## The Standing of the Competition Administrative Authorities - the Judiciary in Brazil

Antitrust still is a fledgling field in Brazil. Until recently, the Brazilian economy model was based on interventionism and excessive protectionism measures, which, amongst other things, fixed prices. This scenario clearly reveals that for a long span of time the Brazilian Competition Defense System, which was originally created in 1962, had no relevant role, for there was no free competition and, therefore, no free market to be protected.

This situation, however, changed radically in the beginning of the 1990s. The implementation of a stabilization plan (Real Plan), which provided for the gradual opening of the economy, effectively put into practice a new model in which the Brazilian government waived the power to control market prices and undertook functions of supervision, incentive, and planning instead. Such model represented a sharp contrast to the previous scenario, by leading the economy to face a free market and, consequently, throwing players into a competitive environment.

In the midst of these major structural changes, a new competition law (Law n. 8,884/94) was enacted, transforming the ultimate Brazilian Competition Tribunal, the Administrative Council for Economic Defense – CADE, into an independent agency. The Competition Law not only established merger control, but also defined anticompetitive conducts. Accordingly, the Brazilian Competition Defense System finally became effective.

Nowadays, the Brazilian Competition Defense System is composed of three governmental entities. The Secretariat for Economic Monitoring - SEAE, the Secretariat for Economic Law – SDE, and the Administrative Council for Economic Defense -

CADE. SEAE and SDE are governmental bodies administratively subordinated to the Ministry of Finance and Ministry of Justice, respectively, whereas CADE, as mentioned before, is an independent governmental agency.

SEAE and SDE issue non-binding technical reports; the latter mainly based on a legal standpoint, and the former mainly based on an economic point of view. Both mergers and antitrust investigations are subject to technical analysis performed by SEAE and SDE[1], being thereafter forwarded to CADE for judgment. CADE is the ultimate competition body, rendering final decisions on antitrust cases.

Despite the current vigorous antitrust administrative enforcement, the long-lasting period based on a governmental policy of price control has been causing major setbacks in that it hindered the Brazilian society from fully understanding the values of competition for general welfare. Actually, bringing the public opinion of consumers and business people in favor of strong antitrust enforcement is one of the biggest challenges faced by the Brazilian Competition Defense System.

Likewise, the Judiciary branch has also demonstrated in several occasions lack of knowledge when competition issues come to their hands. As a general rule, judges tend to make use of traditional fields of law to deal with brand new competition issues, disregarding some basic concepts of economics.

Originally, the Brazilian Competition Law foresaw the Judiciary as an enforcement instrument for the decisions rendered by the Brazilian Competition Defense System. However, the Judiciary has not effectively performed its task as an enforcer of the Competition Law, being conversely used to a certain extent as a mechanism to delay several administrative decisions, hindering the efforts of the Brazilian Competition Bodies towards Antitrust enforcement.

[1] It is important to note that technical reports elaborated by SEAE are mandatory only in merger cases. However, SEAE has the discretionary power to issue non-binding reports also on conduct cases whenever it sees appropriate to do so.

In this regard, it is important to point out that decisions imposing fines for untimely filing of mergers and acquisitions to the Brazilian Competition System have been frequently reverted by the Judiciary[2]. And that is not the worst. How far judicial review of administrative action can go is a question yet to be answered. But some major decisions in which the Brazilian Competition Defense System imposed fines for anticompetitive behavior have been questioned, at least to a certain extent, by the Judiciary.

A major example of that trend happened in the cartel case involving the Brazilian steel industry. The Brazilian Competition Defense System decided to impose a substantial fine upon companies forming a cartel on the steel industry. Such administrative decision was brought by the parties involved to the judicial courts, which decided to grant a preliminary injunction requested by them in order to suspend the collection of the fine, at least until the final judgment by the Judiciary on the grounds of the administrative condemnation. This preliminary judicial decision rendered by the judicial court was appealed and awaits judgment.

Several other cases are bound to face the same fate; and indeed they have. Recently, the Brazilian Competition Defense System condemned a cartel in the gas station market in the city of Florianopolis, State of Santa Catarina. The companies involved in this proceeding have already resorted to the judicial courts, which also granted a preliminary injunction. Likewise, such preliminary injunction was appealed and awaits judgment.

Lack of competition culture, however, is not the only problem when one submits an Antitrust case to the Judiciary for review of administrative decisions. The backlog of cases being litigated clogging the Brazilian Judicial courts is an important factor to be taken into account. Even though the Judiciary has been repeatedly acknowledged as an

[2] There have been several cases in which the judiciary courts reverted the imposition of fines for untimely submission, such as, for instance: (i) the acquisition of the heavy duty division of Altom France S.A. by General Electric.; and (ii) acquisition of 40% of Banco Brascan S.A. by Mellon International Investment Corporation.

independent branch, the excessive number of cases has inevitably reduced the quality of the judicial decisions. Perhaps this is one of the main reasons why the Judiciary is viewed with a certain amount of skepticism by the general public.

The review by the judiciary branch of decisions rendered by the Brazilian Competition Defense System is a policy that follows the trend towards fully review of agency action by the Judiciary. Such trend probably resulted from the redemocratization process, which reinvigorated the checks and balances system in Brazil in order to reach, *inter alia*, greater review of the acts performed by the Executive Branch, especially with regard to problems involving abuse of discretion.

It is important to note that the Judiciary can not be insulated from analyzing competition cases. According to the Brazilian Federal Constitution, all kinds of harms can be appreciated by the Judiciary Branch. That results in the conclusion that every decision rendered by the Brazilian Competition System can be reviewed by the judicial courts to a certain extent.

Besides, the Brazilian Competition Law foresees the possibility of private parties and some other governmental bodies initiating antitrust litigation directly before the judicial courts, without first resorting to the Brazilian Competition Defense System. Although this has not become a popular option for private practice yet, competition advocacy programs tend to gradually increase the participation of the Judiciary in competition litigation.

Therefore, the main issue at hand that needs to be solved relates to competition awareness of the Judiciary branch. Judges will have to become aware of the importance of economic concepts and microeconomic tools involved in competition cases in order to fully understand the benefits brought by competition policy.

Accordingly, they will have to be able to evaluate the implications arising from the economic questions when deciding competition cases. Such analysis will necessarily

go through basic economic concepts, such as relevant market definition, economic efficiency, among many others. The lack of knowledge of competition concepts might increase the probability of erroneous decisions if compared to other decisions in which the underlying subject deals with traditional fields of Law.

In theory, generalist judges would have trouble dealing with competition law. This assumption would lead to a conclusion that specialized courts would be necessary to better involve the Judiciary Branch with Antitrust litigation. At this stage, however, the load of competition cases, especially if compared to all the other kinds of cases under way at the Judiciary, would not justify the creation of such specialized courts. This is a solution perhaps to be taken into account in a few years, since the practice of specialized courts, such as tax and labor courts, is already disseminated in Brazil.

Specialized courts are a possible solution for the future, as mentioned However, in order to hasten antitrust enforcement, the participation of the Judiciary could be limited to the review of the adequacy of the application of the Competition Law. According to this proposal, the construction of facts by the administrative agencies would not be subject to review by the judicial courts. Such proposal would have to be supported by relevant alterations in the legislation now in force.

Besides that, the overload of cases, as mentioned before, is a major hindrance not only to regular cases, but especially to the analysis of competition cases. Increasing backlogs and trial delays become even greater problems when dynamic market conditions are at stake. Again, the solution for the excessive caseload for each judge would unavoidably involve a major reform in the Brazilian Judiciary branch.

For now, therefore, the best way to approach the goal of improving the relation between the Judiciary and the Competition Administrative Bodies would inevitably entail awareness campaigns specifically targeting judges, by demonstrating to them in detail the scope and purposes of the Brazilian Competition Law.

Such campaigns can be organized by national and international governmental agents in order to promote competition awareness. As a matter of fact, the Brazilian Competition Defense System is already working in a project envisioned by UNCTAD with the specific purpose of promoting awareness of competition goals in developing countries. This project involves the formation of trainers who will be responsible for providing antitrust information for several groups of the society in Brazil in the years to come. One of the first groups targeted by said project is the judiciary.

Apart from these governmental campaigns, the Brazilian Competition Defense System could increase its participation in universities and colleges in order to foster to organization of seminars featuring competition awareness. These seminars would not only target judges, but all parts of the society. This would be a way of spurring the development of competition in the country as a whole, thus eventually reaching the Judiciary. Similar seminars were carried out by the time of the enactment of the Brazilian Consumer Law in 1990 in order to promote awareness of consumer rights, obtaining fairly good results.

Besides that, Law Schools should include microeconomics and economic law as mandatory courses in their curriculums. Such measure would not only enable future lawyers and judges to get the underlying ideal of competition at a very early stage of their careers, but also become an example of the importance of the subject to society. Hopefully, the few graduate courses on the subject of competition being offered today would multiply into many, thus fostering awareness.

All in all, in spite of the great improvement of the Brazilian Competition Defense System over the last few years, judicial review of administrative constitutes to a certain extent a barrier to effective antitrust enforcement in Brazil.

According to the Brazilian legislation, judicial review of administrative action might be considered inevitable. Nevertheless, such review must be adequate to the peculiarities of competition matters. Their lack of judicial experience and resources

account for major barriers against the integration of competition enforcement. At this initial stage of entanglement of the Judiciary with competition concerns, the best approach would involve awareness campaigns in the fashions already described herein. Awareness leads to better judicial decisions and, therefore, to effective competition enforcement.