition rules are mandatory to guarantee the existence of the free market. These objectives, however, were just consolidated in the last decade.

13. The industrial policy has grown stronger as of 2002, during President Lula’s government, with the policies called “Industrial, Technological and Foreign Trade Policy” (PITCE), and “Policy for Productive Development” (PDP), aiming to strengthen and expand the Brazilian industrial sector trough an improvement on companies innovative capacity in a long term strategy.

14. Furthermore, the Brazilian National Agency for Industrial Development (“ABDI”) was created in 2004 in order to execute the projects of said development policy, which acts jointly with the Finance Ministry and the Brazilian Development Bank (BNDES).

15. The PDP aims to continue the advances promoted by the PITCE, amplifying its objectives and consolidating the ongoing actions and the capacity of implementing and evaluating the industrial policies,

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<sup>1</sup> Sole Paragraph – Article 170 of the Constitution.

<sup>2</sup> The Color Plan was officially called New Brazil Plan, but it became closely associated with the former President, Fernando Collor de Mello himself, and therefore was names “Collor Plan”

<sup>3</sup> CADE was created in 1962, but the Council had marginal economic impact

through a long term strategy, as per described above. Said Plan was developed under the leadership of the Brazilian Ministry of Development, Industry and Foreign Trade and has four horizontal macro targets: (i) expansion of fixed investment; (ii) raising private expenditure in research and development (R&D); (iii) expansion of exports; (iv) making Small and Micro Enterprises (SMEs) more dynamic. These targets were divided in three different levels: (i) systemic actions, which have the focus on generating positives externalities for the whole productive structure; (ii) strategic highlights, consisting on public policy goals chosen due to their importance to the long-term productive development of Brazil; and (iii) structural programmes for productive systems, oriented towards strategic targets based on the diversity of the domestic productive structure.

16. The instruments of the PDP are divided in four categories, which expressively comprise antitrust regulation: (i) incentives (fiscal incentives, credit, venture capital, and economic subvention); (ii) state's buying power (public procurement and state-owned companies' procurement); (iii) technical support (certification, export/trade promotion, intellectual property, human resources and business capacity building); and (iv) regulation (technical, economic and antitrust).

17. The PDP is a horizontal policy, meaning that it is aimed at promoting incentives for the increase of economic competitiveness. An example worth mentioning of this horizontality is the inclusion in the macro targets of the PDP of incentives for the promotion of SMEs, which represent around 20% of the Brazilian GDP. This example also shows that industrial policy converges with competition policy, to the extent it provides conditions for the increase of competition and participation of SMEs in international markets and, consequently, within the internal market as well.

18. Competition principles are intrinsic to the whole industrial policy. Notwithstanding, the Brazilian Government can recognize some sectors such as the information technology, biofuels, infrastructure and capital goods sectors as essential for the systemic competitiveness, should they generate horizontal effects to the economy as a whole. Furthermore, even when there is such recognition, policies are designed on a horizontal way, so that no companies are privileged to the detriment of other companies of the same sector. Indeed, financial support lines and programs offered by the Brazilian Development Bank (BNDES) are available to all the companies of a respective sector.

19. Nowadays, both competition and industrial policies are mature and representative in the political agenda, which aims to enhance dynamic competitive advantages in markets increasingly integrated. However, the convergence of said policies is something new to the agenda.

### **3. Convergence between industrial and competition policies**

20. Nowadays, post-merger control in Brazil is mandatory, and there are no exemptions in the Brazilian Competition Law or other sectorial laws.<sup>4</sup> Thus, there is antitrust enforcement even when mergers occur in the regulated sectors.

21. Notwithstanding, article 54 of the Law 8.884 contains a special provision that permits mergers that satisfy attributes enumerated in its Paragraph 2 to be approved, provided that the transaction is *“taken in the public interest or otherwise required to the benefit of the Brazilian economy”* and that *“no damages are caused to end-consumers or end-users”*:

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<sup>4</sup> The role of the Central Bank while analyzing mergers in the financial sector is being discussed at the moment, according to what is going to be explained below.

*“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 authorize 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 ratably 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 to end-consumers or end-users. (...)”*

22. To date, however, no decisions have ever been issued on grounds of this provision.

23. There are other discussions in regards to competences of the Brazilian Competition Policy System (BCPS)<sup>5</sup> and other agencies in certain regulated sectors. The regulatory policies – especially those focused on infrastructure sectors, in which market failures occur – should be connected to a wider and more modern industrial policy. In this perspective, in which there is a regulatory agency responsible for the technical and economical regulation, cooperation strategies between CADE and said agencies have been implemented regarding conducts and merger control. These sectorial bodies can issue non-binding opinions concerning the impacts of competition processes to industry.

24. Relating to the financial sector matters, the Bill # 5.877/05 establishes, among other provisions, the role of the Central Bank while analysing mergers in the financial sector. According to said Bill, the Central Bank would be responsible for evaluating if the merger is justifiable in order to avoid systemic risks. In case of no systemic risk involved, CADE would be responsible for reviewing the merger according to the competition rules in force.

25. In the same tone, negotiations between CADE and BNDES are being undertaken aiming to strengthen the relationship between the two authorities. Among the objectives of the negotiations are the

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<sup>5</sup> The Brazilian Competition Policy System (BCPS) is composed of three agencies -- namely, the Secretariat for Economic Monitoring of the Ministry of Finance (SEAE), the Secretariat of Economic Law of the Ministry of Justice (SDE), and the Administrative Council for Economic Defense (CADE).

establishment of technical cooperation, the exchange of information, and the development of sectorial studies. Furthermore, CADE and Ministry of Development, Industry and Foreign Trade (MDIC) are also presently engaged in developing a cooperation agreement designed to facilitate sharing of industrial sector information between the two agencies.

26. Brazil's antitrust law provides that any transaction that may limit or otherwise restrain competition must be notified. As mentioned above, there are no exemptions to antitrust review under the Brazilian law. However, CADE could take into consideration if the transaction being analyzed is being supported by an industrial policy. In this case, the support by other governmental agencies to the transaction could be a strong indication for CADE's review, as long as it is identified that the aims of the industrial policy that supports the merger are subsumed to one of the provisions of the article 54 above mentioned. This is a feasible convergence between industrial and competition policies, should both policies target the increase of productivity, the improvement of quality and the increase of efficiency as well as fostering economical and technological development.

27. Even though to date no decisions on merger reviews have ever been justified on the grounds of this convergence, the polemic discussion regarding national champions was brought to discussion in AmBev case.

28. In said case, (Merger Review nº 08012.005846/1999-12) two of the largest Brazilian beverage companies merged, creating American Beverage Co (AmBev), which turned to be the biggest beverage company in Latin America. Part of the case for the AmBev merger was that it would create a "national champion" capable of competing internationally, even though the debate was limited to private interests and there was not public effort or public policy involved.

29. The transaction was approved with the imposition of some remedies. However, CADE could not impose, as a restriction, the prohibition of selling the company to an international company, what happened four years after the transaction was approved, when the firm was taken over by Belgian beer giant Interbrew in the deal that created Inbev. CADE does not have the power to prohibit an international company to buy a Brazilian company if the deal is in accordance with the Brazilian rules.

30. More recently, two large telecommunication companies in Brazil announced their merger. Again, it is been alleged that the merge would create a national telecommunications champion. CADE, however, has not issued any opinion in said ongoing Merger Review yet.

#### **4. Conclusions**

31. The convergence between industrial policy and competition policy is feasible. Industrial policy should be designed in a pro-competitive way and the competition policy should amplify its competitive process, recognising that cooperative actions are mandatory to the power of antitrust policy.

32. The relationship between competition and industrial policies is recent. However, Brazil has nowadays mature institutions that have been working hard on said convergence, and the negotiations between CADE, the Brazilian Development Bank and the Ministry of Development, Industry and Foreign Trade are an indication of these efforts put towards the development of a qualitative transformation of the economy.

33. The Brazilian state continues to act as a regulator and therefore no types of companies are exempted of antitrust rules. Notwithstanding, the Brazilian Competition Policy System, when applying the antitrust policy can take into consideration the existence of public policies towards a certain industry.