

The ICN @20: A Solid Path to International Cooperation & Convergence

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During the past 25 years, convergence to international best practices on substance and procedure has set the path to modern competition law enforcement in Brazil, while also ensuring the most efficient use of the government's scarce resources. Brazil's experience is not unique. Competition agencies in developed and developing countries alike have strong reasons to pursue further cooperation and conversion: over 125 jurisdictions have a competition law system, and the large majority has an active enforcement agency.² Merger and conduct cases are increasingly multinational. Case dockets grow every year, while resources in most countries do not follow suit.

Joining forces through international cooperation and convergence is therefore the only possible way to achieve consistency, efficient outcomes and predictability on competition enforcement. It is also a promising path to minimize (although perhaps not eliminate entirely) clashes among the different systems and ensure procedural fairness.

The first Brazilian competition law dates from the 1930s, but it was only in the mid-1990s that enforcement effectively began in Brazil, as the country shifted to a market-based economy. Among other reforms, fruit of the Washington consensus, in 1994 Congress enacted Law No 8,884/1994, which governed Brazil's administrative antitrust law and policy until May 2012. Law No. 12,529/2011 entered into force then, introducing significant changes to the country's institutional and legal framework. Many if not most of the current statutory provisions reflect international best practices on merger review, conduct enforcement and the Administrative Council for Economic Defense's (CADE) organization.³

During all this time, the antitrust authority implemented several changes to its rules and policies considering well tested experiences from more mature jurisdictions. Technical assistance from agencies such as the United States Department of Justice (DoJ) and Federal Trade Commission (FTC), the European Commission, and international organizations such as the Organization for Economic Co-operation and Development (OECD) were also crucial. And since 2001, tapping into tools and other resources made available by the International Competition Network (ICN) have been instrumental to ensure continuous and sustainable progress of competition law enforcement and policy in the country.

Of all its numerous resources, ICN's Recommended and Good Practices⁴ have probably been the most often sought over the years and particularly welcome in two situations: (a) when agencies are confronted with issue for the first time; and (b) when necessary to convince other stakeholders (*e.g.*, government agencies, the Bar, Congress, courts) of the need for specific measures (*e.g.*, introduce changes to existing rules, arguments in a complex case, win a case in court). Its Recommended Practices for Merger Notification & Review Procedures and the Anti-Cartel Enforcement Manual are two very popular sets of compilation of international practices that Brazilian authorities

have resorted to during the past years to advocate for changes to its policies and legal provisions and win support along the way.

A hard-core cartel; an abuse of dominant position or an anticompetitive merger has similar effects on consumer welfare regardless of whether it takes place in a developed or in a developing jurisdiction, a small market economy or a large economy, in a national or a regional market. Antitrust rules on the other hand control creation and uses of economic power and so help markets work for the benefit of buyers, sellers, and firms competing on the merits rather than for the benefit of a privileged and powerful few. So, having effective antitrust system based on rules that have been successfully tested elsewhere is critical for Brazil and arguably for other countries at comparable level of economic development and facing similar challenges.

Convergence allows agencies around the world to potentially reach similar answers regarding comparable challenges when reviewing cases that many times have the same elements. But (i) most antitrust rules addressed in best practices are general enough; and (ii) market structures and many elements of the case are specific to each of the jurisdictions, and so agencies will continue to reach different outcomes regardless of the degree of convergence achieved on the legal and economic theories they apply. Therefore, the critique that good, best and recommended practices are based on experiences in the developed world and may not be as useful for developing countries, while certainly sheds light on an area that merits thoughtful consideration by the ICN during its third decade, may not be entirely on point, at least not in all instances.⁵

In a multi-jurisdictional merger, for example, when agencies work closely together, differences in the products affected by the merger and the market structures in the different jurisdictions will lead to different outcomes, which ideally should not be conflicting outcomes to the respective investigations. International best practices such as ICN's on Merger Notification & Review Procedures make this dialogue easier. Conversely, since agencies increasingly investigate the same matters, without such tools, this process tends to become very burdensome for the agencies and the parties involved.

On conduct enforcement, both the potential rewards and challenges are perhaps even greater. Proliferation of anti-cartel regimes with strong detection and sanctioning tools is welcome news, opportunities for joint actions will likely lead to increased deterrence. As is the increasing focus by many jurisdictions on sophisticated questions that arise in the digital markets. Cooperation on multijurisdictional cases and joint studies and discussions on how to deal with difficult issues such as over-punishment and effective enforcement against abuse of dominance by big-techs may be more fruitful under the auspices of the ICN.

Participation involves relevant commitment, though. Many times, the same case-handlers (fluent English speakers) in charge of key enforcement roles at the agency are the same in charge of attending meetings, participating in projects, which involves drafting submissions and responding to surveys. This was the case in Brazil for many years. The investment most certainly paid off, but it has not always been easy.

Cautious examination on how to involve younger agencies without straining their limited resources and at the same time making sure the dynamics of its economies and its political systems are adequately taken into account in its work products seems to be another central agenda item for the network going forward. Facilitating participation may expand and further improve the ICN, which during the past two decades has been playing an essential role in the dissemination of competition law and policy globally.

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² See OECD Competition Trends 2020. Available at <https://www.oecd.org/daf/competition/OECD-Competition-Trends-2020.pdf>

³ From 1994 to 2003, the Brazilian antitrust authorities focused primarily on merger review, and substantial resources were devoted to the review of competitively innocuous mergers. The post-merger review system introduced in 1994 proved to be very inefficient: CADE reviewed around 8,000 transactions, and only very few cases were approved with remedies or ultimately blocked, *i.e.*: the proposed joint venture between asbestos producers Brasilit / Eternit (Case No. 06/94, adjudicated in 1996), the proposed joint venture Brasil-Álcool / Bolsa Brasileira do Álcool among alcohol producers with the goal of serving as a joint selling agency for all output of the members (Case No. 08012.002315/99-50, and Case No. 08012.004117/99-67, adjudicated in 2000), and the merger between chocolate makers Nestlé / Garoto (Case No. 08012.001697/2002-89, adjudicated in 2004, in which CADE ruled that the transaction had to be unwound, notwithstanding the fact that the transaction had closed two years earlier. The decision is now being challenged in Brazil's judicial courts). Only in cases involving high concentrations in the Brazilian market and a lack of efficiencies resulting from the transaction has CADE imposed restrictions in order to approve the transaction (e.g., Case No. 12/94, Rhodia / Sinasa; Case No. 27/94, Kolynos / Colgate-Palmolive; Case No. 16/94, Siderúrgica Laisa / Grupo Korf GmbH, "Gerdau Case"; Case No. 58/95, Brahma / Miller; Case No. 83/96, Antarctica / Anheuser Bush). According to the OECD & Inter-American Development Bank, *Competition Law and Policy in Brazil: A Peer Review*, at 31 (2005), although CADE has imposed conditions on approximately 3.4 percent of transactions for the period 2000/2005, structural requirements directing the sale or utilization of assets were imposed only in four cases.

⁴ See <https://www.internationalcompetitionnetwork.org/document-library/?keyword&groups=11&types=22>

⁵ See Panel Discussion "Global Antitrust Policies: How Wide is the Gap?" moderated by Mark Gidley (White & Case), with panelists Rachel Brandenburger (Hogan Lovells), Randy Tritell (Director of International Affairs at the Federal Trade Commission) and Ewoud Sakkers (Head of Unit at DG COMP). Published in *Concurrences Competition Law Journal*, No. 1-2012, pp. 3-11. Available at <http://www.justice.gov/sites/default/files/atr/legacy/2012/05/04/282930.pdf>