

Executive Summary

Brazil's modern era in competition policy began with the competition law of 1994, which created the three bodies that form the Brazilian Competition Policy System – BCPS. Improvements since 2003 eliminated overlapping functions, so SDE concentrated on anticompetitive agreements and abuse of dominance while SEAE concentrated on merger analysis.

Cartel investigations were aided by powers to conduct dawn raids and to create a leniency programme. Criminal prosecution of cartels is conducted by federal and state prosecutors, in co-operation with the BCPS.

Merger review was improved by a “fast track” process, so mergers that do not present competitive problems are reviewed and approved quickly. Merger review continues to suffer from the lack of pre-merger notification, though.

Competition advocacy to other parts of government and to regulators is particularly important, and effective, because it is performed principally by SEAE, whose position as part of the powerful Ministry of Finance affords it access to many other government bodies.

The most serious problem confronting the BCPS continues to be its lack of resources, which is compounded by a high rate of employee turnover. CADE had no permanent professional staff. SDE is also chronically understaffed, leading to a large backlog of investigations. Another ongoing problem is judicial review. Appeals to the courts from CADE's decisions are common. Cases take years to make their way through the Brazilian judicial system. The result may be effectively to frustrate the enforcement of CADE's orders during this long appeals process.

Proposals to amend the defects in the 1994 competition law have been made for years, without success. But prospects for reform look more promising now. As of mid-January 2010, legislation to consolidate the BCPS into one agency, impose pre-merger notification and provide the agency with a significant number of new, permanent positions had been approved by one house of the Congress and was under consideration in the second. Still, it had not been accomplished, and there was urgent need to complete the process in the first half of the year, lest other important events, including particularly a national election scheduled for later in the year, push it aside.

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This report offers several recommendations for improvement. The most important by far is that the proposed legislation in Congress be enacted. Other recommendations relate to: reducing the backlog in conduct investigations; increasing the use of settlement procedures in both conduct and merger cases, thereby both enhancing efficiency and reducing the number of appeals to the courts; increasing the use of structural remedies in merger cases; strengthening the co-operation between the competition agency and federal and state prosecutors in criminal cases initiated by the prosecutors; enacting proposed legislation that would extend to the competition agency the power to review bank mergers, which is currently in question; developing a stronger competition advocacy capability in CADE and co-ordinating it with SEAE; and continuing to strive for a more effective litigation programme in court.