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ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT

Competition Law and Policy in Brazil

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Introduction

The modern era of competition policy in Brazil began in 1994 with the enactment of a new law as part of the "Real Plan", a set of policies developed to deal with a period of hyperinflation. The law established a Brazilian Competition Policy System (BCPS) consisting of three agencies: a re-configured Administrative Council for Economic Defence (CADE), which had originally been created in 1962, the Economic Law Office (SDE) in the Ministry of Justice, and the Secretariat for Economic Monitoring (SEAE) in the Ministry of Finance. CADE has adjudicative authority in BCPS cases, while SDE has the principal investigative role, and SEAE is primarily responsible for providing economic analysis.

An OECD report in 2000 reviewed the activities of the BCPS since 1994, concluding that while much had been achieved in the effort to develop a fully functioning market economy in Brazil, much remained to be done. In 2005, the OECD updated the earlier study with a new assessment, concluding that, despite serious handicaps, the BCPS has made substantial headway during the past five years in implementing sound competition policy in Brazil. The BCPS agencies exhibit a strong institutional dedication to high standards of integrity, autonomy, sound policy, and fair procedure; have an excellent leadership cadre; and enjoy a supportive business community. They are hindered, however, by a counter-productive institutional structure, inadequate staff, certain statutory provisions that interfere with efficient and effective law enforcement, and a slow judicial review system that is unfamiliar with competition law. The 2005 Report recommends changes that the CADE itself can make to enhance performance, and also suggests a variety of statutory modifications that would improve the legal environment for competition policy. ■

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How is competition law enforced in Brazil?

The competition law establishes CADE as an autonomous agency consisting of a President and six Council members (or commissioners) appointed by the President of the Republic and approved by the national Senate for terms of two years, with the possibility of reappointment for one additional term. The members may not be removed from office except for cause. SDE, headed by a Secretary appointed by the justice minister, has a prosecutorial role, undertaking investigative functions and some preliminary enforcement functions. SEAE, headed by a Secretary appointed by the finance minister, has the same investigative powers as SDE, but no prosecutorial functions. The law requires SEAE to provide a technical analysis report to SDE on all merger transactions that are notified to the BCPS and also permits (but does not require) SEAE to provide opinions on investigations of commercial conduct opened by SDE.

Amendments to the competition law in 2000 expanded the investigative powers of the BCPS. The law now provides not only authority to compel production of documents and witnesses, but also permits the agencies to issue search warrants with 24 hours advance notice and request that the Federal Attorney obtain judicial warrants to execute unannounced search warrants ("dawn raids"). The amendments also empowered SDE to enter into leniency agreements under which individuals and corporations, if they co-operate in a case, are excused from some or all of the civil penalties for unlawful conduct under the competition law and protected from criminal prosecution under Brazil's economic crimes law.

The substantive provisions of Brazil's competition law appear in three articles. Articles 20 and 21 deal with all types of anti-competitive conduct other than mergers, while mergers, acquisitions, and similar transactions are addressed in Article 54. Article 20 provides that "any act in any way intended or otherwise able to produce the effects listed below, even if any such effects are not achieved, shall be deemed a violation of the economic order". The specified effects are:

- to limit, restrain or in any way injure open competition or free enterprise;
- to control a relevant market of a certain product or service;
- to increase profits on a discretionary basis; and
- to abuse one's market control.

Article 21 contains a lengthy but non-exclusive list of acts, including various kinds of horizontal and vertical agreements and unilateral abuses of market power, that are considered unlawful if they produce the effects enumerated in Article 20. In 1999, CADE issued enforcement guidelines for actions under Articles 20 and 21 specifying that for either horizontal or vertical restrictions to be found illegal, there must be evidence of the existence of market power as well as an anti-competitive effect on a substantial share of the relevant market. Although the guidelines do not specify that cartels are illegal per se, CADE assumes that anticompetitive effects exist once a cartel is shown to have market power.

Article 54 provides that "any acts that may limit or otherwise restrain open competition, or that result in the control of relevant markets for certain products or services" must be submitted to CADE for review. This requirement thus applies to all agreements and not merely to mergers. Advance notification is not, however, required and penalties attach only if the filing occurs more than 15 business days after the transaction. In practice, most penalties imposed for failure to file a notification relate to transactions that entail some structural realignment among the parties, and most filings relate to mergers and acquisitions rather than to other commercial agreements. The law establishes special notification thresholds for acts that constitute mergers. Notification is mandatory for any form of economic concentration where the resulting entity accounts for 20% of a relevant market or where any of the transaction participants had total turnover in the previous year of BRL 400 million (USD 156 million). An important decision by CADE in January 2005 determined that annual turnover would henceforth be measured using Brazilian rather than worldwide sales.

The competition law does not specify the substantive standard to be employed in reviewing mergers, but Horizontal Mergers Guidelines issued jointly by SDE and SEAE in 2001 specify that transactions will be assessed in terms of their economic welfare effects. Although CADE has not formally adopted the Merger Guidelines, it treats them as non-binding guidance and its most recent merger decisions have rejected transactions only if they entail anti-competitive consequences that are not offset by efficiency gains sufficient to increase consumer surplus.

CADE's final decisions are subject to review in the courts and parties to CADE proceedings may also seek judicial intervention during the course of CADE proceedings. Judicial review proceedings are typically lengthy and few CADE cases have reached final resolution in the courts. In addition to the competition law itself, antitrust violations may also be attacked as crimes in court by public prosecutors, and the victims of antitrust violations may seek damages in private suits (although very few cases of the latter kind have ever been filed).

The competition law applies economy-wide and contains no express exclusions for particular sectors or firms. Commercial enterprises owned by federal or state governments are covered, as are companies operating in regulated sectors. In applying the statute to regulated firms, CADE avoids creating conflict with the operative regulatory scheme, and does not prosecute firms for unilateral conduct mandated or controlled by regulatory agencies. One exception to CADE's universal jurisdiction has arisen in the banking sector, where there is a longstanding disagreement between the Central Bank and CADE over the control of bank mergers.

At present, three pieces of proposed legislation designed to re-model the competition law system in Brazil are pending. The first is a wide-ranging revision of the competition law that would combine SDE with CADE; add new institutional elements to CADE's structure; and redefine SEAE's role in the competition regime. The revisions would also institute a pre-merger notification system; alter the present triggering requirements for reporting mergers; and make other changes in the substantive and remedial provisions

of the law. The second proposal is an omnibus bill intended to revise and standardise the procedural requirements applicable to sector regulatory agencies, including various provisions affecting the relation between the sector regulators and the competition regime. The third bill would resolve the jurisdictional controversy respecting banks by giving exclusive jurisdiction over bank mergers to CADE, except for those involving a risk to the overall stability of the financial system, for which exclusive authority would lie with the Central Bank. ■

What are the principal strengths and weaknesses of the BCPS?

Particular strengths of the BCPS include a strong institutional dedication to high standards of integrity, autonomy, sound policy, and fair procedure; an excellent leadership cadre; and a supportive business community.

Weaknesses include a counter-productive institutional structure and a staff that is neither sufficient in size nor compensated adequately to retain qualified employees over the long term. The consequences of inadequate staff include poor institutional memory, inefficiency, and delay. Also, some statutory provisions relating to merger notification and to the leniency programme interfere with efficient and effective law enforcement, and the unfamiliarity of the courts with competition law is yet another source of difficulty. ■

How can Brazil make the BCPS more effective?

Consolidate the investigative, prosecutorial, and adjudicative functions of the BCPS into one autonomous agency.

There is a clear consensus in Brazil, supported by a decade of experience, that the current structure of the BCPS is not merely inefficient but counter-productive. The proposed legislation, by combining SDE with CADE and redirecting SEAE to focus on competition advocacy rather than case investigation, effectively consolidates all of the essential law enforcement functions of the BCPS into a single, autonomous agency. An alternate model, under which the President of CADE would be empowered to appoint (and remove) the Director General subject to approval by the Plenary, might deserve consideration if Brazil wishes to vest greater authority to control the law enforcement agenda in the hands of the President and the Plenary.

Protect the autonomy of the re-constituted CADE by extending the terms of the commissioners, the Director General, and other senior officers to at least four years (and preferably five), and by making commissioners' terms non-coincident.

The present statute, which provides that commissioners will serve a two-year term with the possibility of re-appointment for a second term, detracts from CADE's autonomy by creating an incentive for sitting commissioners to adjust their decisions in order to win re-appointment. Even if such adjustment never actually occurs, the short term limit creates the suspicion that it could. The proposed statute contemplates four-year terms. Because the President of Brazil serves a four-year term, consideration might also be given to establishing five-year terms, on the grounds that officers of autonomous agencies should have terms longer than that of the appointing political agent. Further, as the proposal provides, terms should be made non-coincident, to forestall the simultaneous replacement of all or most of the commissioners.

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In making appointments, accord due consideration to the importance of technical expertise in economics and competition law.

Competition agencies apply broadly written legal standards to what can be highly complex forms of commercial activity. Technical expertise is important not only because of the high stakes for the parties involved, but also because ill-considered enforcement of a competition law can materially impair economic vitality, discourage investment, and reduce innovation.

Fix the Plenary's quorum at four (rather than five as now required in all cases) whenever the number of commissioners available to vote on a case is reduced to four by vacancies or recusals.

Adopt legislation creating CADE career positions and provide adequate resources to hire and retain a sufficient number of qualified professional staff.

Without career and permanent positions, CADE cannot compete effectively against other agencies to hire qualified personnel. Further, the problems that CADE faces cannot be resolved simply by creating career staff positions, because the number of, and the compensation associated with, those positions is also critically important. In any event, additional resources are warranted if SDE and CADE are to continue increasing the effort devoted to cartel enforcement (as recommended elsewhere in the report). Consideration might be given to the economic feasibility of establishing CADE regional offices in locations across Brazil.

Revise proposed bill to eliminate allocation of fine proceeds to CADE and SEAE.

The proposed bill allocates 25% of revenue from fines to CADE and an equal amount to SEAE, with the remaining 50% directed to the Fund for the Defence of Diffused Rights. The better practice is to remit fines to a general account disassociated from the enforcement agency.

Modify the merger notification and review process to:

- Adopt an explicit standard for reviewing the competitive implications of merger transactions (such as that in the proposed legislation, which prohibits mergers that "eliminate competition in a substantial part of the relevant market, that can create or strengthen a dominant position, or that can dominate a relevant market").
- Establish a pre-merger notification system.
- Eliminate the present market share notification threshold and adopt thresholds based on the domestic turnover of both the larger and the smaller parties to the transaction.
- Eliminate notification of non-merger transactions, because the costs imposed by broad notification systems on the business community and on the enforcement agency typically exceed the resulting benefits to competition.
- Provide for expedited review and clearance of transactions that do not raise competitive concerns.

- Establish a final deadline by which CADE must determine whether to block a merger (rather then merely a deadline, as provided by the proposed law, by which transactions must be scheduled for judgment).
- Establish formal settlement procedures for merger cases.

Modify the leniency program to:

- Eliminate exposure of leniency participants to prosecution under other criminal laws (such as those against racketeering and conspiracy) in addition to the Economic Crimes Law.
- Reduce the exposure of leniency participants to civil damages awards.
- Adopt regulations providing that incriminating evidence provided by leniency programme applicants will not be used against them if they are found ineligible for participation.

Consider designating specialised judges and appellate panels to resolve competition law issues.

Limit the Economic Crimes Law to cartel violations.

Consider limiting civil suits for antitrust damages to parties and conduct that have been subject to a specific finding of illegality by CADE.

Adopt the provisions in the omnibus sector agency bill that establish standard procedures for enforcing the competition law and for participation by SEAE in agency proceedings to promulgate norms and regulations.

Adopt the pending bill providing for allocation of competition law enforcement authority in the banking sector. ■

What can CADE do to increase its effectiveness?

Address anti-competitive restraints by state and local governments.

CADE should employ its consultation procedure and its authority under Article 7 X (which confers power on CADE to request action from federal agencies and from "state, municipal, Federal District and territorial authorities") to examine anti-competitive restraints imposed by state and local governments.

Serve as a competition advocate with respect to federal legislation and regulatory programs.

Although the proposed bill provides SEAE with special responsibility for assessing the competitive implications of government regulatory activities, CADE will still retain and should exercise its power under Article 7 X of the competition law to request that federal agencies take any actions necessary for compliance with the competition law. CADE should also maintain its interpretation of Article 7 X under which CADE is vested with authority to recommend changes in anti-competitive regulations.

Update the 2001 Horizontal Merger Guidelines.

A project to revise the guidelines would provide an opportunity for the BCPS to describe more accurately the analytical elements actually employed in the examination of mergers and to address the merger review recommendations issued by the International Competition Network.

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Assure that case decisions enable the public to assess rationality and fairness in application of the competition law.

Because the private sector needs a clear understanding of legal constraints if it is to engage in efficient business planning, decisions issued by CADE should tie its analysis to applicable guidelines and identify whether the agency is introducing a new or modified analytic element.

Permit settlement of conduct cases by consent even where the defendant admits unlawful behaviour.

Conduct cases are now settled by consent only in circumstances where the defendant does not admit guilt and were no monetary fine is assessed by CADE. A settlement mechanism should also be available where a defendant does not wish to contest CADE's charges and is willing to plead guilty, pay a fine, and accept an order terminating the offending conduct.

Treat private suits seeking antitrust damages as opportunities for competition advocacy and develop more information about the competitive impact of such litigation.

A court handling a private suit that involves application of the competition law must notify CADE and invite CADE to assist in the proceeding. CADE's policy is to accept such invitations only when the conduct at issue in the private action has been the subject of a CADE proceeding and CADE has rendered a final decision on the conduct's legality. With respect to cases for which CADE has no proceeding of its own, CADE should consider treating such invitations as opportunities for competition advocacy. CADE should also develop a database containing information about the volume, nature, and outcome of civil suits for antitrust damages.

Continue existing BCPS programs to:

- focus law enforcement efforts on cartel cases;
- develop law enforcement cooperation agreements with sector regulatory agencies and prosecute anti-competitive conduct by firms in regulated sectors;
- establish consensus with the Public Prosecutor's Office respecting the role of the public prosecutors assigned to CADE;
- promote understanding of, and appreciation for, competition law among both public prosecutors and members of the judiciary; and
- increase the recognition and acceptance of competition principles in society at large, by advocating the development of a competition culture in Brazil. ■

For further information

For further information on the OECD's work on competition policy, please see our website at *www.oecd.org/competition* or contact us at dafcomp. contact@oecd.org.

For further information about this policy brief and the 2005 report on Brazil, please contact
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For further reading

OECD (2005), **OECD Economic Surveys: Brazil**, ISBN 92-64-00747-4, € 42, 162 p.

Competition Law and Policy Developments in Brazil, OECD Journal of Competition Law and Policy, October 2000, Vol. 2, No. 3.

OECD, **OECD Journal of Competition Law and Policy**, ISSN 1560-7771, Subscription (3 issues per year), € 152.

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Competition Law & Policy in Turkey: An OECD Peer Review.

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