

COMPETITION LAW AND POLICY IN BRAZIL A PEER REVIEW



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1. WHAT IS A PEER REVIEW?

- It's an in-depth analysis of competition policy and competition law enforcement in a country.
- It begins with an in-depth questionnaire sent to the Competition Authority, comprehensive research, on site interviews and document review.
- A draft report is prepared and discussed. In this case, it was at the February 2010 meeting of the OECD Global Forum on Competition (in presence of 90 countries and IGOs/NGOs).
- Representatives of the country under review are subject to searching questions by selected country examiners.
- Finally the report is published and presented in the reviewed country.

2. THE 2010 PEER REVIEW REPORT ON BRAZIL

- The OECD and the IDB have been studying competition policy in Brazil for ten years. An OECD report published in 2000 (not a peer review) was followed by a full peer review in 2005. This 2010 Report is the second peer review of Brazil done by the OECD in partnership with the IDB.
- These reports document the remarkable progress made in competition policy here in the past decade. These achievements were made despite what many experts believe to be serious flaws in Brazil's competition law, Law 8884, enacted in 1994.

3. EVOLUTION OF COMPETITION POLICY IN BRAZIL: CARTELS

- Hard core cartels – agreements among competitors fixing prices or allocating markets – are considered on a global scale to be the most harmful of all types of anticompetitive conduct, and prosecuting them should have high priority in a competition agency.
- In 2000, the anti-cartel programme of the BCPS (comprising CADE, SDE and SEAE) was almost nonexistent. Today it is robust, and widely admired.
- The BCPS effectively employs such important tools as a leniency programme and dawn raids in its anti-cartel effort. Its use of criminal process against cartels is especially noted.

3. EVOLUTION OF COMPETITION POLICY IN BRAZIL: MERGERS

- In 2000, merger review occupied a substantial part of the BCPS' resources – as much as 70%. The review process was slow and inefficient. The rules controlling merger notification were flawed; notably, notification before consummation (“pre-merger notification”) was not required.
- Beginning in 2003 the BCPS perfected a “fast track” review process for non-problematic mergers. Ambiguities in the notification rules were largely (but not completely) resolved. The lack of pre-merger notification, however, continues to be an impediment.

3. EVOLUTION OF COMPETITION POLICY IN BRAZIL: ADVOCACY

- Competition advocacy has two functions – promoting competition policy in other parts of government and in regulation, and promoting public support for an effective competition policy.
- The BCPS excels in both of these areas. SEAE, as part of the Ministry of Finance, has long had an influential role in the formulation of government policies. CADE and SDE are active in the public arena in various ways. SDE's efforts in promoting the anti-cartel agenda are especially notable.

3. EVOLUTION OF COMPETITION POLICY IN BRAZIL: JUDICIAL REVIEW

- Review of CADE's decisions by the courts has become an important issue. The standards for judicial review of competition cases are not well articulated. As in many countries, courts are not familiar with competition cases. For years, fines imposed by CADE had not been collected. Perhaps most important, appeals to the courts meant long delays – up to ten years or more.
- Beginning in 2006 CADE became much more aggressive about collecting fines in court – with good results. CADE revised its internal litigation procedures, making them more efficient and effective. But fundamental problems remain.

3. EVOLUTION OF COMPETITION POLICY IN BRAZIL: INSTITUTIONAL ISSUES

- The BCPS has long faced problems resulting from its institutional design. Interaction between the three agencies was inefficient. Their budgets were inadequate. They suffered from a lack of permanently assigned staff – the problem was especially acute at CADE. A chronic problem at the three agencies was a high rate of staff turnover. The terms of CADE's commissioners (two years) were too short.
- The three agencies now work together much more efficiently, but other institutional problems, which are mostly a function of the competition law, continue.

4. RECOMMENDATIONS

The BCPS has made great progress in the past decade. Notable achievements include its development of a vigorous anti-cartel program and the creation of a fast track merger review process. More should be done, however. The 2010 Report sets out a number of recommendations, the most important of which are:

4. RECOMMENDATIONS

Consolidate the functions of the BCPS into one agency. *The BCPS has made the best out of what once was a highly inefficient system. Still, the single agency model, which has proved successful in many other jurisdictions, should result in further improvements in Brazil.*

4. RECOMMENDATIONS

Create CADE career positions and provide adequate resources to hire and retain a sufficient number of qualified professional staff. Of the problems facing the BCPS at present, inadequate staffing and high employee turnover may be the most critical.

4. RECOMMENDATIONS

Extend the terms of the commissioners and other politically appointed senior officers to at least four years and make the terms non-coincident. *The short terms of the commissioners are another reason for high staff turnover, and they adversely affect CADE's institutional memory and its political independence.*

4. RECOMMENDATIONS

Modify the merger notification and review process to provide for premerger notification and revise the notification rules to conform to international best

practices. These reforms will make BCPS merger review more efficient and predictable. The fast track process is evidence of the ability of the BPCS to review mergers quickly, which is important for pre-merger notification.

4. RECOMMENDATIONS

Reduce the backlog of conduct investigations and cases within the BCPS and shorten the time required for the final disposition of an investigation or case.

The backlog of conduct investigations in the BCPS is significant, though it has been reduced somewhat in recent years. Resolution of conduct investigations can take years. Reorganization and additional resources will help, but the BCPS should assess and revise its own procedures for further efficiencies.

4. RECOMMENDATIONS

Continue to strive for a more effective litigation programme in court. In the longer run, consider proposals for changes in the judicial system that could help to expedite competition cases.

The BCPS has begun to address this litigation issue, but not all problems, especially that of inordinate delay, are within its control. The BCPS and other interested parties could begin to think about changes in the system that could speed the review of competition cases.

4. RECOMMENDATIONS

Take advantage of procedures for settling cases (reaching agreement with respondents on an appropriate remedy).

Settling competition cases is common in some other countries. Procedures for settling both conduct and merger cases exist in Brazil, and CADE has begun to use them more often. Settling cases (but not too cheaply) promotes efficiency and helps to avoid costly and lengthy judicial appeals.

Also in the Report are several more specific recommendations on various issues.

5. THE PENDING LEGISLATION

The legislation now in Congress addresses all of the major concerns expressed in the Peer Review Report. The Bill is complex; most importantly it:

- consolidates most of the functions of CADE, SEAE and SDE into one agency, CADE, and provides for more efficient review procedures;
- provides for more resources and for permanent positions in the new agency;
- lengthens the terms of CADE's commissioners;
- provides for pre-merger notification and revises the notification rules appropriately.

6. CONCLUSION

The BCPS has made historic strides in its enforcement of the competition law and in implementing competition policy in Brazil. More is to be done, however, and much depends on implementing structural changes of the kind articulated in the revisions to the competition law currently pending in Congress.