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Contribution by Brazil

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THE AUTONOMY OF ANTITRUST AUTHORITY IN BRAZIL: CADE'S ACHIEVEMENTS, CHALLENGES AND PERSPECTIVES UNDER THE NEW COMPETITION LAW

-- Brazil --

1. Among the variables that help to explain the autonomy of competition authorities, the institutional design of such organisations and their adequacy to the specific economic, legal and political characteristics of each jurisdiction remain key elements in explaining the achievements and challenges of antitrust authorities around the world.¹ Such institutional designs – which may vary significantly according to the jurisdiction in question – encompass a wide set of considerations, including legal competencies, freedom from political pressure, budgetary autonomy and the relationship with other governmental bodies, which enable antitrust agencies to pursue antitrust enforcement and policy objectives in accordance with the law.²
2. The combination of such considerations is even more relevant when taking into account the broad scope of antitrust actions and the amount of individuals, groups and companies exposed to their effects. Given that no antitrust authority conducts its duties in complete isolation, autonomy holds an additional value, namely, the legitimacy of competition authorities' decisions towards diverse stakeholders.³ Indeed, depending on the purpose, isolation from other governmental bodies may even harm the autonomy sought by competition authorities.⁴
3. As in other jurisdictions, the Brazilian Competition Defense System (SBDC for its acronym in Portuguese) has undergone significant changes over the past years, which necessarily reflect on CADE's autonomy as the Brazilian antitrust authority and as one of the institutions composing the SBDC.⁵
4. In order to assess CADE's autonomy, this contribution presents CADE's institutional design under the new Brazilian competition law (Law 12.529/2011). In light of the abovementioned considerations regarding institutional autonomy, CADE's strategies adopted to enhance the reach of the available resources and compensate its restraints will also be presented.

¹ Carvalho, V. (2015). *A política de defesa da concorrência quatro anos depois: ainda em busca de melhores práticas?* In: Carvalho (2015) *A Lei 12.529 e a Nova Política de Defesa da Concorrência*. São Paulo: Editora Singular, pp. 13-29.

² Trebilcock M. Lacobucci E. (2010), "Designing Competition Law Institutions: Values, Structure, and Mandate", *Loyola University Chicago Law Journal*, Vol. 41, No. 3, pp. 455-471. <http://lawcommons.luc.edu/lucj/vol41/iss3/5/>.

³ United Nations Conference on Trade and Development, *Independence and Accountability of Competition Authorities*, TD/B/COM.2/CLP/67 http://unctad.org/en/docs/c2clpd67_en.pdf.

⁴ Carvalho, V. (2015). *A política de defesa da concorrência quatro anos depois: ainda em busca de melhores práticas?* In: Carvalho (2015) *A Lei 12.529 e a Nova Política de Defesa da Concorrência*. São Paulo: Editora Singular, pp. 13-29.

⁵ The Secretariat for Economic Monitoring (SEAE, for its acronym in Portuguese), which is subject to the Brazilian Ministry of Finances, is the other institution that currently composes the SBDC. SEAE's role within the competition scope is restricted to advocacy initiatives.

1. CADE's institutional design under the new competition law

5. The entry into force of the new competition law has brought significant improvements to the SBDC, and particularly to CADE. Such improvements are also related to CADE's autonomy.

6. With the new competition law, the SBDC, which was previously composed of three authorities, was reformed in two organisations. As the Brazilian competition authority, CADE is a federal, decentralised unit (*Autarquia*) linked to the Ministry of Justice and divided in three main bodies.

7. The Administrative Tribunal is the authority's adjudicative body. Composed by six Commissioners and by CADE's President, the plenary is responsible for issuing decisions regarding the cases submitted to it in accordance to competition law and for ensuring compliance to the authority's internal statute, which is elaborated and amended by the plenary through resolutions.

8. The General Superintendence is CADE's investigative body, headed by the General Superintendent and, immediately below his authority, by two Deputy-Superintendents, one being responsible for anticompetitive conducts and the other for mergers and unilateral conducts. Together, the General Superintendent and the Deputies compose the Cabinet of the General Superintendence, which is responsible for instructing the activities of eight Antitrust Analysis Units (CGAAs 1 to 8, for their acronym in Portuguese).

9. The General Superintendence is therefore responsible for i) validating notifications and instructing the proceedings, conducting investigations regarding anticompetitive conducts; ii) signing Leniency and negotiating Cease and Desist agreements with applicants; iii) issuing opinions based on the assessment of each case and, if applicable; iv) forwarding them to the Tribunal for a final administrative decision.

10. The Department of Economic Studies is responsible for issuing technical opinions to support the Tribunal or the General Superintendence's decisions upon request of the President, the Plenary or the General Superintendent. It may also conduct economic studies that it deems relevant for competition authority's activities. The Chief Economist and the Deputy Chief Economist are appointed jointly by the President and the General Superintendent.

2. Autonomy and the 'New CADE'

11. By means of a pragmatic conduction of the transition to the new competition system, it was possible to define clear competencies for each one of CADE's three main bodies.⁶ This unequivocal definition of roles not only dissipated possible concerns regarding the concentration of investigative and adjudicative responsibilities under a single institution, but has also reinforced the coordination between the two stages of antitrust regulation, rendering enforcement more efficient and isolated from political pressure, if compared to the previous structure. Whereas the previous merger assessment units were subject to the Ministry of Justice and to the Ministry of Finances, with the new pre-merger review mechanism, the analysis of mergers lies currently under CADE's competence. The nomination of CADE's top ranks (i.e. President, General Superintendent, Commissioners and Attorney-General) behooves to the President of the Republic and must be approved by the Brazilian Senate. The provisions of the new competition law ensure a fine balance between the autonomy required for the due exercise of these positions and the accountability towards governmental institutions.

⁶ Zarzur, C., Bagnoli V. (2015). Os três primeiros anos da Lei 12.529/2011. In: Carvalho (2015) A Lei 12.529 e a Nova Política de Defesa da Concorrência. São Paulo: Editora Singular, pp. 3-12.

12. Both the President and the Commissioners are assigned for a non-renewable four-year term. The General Superintendent is be assigned for a two-year term, renewable once. The President, the Commissioners or the General Superintendent may be removed from their office only under specific reasons, which are set in the competition law. According to the text, such authorities may only be removed by a decision of the Senate, upon request of the President of the Republic, by conviction for crimes or due to non-compliance to the Article 8, which intends to isolate such public positions from private or political pressures that might influence their role.⁷

13. CADE's new institutional design has also engendered other relevant features. The incorporation of additional competencies mentioned previously has fostered initiatives to strengthen some of the existing structures under the previous SBDC. For instance, following important lessons from the international experience, the authority has improved its internal negotiation mechanisms in order to optimize results regarding Leniency and settlements agreements.

3. Co-operation as a tool to bolster autonomy

14. Although the examples mentioned until the moment focused on the improvement of CADE's internal capabilities, the antitrust authority has not neglected cooperative efforts with different stakeholders in order to expand its autonomy to pursue and accomplish the objectives of the Brazilian competition law. Over the past years, CADE has also equated the dynamics of cooperation – both in the international and domestic scopes – as means of strengthening the authority's autonomy in the pursuit of its core competencies. Within the international competition community, CADE has cooperated directly with sister agencies in order to assess transnational mergers and anticompetitive conducts in multiple jurisdictions. The authority has signed international agreements with foreign antitrust authorities and international organisations in order to exchange information and share the best practices available on competition matters. Within the multilateral sphere, the authority has actively participated in the International Competition Network (ICN) and in the OECD competition fora, among other important cooperative instances, with the purpose of exchanging views on competition matters with its peers and aligning its initiatives with the best practices available.

15. On the domestic sphere, the authority has strategically strengthened its ties with the Public Prosecution Services and Comptroller Offices at the federal, state and local levels. Bearing in mind CADE's autonomy, these strategic partnerships are meaningful, since they bolster the authority's investigative capabilities beyond the resources available to the agency by providing the exchange of information between public authorities that investigate illicit activities involving several wrongdoings – and among them, anticompetitive conducts.

16. CADE has also approached several regulatory agencies in various economic sectors as means to articulate competition and regulatory policies with the purpose of preventing institutional conflicts that may derive from the overlapping of legal competencies. With the consolidation of the ties between CADE and the regulatory agencies, the latter will tend to employ their technical expertise on their respective sectors in service of the maintenance of a competitive economic environment.

17. Furthermore, the civil society is also part of the cooperative engagements of the competition authority. CADE has spared no efforts to submit its internal resolutions, guidelines and other institutional

⁷ Article 8 forbids the President, Commissioners and General Superintendent i) to receive any kind of fees for the exercise of their mandate; ii) to exercise any profession in parallel with their mandate; iii) to participate in any way from the management of a company, association or civil society organization; iv) to act as consultants or issue opinions privately; v) to provide their private opinion regarding CADE's cases to the media; and, vi) to exercise political/party activities during their term.

initiatives to public consultations. The effect of this proactive openness and transparency to several different professional, social and economic actors' opinions is the progressive consolidation of the authority's *de facto* legitimacy to act in the pursuit of the goals of the competition law.

4. Autonomy, Challenges and Perspectives

18. The antitrust authority's workforce employed in its core responsibilities is currently provided by the Ministry of Planning, Development and Management, which is responsible for hiring the civil servants and for assigning them to the antitrust authority upon request.⁸

19. In order to deal with the scarce workforce and the high degree of labor turnover, some alternatives have been suggested. The creation of an antitrust analyst career within the Brazilian civil service, based on the model of the national regulatory agencies, is one of them. A permanent solution for the problem is therefore relevant for the autonomy of the agency, given the increasing amount and complexity of cases to be assessed or investigated.

20. Concerning its budget, CADE must submit annually a formal budget request to the Ministry of Justice, which then forwards the budget proposal to the Ministry of Planning, Development and Management. The latter incorporates the request in the project of the annual budget bill (PLOA, for its acronym in Portuguese). The Executive then sends the bill to the Congress for approval.

21. In spite of the challenges posed by the workforce and by budgetary restraints, CADE remains committed to its core responsibilities. Autonomy is therefore an essential asset in the pursuit of competition policy goals. There are several means to enhance autonomy. They include a favorable institutional design that prevents political pressure and private interests within the scope of the antitrust authority's investigations and rulings. Moreover, cooperation with various stakeholders contributes to optimise the outcomes of the available resources, thus enhancing the authority's powers to ensure the compliance of economic agents to the principles and obligations of competition policy.

⁸ In order to illustrate this matter, CADE currently counts with a staff of 318 employees, from which only 149 are career civil servants (civil servants who have been hired by means of public *concours*). The authority also counts with additional 42 interns distributed along the three bodies. According to the Article 121 from the new Competition Law, 200 career civil servants should also integrate CADE's staff.