

Unclassified

DAF/COMP/WD(2014)129

Organisation de Coopération et de Développement Économiques  
Organisation for Economic Co-operation and Development

18-Nov-2014

English - Or. English

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE**

DAF/COMP/WD(2014)129  
Unclassified

**ROUNDTABLE ON CHANGES IN INSTITUTIONAL DESIGN OF COMPETITION AUTHORITIES**

-- Note by Brazil --

**17-18 December 2014**

*This document reproduces a written contribution from Brazil submitted for Item VIII of the 122nd meeting of the OECD Competition Committee on 17-18 December 2014.*

*More documents related to this discussion can be found at <http://www.oecd.org/daf/competition>.*

**JT03366482**

Complete document available on OLIS in its original format

*This document and any map included herein are without prejudice to the status of or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city or area.*

English - Or. English

## BRAZIL

### 1. Preliminary remarks

1. The option for a certain institutional design is usually the result of choices regarding different ways of fulfilling and harmonising three main objectives: (i) promoting adequately and efficiently the provision of a public service, (ii) controlling the exercise of state activity in view of individual rights and guarantees and (iii) legitimating state action in view of the need that individuals have for the public authority to perform its functions<sup>1</sup>.

2. In 2011, the enactment of Law n° 12.529/2011 modified the landscape of the Brazilian System for Protection of Competition (SBDC by its Portuguese acronym). The adoption of this Law reflected particularly a concern with the first of the three objectives listed above<sup>2</sup>. Efficiency losses related to the fact that three different institutions made up the SBDC and the challenges posed by a post-merger notification system are key examples of the problems identified in the previous regime. The extensive and profound changes brought by the new Law aimed to tackle these problems introducing structural and technical modifications.

3. The technical changes introduced by the new Law (e.g., a pre-merger notification system, a new threshold for the pre-merger notification and a modified fining policy) are of upmost relevance for understanding the current functioning of the SBDC and do affect the institutional design chosen for the latter. After all, not only good laws on the books are meaningless without well-designed institutions to enforce them, but the contrary is also true. Nevertheless, this paper focuses on structural changes implemented by the new Law, since they are the ones that better reflect the topics to be addressed in further detail in this essay: (i) the independence of the competition authority from the government and (ii) policy functions beyond competition law that might have been assigned to the competition authority.

4. In light of the above, this essay shall first present the changes in SBDC's institutional organisation with the entry into force of the new Law. After that, the essay shall examine if and how the changes in the institutional design affected the independence of the competition authority from the government. Similarly, in its fourth part, the contribution shall analyse if and how these changes affected the types of function assigned to the Brazilian competition authority. Finally, a brief conclusion shall be made.

---

<sup>1</sup> CARVALHO, Vinicius Marques de. Lei 12.529, de 30 de novembro de 2011. In: *Nova Lei de Defesa da Concorrência Comentada*. São Paulo: Editora Revista dos Tribunais, 2012. p. 31.

<sup>2</sup> In the explanatory memorandum presented by the Administration in the Bill of Law n° 5.877/2005, which preceded the new competition law, the following statement was made: "The main difficulties faced by the SBDC are related to reduced administrative efficiency; high costs due to the existence of three distinct bodies; the lack of material and of human resources; excessive emphasis on mergers; a post-merger control regime; and a notification system based on overly broad criteria." Explanatory memorandum available at: [http://www.camara.gov.br/proposicoesWeb/prop\\_mostrarintegra;jsessionid=65A779D7E33E7AF394E9D7CA64DF3B95.proposicoesWeb2?codteor=339118&filename=PL+5877/2005](http://www.camara.gov.br/proposicoesWeb/prop_mostrarintegra;jsessionid=65A779D7E33E7AF394E9D7CA64DF3B95.proposicoesWeb2?codteor=339118&filename=PL+5877/2005)

## 2. Changes in the institutional design

5. As noted in the Annual Report on Competition Law and Policy Developments in Brazil of 2012, the changes carried out by Law n° 12.529/2011 had the objective of rationalising operations of the SBDC<sup>3</sup>.

6. Under the repealed law (Law n° 8.884/94), the antitrust operations were divided between the Secretariat of Economic (SDE by its Portuguese acronym), the Secretariat for Economic Monitoring (SEAE by its Portuguese acronym) and the Administrative Council for Economic Defense. Both SDE and SEAE were bodies that integrated, respectively, the Ministry of Justice and the Ministry of Finance and, as such, did not have legal personality. Whereas the former was an investigative body that issued opinions on conduct cases and eventually in mergers and acquisitions, the latter was responsible for competition advocacy before other government bodies and regulators and for issuing opinions on M&A cases.

7. CADE, on the other hand, since 1994, is what is called in Brazil an autarchy. It is a legal entity that, under the terms and limits established in the law that created it, has the ability to enact internal regulations disposing of its organisation and operation, its personnel and financial management, as well as its services. In addition, although the Ministry of Justice has oversight over CADE in order to guarantee that it is performing its functions according to the law, CADE is not subordinated or hierarchically related to the Ministry. This is why the Counsel is an independent and autonomous administrative tribunal for merger control and anti-competitive practices since the previous law.

8. As per the new law, all SDE's functions concerning competition and part of SEAE's functions concerning competition are centralised under the "New-CADE". For this purpose, the "New-CADE" is divided into (i) the Administrative Tribunal, which maintains jurisdiction over merger and conduct cases; (ii) the General Superintendence (SG by its Portuguese acronym), competent for antitrust investigations, for reviewing submitted transactions and for forwarding litigious cases to the Tribunal; and (iii) the Department of Economic Studies, responsible for producing non-binding opinions so as to support and ground the technical decisions rendered by both the Tribunal and General Superintendence. SEAE, on its turn, is still responsible for promoting competition in government agencies and before society.

## 3. Independence of the competition authority from the government

9. First, it is important to emphasise that changes brought by the new Law have only reinforced an independence of government that already existed in the institutions that made up the SBDC under Law 8.884/1994. Even though only CADE was constituted as an autarchy, the other bodies that composed the competition system operated in a highly independent manner. As stated in OECD's Peer Review Report on Competition Law and Policy in Brazil of 2005, "although SDE is not created as an independent agency, Law 8884 provides that the Secretary's decisions 'cannot be appealed to higher ranks' in the Justice Ministry (Art. 41). Traditionally, the Ministry has not interfered in SDE's activities."<sup>4</sup> Thus, having in mind that the independence of government is previous to Law n° 12.529/2011, this part of the essay is dedicated to examine how the new Law incremented such independence.

10. The independence of a competition authority hangs not only on structural aspects. Changes that allow for simplified processes and more rational operations are likely to enhance the authority's capacity of exercising its functions with independence. The same can be said about the change that unified the

<sup>3</sup> Annual Report on Competition Law and Policy Developments in Brazil of 2012 available at: [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/AR\(2013\)19&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/AR(2013)19&docLanguage=En)

<sup>4</sup> OECD's Peer Review Report on Competition Law and Policy in Brazil of 2005 available at: <http://www.oecd.org/daf/competition/prosecutionandlawenforcement/35445196.pdf>

headquarters of the competition authority in a single building, enabling its departments and civil servants to interact more easily and on a more consistent and regular basis. These are examples of changes promoted by the new law that undoubtedly had a positive impact on CADE's independence. Nevertheless, as previously mentioned, structural changes are the ones that better reflect – at least in the Brazilian case – the gain of independence of government and, therefore, are the ones that will get more attention in this paper.

11. The fact that the investigative body of the SBDC, the General Superintendence, is now part of CADE's structure and no longer a body within the Ministry of Justice is a good indicator that the independence of the competition authority was enhanced. After all, as noted before, the level of autonomy that Brazilian Law bestows to government bodies is different from the one it bestows to autarchies. An evidence of this is that, while SDE's Secretary had no fixed term<sup>5</sup>, the General Superintendent has a fixed term<sup>6</sup> of two years and may be reappointed for a single subsequent period<sup>7</sup>.

12. As for CADE, even though it was already a highly independent authority before Law n° 12.529/2011, the institutional design created by the new Law was thought to strengthen even more this characteristic. Aspects concerning the authority's autonomy which could still be improved were indicated in OECD's Peer Review Report on Competition Law and Policy in Brazil of 2005. In this report, the following statement was made: "the language of the present statute (Law n° 8.884/1994), providing that commissioners will serve a two year term with the possibility of reappointment 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"<sup>8</sup>. Thus, the suggestion was that the new law contemplated four-year terms, non-renewable, for the commissioners. Another observation made in the report was that the prospect that a president could replace all of the commissioners during the course of a four-year presidential term was not as troubling in terms of autonomy as the simultaneous replacement of all or most of the commissioners at a single point in time. Therefore, the report proposed that commissioner's term should be non-coincident.

13. The Committee on Constitution and Justice of the Brazilian Senate, in the same direction as OECD's report, when appreciating the bill that restructured the SBDC, noticed that it brought important advances compared to Law n° 8.884/1994, as it provided greater functional independence to CADE's members. According to the Committee, the fact that the bill established fixed term of four years and prohibited reappointment of the President and Commissioners increased the autonomy of the authority in comparison to the model formerly adopted.

<sup>5</sup> Law n° 8.884/1994 provided the following: "Article 13. The Secretariat of Economic of the Ministry of Justice — SDE, as structured pursuant to law, will be headed by a Secretary appointed by the Minister of Justice from among Brazilian citizens of renowned legal or economic expertise and unblemished reputation, duly commissioned by the President of the Republic."

<sup>6</sup> Law n° 12.529/2011 provides the following: "Article. 12. Cade shall be comprised of a General Superintendence, with one (1) General Superintendent and two (2) Deputy Superintendents, whose specific duties shall be defined by Resolution. (...) § 2 The General Superintendent shall hold office for two (2) years, and reappointment for a single subsequent period is allowed."

<sup>7</sup> The importance of assuring that the General Superintendent has a fixed mandate was highlighted by the Senate when appreciating the bill that restructured the SBDC. According to a Committee of this House: "It is also noteworthy that the Superintendent, unlike the current Secretary of Economic Law, will have a fixed term, after regular appointment by the President and Senate's approval. He must meet the same requirements as the Commissioners and the President of CADE's Tribunal. His tenure, however, will be of two years and one renewal shall be allowed." Senate's opinion available at: <http://legis.senado.leg.br/mateweb/arquivos/mate-pdf/71091.pdf>

14. In line with the suggestions made by OECD's report, Law n° 12.529/2011 not only provides that the term of office of the President and Commissioners is of four years and consecutive terms for reappointment are prohibited, but also establishes criteria in order to implement the transition to the system of non-coinciding terms of office. According to the law, the appointment of the first four Commissioners had to meet the following criteria in regards to the terms of office, in the following order: (i) two years for the first two vacant seats (ii) three years for the third and fourth vacant seats. These requirements have already been met and the system of non-coinciding terms of office is already in operation.

15. The changes mentioned above show that the new Brazilian law on competition was thought to and has been highly successful in consolidating the autonomy of SBDC's institutions.

#### **4. Multifunction competition authority**

16. Neither the former nor the current competition law assigned CADE economic policy functions beyond competition law. Nevertheless, the new law has introduced changes that must be addressed when analysing how competition authorities relate with other areas and with regulated sectors of the economy.

17. As explained in the first part of this essay, the new competition law extinguished SDE and provided that CADE's General Superintendence was to incorporate the Secretariat's competition functions. Yet, it is important to note that SDE was composed of two departments responsible for distinct subjects. Whereas the Department of Economic Protection and Defense (DPDE by its Portuguese acronym) supported the SDE in competition matters, the Department of Consumer Protection and Defense (DPDC by its Portuguese acronym) supported the Secretariat in consumer law enforcement. Different laws provided the functions of these departments and they did not overlap<sup>9</sup>. However, in view of SBDC's restructuring and of SDE's elimination, it had to be decided whether consumer protection was to be brought together with competition defence or assigned to a different body. If, on the one hand, gains could be achieved by locating responsibility for both competition and consumer policy in a single institution (better policy co-ordination, better understanding of policy-makers and enforcers in each area of the role and limitations of the other, cost savings, etc.), on the other hand, the fact that aspects of consumer protection are not closely related to competition could indeed reduce focus in each area or dilute an integrated agency's mission.

18. In view of the limits and challenges that such an integration could present, the option was for creating a new body that would solely dedicate to consumer protection. The National Consumer Secretariat (SENACON by its Portuguese acronym), a body within the Ministry of Justice, was created in 2012. While it has incorporated all DPDC's assignments<sup>10</sup>, it has the advantage of disposing of greater administrative autonomy, a bigger budget, and a more structured staff. The creation of a Secretariat separated of the competition authority intended to continue to strengthen consumer policy in a scenario in which the body originally responsible for it (DPDC) no longer existed.

19. The other change brought by Law n° 12.529/11 that must be addressed in this essay, concerns the relation of competition and regulated sectors.

---

<sup>9</sup> The repealed articles 18 and 19 of Decree n° 6061/2007 provided the following: "Article 18. The Department of Economic Protection and Defense must support the Secretariat for Economic Monitoring in the enforcement enforce Laws n° 8.884/1994 and n° 9021/1995. Article. 19. The Department of Consumer Protection and Defense must support the Secretariat for Economic Monitoring in the enforcement Law n° 8078/1990."

<sup>10</sup> According to article 17 of Decree n° 6061/2007, the National Consumer Secretariat is responsible for the enforcement Law n° 8078/1990.

20. There is a tension between the option for sectorising antitrust protection by assigning it to sector regulators and the option for unifying it under a single specialised authority. While it might be argued that regulators are more qualified and have greater access to the information necessary to understand the sectors they dedicate to, the antitrust authority, apart from the greater expertise in dealing with technical and complex antitrust issues, is less subject to the influence exercised by players of a certain sector.

21. In the previous regime, while the competition law itself made no exception as to the sectors or markets to which it would apply, the law on telecommunications assigned the investigative functions on competition matters involving telecommunication to the agency responsible for regulating this sector (ANATEL). This exception was repealed under the new law. According to the Committee on Constitution and Justice of the Brazilian Senate, if an exception were made to the telecommunication sector, ANATEL would be the only agency to replace CADE's Superintendence in the investigation of mergers and conducts in a regulated sector. As the commission stated, "despite the great value of ANATEL's expertise in the sector, the application of different standards of analysis for telecommunications is not justified. The antitrust analysis requires very specific knowledge, which is still insufficiently available in the telecommunications agency. The SG has better conditions than ANATEL to ensure greater harmony in the application of competition policy to telecommunications"<sup>11</sup>.

22. Another topic that must be addressed when examining how functions concerning competition are distributed in a jurisdiction is the divergent understandings of CADE and the Brazilian Central Bank as to which of them has jurisdiction over merger cases in the financial sector. On one side, both the former and the current competition law provide CADE with full powers to analyse and decide on any concentration acts that meet the legal thresholds, making no exceptions to any market or sector. On the other side, the law that organised the Brazilian financial system and created the Brazilian Central Bank (Law n° 4.595/1964) empowered the latter to analyse and authorise mergers and acquisitions involving financial institutions. In 2001, the Attorney-General, when confronted with the divergence between the authorities, issued an opinion defending that the Central Bank had jurisdiction over the matter. In 2009, the Brazilian Superior Court of Justice ruled, in a not unanimous decision, in the same direction. Recently, in July 2014, the Brazilian Supreme Court (the Brazilian Constitutional Court) decided, on a preliminary order, that the conclusion of the Superior Court of Justice should prevail, arguing that the Supreme Court does not have jurisdiction to analyse the merits of the case. Since CADE can appeal the decision, the dispute is still unresolved.

23. Finally, it is important to note that, even though the new competition law only refers to CADE and SEAE as institutions that compose the SBDC, it provides that CADE can request other bodies and agencies to assist and collaborate with it. In the same way as Law n° 8.884/1994, Law n° 12.529/2011 provides that "the federal authorities, directors of independent entities, foundations, federal public companies and mixed capital companies and regulatory agencies, are required to provide, subject to liability, all assistance and co-operation required by Cade, including developing technical opinions on matters within their competence"<sup>12</sup>. Such a provision allows CADE to count with the expertise of other agencies when dealing with cases that require a deeper understanding of complex sectors. It also encourages the dialogue between CADE and other agencies, which may as well resort to the competition

---

<sup>11</sup> Senate's opinion available at: <http://legis.senado.leg.br/mateweb/arquivos/mate-pdf/71091.pdf>

<sup>12</sup> While the text above refers to article 9, § 3° of the new competition law, a very similar text can be found in article 36 of law n° 8.884/1994: "Federal authorities, as well as officers of independent agencies, federal government-owned companies and mixed-capital companies, shall render all assistance and collaboration required by CADE or SDE, including as regards preparation of technical reports on the matters under the authority thereof, under penalty of liability."

authority in discussions about cases or regulations that concern antitrust<sup>13</sup>. The collaboration between CADE and other agencies and bodies, whether formally or informally, has been a key tool in the protection and promotion of competition<sup>14</sup>.

## 5. Conclusion

24. This short essay intended to examine how the changes brought by the new competition Law (i) affected the independence of government that SBDC's institutions have and (ii) if these changes resulted in them acquiring or divesting other policy functions than competition protection and promotion.

25. As demonstrated in the third part of the essay, although SBDC's institutions were already highly independent under the previous Law, Law n° 12.529/2011 has introduced changes that added up to the competition authority's independence.

26. Part four of this essay, on the other hand, was dedicated to examining if the competition law assigned the institutions of the SBDC economic policy functions beyond competition law. As has been shown, neither the former nor the current competition law assigned CADE economic policy functions other than competition. Nevertheless, the new Law introduced changes that required considerations on whether consumer protection was to be brought together with competition defence or not. Another question that stood out was if the investigative functions on competition matters involving telecommunication should be kept with the agency responsible for regulating this sector (ANATEL). The dispute between CADE and the Brazilian Central Bank as to which of them has jurisdiction over merger cases in the financial sector is, on its turn, still an unresolved one.

27. As in the case of the changes concerning independence, the decisions to create a new body that would be solely dedicated to consumer protection and to assign to a body within CADE (SG) the investigative function on competition matters involving telecommunication contributed to make Brazilian competition policy more coherent and autonomous.

28. The specific topics addressed in this essay indicate that the SBDC experienced institutional changes devoted to make competition policy more effective and efficient. Even though Law n° 12.529/2011 is relatively recent, the concern – shown in the development of the Law – with government independence and with how competition policy should relate with other areas and regulated sectors reflects on the widespread perception that the changes in the Brazilian competition policy have been positive.

---

<sup>13</sup> Besides opening channels for collaboration between CADE and regulatory agencies, the new competition Law also provides that these agencies may appeal SG's decision which approves a concentration act in their respective sectors. According to the Law: "Article 65. Within fifteen (15) days as of the publication of the decision by the General Superintendence approving the concentration act, under the terms of item I of the caput of Art. 54 and item I of the caput of Art. 57 of this Law: I – an appeal may be submitted to the Tribunal, which may be filed by third parties or, in regards to regulated markets, by the respective regulatory agency".

<sup>14</sup> CADE celebrated more than 25 co-operation agreements and understanding memorandums with other government bodies or agencies. Among them are the agreements with the following regulators: the National Petroleum, Natural Gas and Bio-fuel Agency (ANP); the National Agency for Supplementary Health Services (ANS); the National Health Surveillance Agency (ANVISA); the National Agency for Electrical Energy (ANEEL); the National Agency for Civil Aviation (ANAC); the National Waterway Transportation Agency (ANTAQ); the National Agency for Land Transportation (ANTT). CADE's agreements are available at: <http://www.cade.gov.br/Default.aspx?1d1d1fe12eec2f0b59f94b>