

OECD PEER REVIEWS OF COMPETITION LAW AND POLICY: BRAZIL 2019

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Highlights from the Peer Review on Competition Law and Policy in Brazil

Brazil requested a peer review as part of the process to become an Associate to the OECD Competition Committee. The OECD report served as a basis of the peer review that was carried out by the OECD Competition Committee on 27 November 2018. This is the third report on competition policy in Brazil prepared by the OECD as part of a peer review process. The report focuses on the extent to which the laws, institutions, policies and enforcement practices in Brazil are in line with OECD competition policy instruments.

Brazil has recently introduced a new Competition Law, as part of several reforms stemming from the 2010 review. The reforms were a significant improvement for Brazil's competition law and policy. In particular, by creating a single autonomous competition agency and introduced a pre-merger notification system. The new Law effectively reformed several important areas previously identified for improvement, including in the previous 2005 and 2010 OECD Peer Reviews.

Below is a summary of the recommendations as to how Brazil could improve its compliance with OECD best practices relating to competition policy and otherwise further improve its competition regime.

Institutional Design and Resources

The new Law addressed the inefficiencies of the old structure, which had split jurisdiction between three competition agencies, by creating a single new agency – CADE. The choice of merging investigative and adjudicative functions into a single agency offered efficiency benefits but raised potential concerns over procedural fairness if the investigator was also the decision maker. This was dealt with by separating these powers into two separate divisions. The investigative arm – the General Superintendence (GS) – to launch and conduct investigations, and a Tribunal in charge of decision-making. These are separated physically within CADE and also through Chinese walls.

In practice, however, the Tribunal has a much more involved role in the investigations than its functions of reviewing the decisions of the GS and the adjudication of challenged mergers and antitrust proceedings would imply. This risks undermining the procedural fairness safeguards of separating the two functions.

Currently, there is no formal application system for interested candidates to the positions of CADE's President, Commissioners and the General Superintendents. Tribunal members are nominated by the Government. This risks the perception that the process is politicised, particularly when nominees have limited relevant experience.

On staffing levels, CADE has a high turnover of staff, especially among the more junior-levels. Allegedly, the reason for this phenomenon is the higher salaries in the private sector and the fact that there is no dedicated civil service career path for CADE employees. Moreover, there is a need for more economists, particularly highly skilled PhD economists. This would improve CADE's ability to conduct detailed quantitative assessments, which is necessary for abuse of dominance cases. Increased economic expertise would also enable it to conduct more ex post evaluations of its actions to feed in to future case assessments.

Agency independence is key for the effective enforcement of competition rules. Despite CADE's autonomy in all areas, the Ministry of Justice has budgetary supervision of CADE's foreign travel expenditure.

Enforcement Powers and Merger Control

The abuse of dominance has not been a priority enforcement area for CADE since the new Competition Law entered into force. There have been few investigations and fewer full-fledged decisions by the Tribunal, as most cases are settled. Priority was understandably allocated to the implementation of the new mandatory notification system in the first years after the introduction of the new Law. Subsequently, CADE's cartel enforcement programme was the main focus, particularly due to the number of cases that flowed from the Car Wash operation. This pressure combined with the lack of a dedicated abuse of dominance enforcement team, extensive reliance on settlements and a lack of economic expertise to be able to conduct the in-depth analysis required, has limited the number of abuse cases that CADE has been able to investigate.

Settlements are extensively used by CADE. CADE has modified its settlement procedures to increase the incentives for companies to co-operate and that has proven very effective. There are, however, downsides to this. CADE's interventions may not be sufficiently deterrent, given that discounts are generous and companies know they can settle right up until the Tribunal's final decision. If a settlement can be concluded after the General Superintendence has finalised its investigation, this impacts on the administrative efficiencies and resource savings that typically justifies a settlement policy.

In addition to its turnover-based merger control thresholds, Brazil applies an effects test to determine whether a merger should be notified. The 2005 OECD Recommendation on Merger Review recommends that countries should assert jurisdiction only over those mergers that have an appropriate nexus with their jurisdiction, and use clear and objective criteria to determine whether and when a merger must be notified. Examples of criteria that are not objectively quantifiable or readily accessible to the parties are market share and transaction-related effects – such as the effects test relied on by Brazil in addition to its merger notification thresholds.

The methodology for calculating the amount of fines for infringements of the Competition Law is unclear. There is uncertainty over what constitutes a "field of economic activity" in relation to the turnover of the infringing company.

There is also uncertainty about how and whether to calculate the benefit derived from the infringement. Calculating the illicit benefit that the offender obtained as a result of its anti-competitive conduct is extremely difficult.

Advocacy

The new Competition Law assigned advocacy powers to the Ministry of Finance (SEPRAC and SEFEL). Absent a formal legal limitation to take advocacy initiatives, CADE continues to consider advocacy one of its core functions. This shared advocacy competency could lead to inconsistencies, notably in relation to their respective intra-governmental advocacy activities and the conduct of competition assessments on existing and proposed policies and regulation, as well as industry sectors.

CADE has issued a number of procedural guidelines (e.g. leniency, settlements) but has not issued a great deal of substantive guidance. The lack of substantive guidelines in key areas, such as the methodology for calculating fines and criteria for the analysis of abuse of dominance cases, has led to inconsistent decisions and approaches within CADE.

Key Recommendations

1. **Ensure better separation between investigation and decision-making.** The roles of the Tribunal and the General Superintendence should be more clearly delineated.
2. **Establish a more transparent appointment system** for CADE Commissioners and the General Superintendent.
3. **Devote adequate resources to competition enforcement** by hiring more economists, in particular with PhDs and by creating a dedicated career path for CADE's permanent staff.
4. **Increase the number of investigations into potential abuses of dominance** by prioritising these kind of cases, creating a dedicated enforcement team to deal with abuse cases and by relying less on settlements.
5. **Improve the scope and application of CADE's settlement policy** by negotiating during the investigation at the GS and before the case goes to the Tribunal, reducing the discount levels granted in cartel settlements in line with levels observed in other jurisdiction, by not accepting settlements in cases involving novel or complex legal issues.
6. **Ensure that only objectively quantifiable and readily accessible criteria** are used as merger notification thresholds.
7. **Clarify the methodology for calculation of fines**, for instance, by adopting a streamlined approach to setting fines that relies on readily identifiable data and avoids having to engage in complex calculations.
8. **Increase legal certainty and predictability** through substantive guidelines.
9. **Clarify the respective advocacy powers** and the roles of CADE and the Ministry of Finance (SEPRAC and SEFEL).

As a Participant, Brazil has been actively involved in the works of the OECD Competition Committee. Since 1997 Brazil has regularly attended the meetings of the Competition Committee and its working parties and participates in other Competition Fora on a regular basis. To date, Brazil has undergone three OECD peer reviews of its competition law and policy (2005, 2010, 2019). As a result of the positive outcomes of these peer reviews, Brazil has been invited to become an Associate member of the OECD Competition Committee and its subsidiary bodies with the aim of strengthening the country's engagement and co-operation with the OECD.

Peer Reviews of Competition Law and Policy

OECD peer reviews have proved to be a valuable tool for countries to reform and strengthen their competition frameworks.

The mechanisms of peer reviews vary, but they are founded upon the willingness of a country to submit its laws and policies to substantive questioning by other peers.

The process provides valuable insights into the country under study, getting to the heart of ways in which each country deals with competition and regulatory issues, from the soundness of its competition laws to the structure and effectiveness of its competition institutions.

Furthermore, these reviews incorporate recommendations for changes in government policy.

Access all OECD country reviews on competition law and policy at www.oecd.org/daf/competition

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| Argentina (2006) | Latin America (2006, 2007, 2012) |
| Brazil (2005, 2010, 2019) | Mexico (2004) |
| Chile (2004) | Panama (2010) |
| Colombia (2009) | Peru (2004, 2018) |
| Costa Rica (2014) | Romania (2014) |
| Czech Republic (2008) | Russia (2004) |
| Denmark (2015) | South Africa (2003) |
| El Salvador (2008) | Chinese Taipei (2006) |
| European Union (2005) | Turkey (2005) |
| Greece (2018) | Ukraine (2008) |
| Honduras (2011) | Vietnam (2018) |
| Kazakhstan (2016) | |

