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International cooperation as an effective tool for competition enforcement : The Brazilian and Portuguese cooperation experience

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Abstract

T his paper reviews the experience in international cooperation between the Brazilian and Portuguese competition authorities and identifies potential areas where the two countries could cooperate even further.

Cette contribution étudie la coopération bilatérale entre les autorités de concurrence brésilienne et portugaise et identifie les domaines dans lesquels cette coopération pourrait être renforcée.

International cooperation as an effective tool for competition enforcement : The Brazilian and Portuguese cooperation experience

Introduction

- 1. Over the last two decades the antitrust enforcement landscape has significantly changed around the globe. From the early 1990's on, several countries introduced competition statutes and others, that had price controls in place up to then, revised existing legal and institutional frameworks so as to effectively introduce competition law and policy in their respective markets.
- 2. The Brazilian and Portuguese experience in the last two decades provides a good example of these transformations. With the removal of trade barriers and other economic reforms that were introduced in many countries during the nineties, there was a significant increase of multijurisdictional mergers and, similarly, of international cartels that operate in different continents. An effective enforcement of competition law and policy in such environment therefore requires intensive and effective cooperation among different competition authorities.
- 3. International cooperation among antitrust authorities serves different purposes, some of broader scope such as capacity building and technical assistance projects to more concrete ones such as facilitating cooperation between the authorities in enforcement activities. Moreover, through cooperation mechanisms, the different jurisdictions seek to promote convergence of competition policy instruments and practices across the globe.
- 4. Brazil and Portugal pursue these goals at two levels : at a multijurisdictional level, through their participation in international fora such as the International Competition Network (ICN) and the Lusophone Competition Network (LCN); and also, since 2005, on a bilateral level, through the implementation of the provisions of the countries' cooperation agreements.

I. Competition enforcement in Brazil and Portugal: Two decades of legal and institutional transformation

- 5. The first Brazilian competition law dates from 1962, but it was only in 1994 when the modern era of antitrust in Brazil began. In that year, the Congress enacted Law nº 8,884, which governs Brazilian antitrust law and policy, as amended in 2000 and 2007 (the "Brazilian Competition Law"). A few years before, Congress enacted Brazil's Economic Crimes Law (Law nº 8,137/90), which establishes that some types of anticompetitive conduct may be considered a crime, subject to penalty of 2 to 5 years of imprisonment or payment of a criminal fine. The nature of Brazil anticompetitive sanctioning system is thus dual (administrative and criminal).
- 6. At the administrative level, the Brazilian antitrust system is composed of three agencies namely, the Secretariat for Economic Monitoring of the Ministry of Finance ("SEAE"), the Secretariat of Economic Law of the Ministry of Justice ("SDE"), and the Administrative Council for Economic Defense ("CADE"). The SDE is the

All the views expressed in this paper are strictly personal.

chief investigative body in matters related to anticompetitive practices and it also issues non-binding opinions in merger cases. The SEAE primarily issues non-binding opinions in merger cases. The CADE is the administrative tribunal, which makes the final rulings in connection with both anticompetitive practices and merger review, after reviewing SDE's and SEAE's opinions. CADE's decisions should be "independent", that is, should be based on the facts and the law, and not on political considerations, and are all subject to judicial review. At the criminal side, Federal and / or State Public Prosecutors have sole enforcement responsibility, pursuant to Brazil's Economic Crimes Law.

- 7. Competition law was introduced in Portugal in 1983 by the Decreto-Lei nº 422/83, of 3th December. It only covered cartels and abuses of dominance. The first law on merger control was enacted five years later: Decreto-Lei nº 428/88, of 19th November. This legal framework was revised in 1993, with the Decreto-Lei no 371/93, of October 29th that, grosso modo, combined the rules on prohibition of cartels and of abuses of dominance with merger control. But it was in 2003, that a major reform of the institutional and legal framework of competition enforcement in Portugal took place.
- 8. The institutional aspect of this reform, implemented by Decreto-Lei nº 10/2003, of 18th January, put in place a new, independent and unified Competition Authority with investigatory and decision making powers. Also, a new Competition Act was enacted, Lei no 18/2003, of 11th June introducing substantive changes namely in what concerns fines, that are now set as a percentage of the annual turnover of the undertakings evolved with a limit of 10 % of the undertaking's annual turnover. Moreover, the new Competition Act also brought the substantive provisions regarding prohibition of cartel and of abuse of dominance closer to the European competition law. In the field of merges, though the notification criteria did not changed, the new Competition Act introduced a major modification on the procedures of merger control, with the Competition Authority being the sole only competent body to decide on merger control. A new reform of the Competition Act is expected for the end of the year as result of the Economic Adjustment Program concluded between the Portuguese Government and the European Commission, the International Monetary Fund and the European Central bank. This Program includes competition-related provisions regarding, inter alia, the revision of the Competition Act.¹

II. The cooperation agreements between BCPS and PCA of 2005 and 2010

9. The bilateral cooperation between the BCPS and the PCA has been framed by two protocols of cooperation. The first protocol was signed in July 2005, in Lisbon. A second

protocol was signed in January 2010² also in Lisbon, in a public ceremony during the III Lisbon Conference on Competition Law and Economics.

- 10. The two Protocols of Cooperation, though translating the same spirit of cooperation between the parties, had different objectives. In fact the Protocol signed in 2005, with a two-year duration, was very much focused on capacity building by ways of exchange of technical information and best practices as well as the organization of capacity building activities, namely within the context of the Lusophone Competition Network.
- 11. The second protocol, signed in 2010 is more focused on cooperation in the enforcement of competition law. In fact in this protocol, while keeping their objective of mutual support on capacity building activities, the parties have expressly stated their commitment to mutually reinforce their capacity to detect, investigate and sanction anticompetitive practices in the respective jurisdiction. In order to accomplish these aims two mechanisms were identified in the 2010's Protocol, first the exchange of non-confidential information regarding the existence of anticompetitive practices that may affect each other jurisdictions and second, the exchange of nonconfidential information regarding the evolution of markets the parties may be monitoring.
- 12. Within the framework of the two cooperation agreements the cooperation developed by BCPS and the PCA can be divided in three types of activities. First activities regarding the Lusophone Competition Network. Second, cooperation in capacity building activities such as PINCADE and PIF-ADC. Third, cooperation in the competition law enforcement.

III. Cooperation between BCPS and PCA in practice

1. Joint forces in the Lusophone **Competition Network**

- 13. The PCA and the BCPS are founding members of the Lusophone Competition Network (LCN). The LCN was created in 2004, with the Rio de Janeiro Declaration³ and its members are the authorities responsible for competition issues in the Portuguese Speaking Countries: Angola, Brazil, Cape Verde, Guinea-Bissau, Mozambique, Portugal, São Tomé e Principe, and East Timor.
- 14. Portugal and Brazil are the only jurisdictions among the LCN members that have already implemented a competition law and its respective institutional framework. Therefore, both BCPS and the PCA have been in the driving seat of the LCN. The Lusophone Competition Network was created to promote technical cooperation among its members, as well

Memorandum of Understanding on specific economic policy conditionality for granting financial assistance to Portugal, 3 May 2011.,

January 14th and 15th, 2010.

Declaração do Rio de Janeiro Relativa ao Primeiro Encontro Lusófono da Concorrência, Rio de Janeiro (Junho 28-29, 2004), available at http://www.concorrencia.pt/Download/

as the dissemination of the fundamentals of competition systems in light of international good practices aims to promote technical cooperation among its members, as well as the dissemination of the fundamentals of competition systems in light of international good practices⁴.

15. At presence, there were two plenary multilateral LCN. The first meeting took place in June 2004 in Rio de Janeiro, during which the Rio Declaration was signed. The second plenary meeting of the LCN took place in Lisbon, on 29th and 30th May 2006 involving high-level officials of Angola, Brazil, Cape Verde, Guinea-Bissau, Mozambique, São Tomé and Príncipe, and Timor-Leste. A third meeting was scheduled for 2008, but has been postponed and will most likely take place in 2012.

16. The agenda of these meetings included a broad range of topics to accommodate the plurality of issues and challenges the members of the LCN face in terms of enforcing or implementing a regulatory framework. The debates were centred on issues regarding: (i) competition and economic development, (ii) mitigating the weight of regulation, (iii) institutional developments, (iv) the role of competition in developing countries in contributing to economic growth, (v) instruments of competition policy, (vi) international cooperation with a focus on the then recently created ICN, and recommendations on analysing mergers.

2. Capacity building: The BCPS' training programs and PCA's international training program

17. The cooperation between the PCA and the BCPS has a strong record of capacity building initiatives. In parallel with the participation by the Heads of the competition agencies in conferences organized by both parties, there are two initiatives that illustrate well this type of cooperation: the training programs organized by the three agencies of the BCPS (SDE's Trainee Program; SEAE's Trainee Program; and PINCADE⁵) and the PCA International Training Program (PIF-AdC).

18. The BCPS program takes place twice yearly, during a month. During this period, students and young professionals work at the agencies and attend seminars on competition policy. At the end, they may submit a final paper, which is monitored by a professional. These programs have become a useful recruiting tool, as several of its participants later came to work at the agencies.

19. Also in 2009 the three BCPS agencies created a trainee program for enforcement officials from Latin American countries, when CADE, SDE and SEAE hosted representatives from the competition agencies of Chile, Argentina, Peru and El Salvador. The second, in which

representatives from eight Latin American countries participated, was held in January 2010.

20. The Portuguese Competition Authority has launched this year an International Training Program (PIF-AdC) that counted in its pilot session with participants from CADE. The PIF-AdC is a two-week training program during which participants take part in the PCA's activities as well as in training sessions. The main goals of the PIF-AdC are to : (i) provide personnel from foreign competition authorities with meaningful hands-on experience in competition law, economics, and policy, as well as competition law enforcement and advocacy; (ii) share information regarding the work and organization of the Authority and other Portuguese regulators; and (iii) exchange information relating to good practices and lessons learned in the area of competition law enforcement and advocacy. During this period, the participants from Brazilian CADE had the opportunity to closely follow the activity developed in several departments of the PCA as well as to have an overview of the Portuguese and European Competition Systems. A visit to the National Parliament and a meeting with the advisors to the Commission of Economic Affairs of the National Parliament was organized. The CADE participants also participate as speakers in a public seminar organized by the PCA on the Brazilian Competition Policy System.

3. Cooperation in the enforcement of Competition law: The acquisition of CIMPOR by Camargo Correa and Votorantim

21. In January 2010, the SDE initiated an investigation to monitor the potential impact in the Brazilian cement market of the acquisition of stakes by Brazilian firms in Cimpor - Cimentos de Portugal SGPS SA (Cimpor). Based on the Cooperation Agreement of 2010, the SDE, informed the PCA about the investigation and of the possible anticompetitive effects associated with such acquisitions by the Brazilian cement producers, Camargo Correa SA (Camargo Correa) and Votorantim Cimentos (Votorantim).

22. Following this contact, the PCA forwarded the SDE's information to Portugal's Securities and Exchange Commission (CMVM) that was reviewing the impact of the acquisitions to Cimpor's minority shareholders. The CMVM subsequently contacted the SDE to request a waiver to publish the information sent to the PCA on the CMVM's website, as well as clarifications regarding the investigation in Brazil. Such clarifications referred to Brazil's regulatory framework and merger review system, as well as to the next stages of the investigation conducted by the SDE.

23. The SDE provided the CMVM with information on Brazil's post merger review system; on its request to CADE that an injunction were issued to halt the acquisitions of Cimpor's stakes by Votorantim and Camargo Correa⁶; and

For a general overview of the Lusophone Competition Network : see M. Tavares," The One of the Many International Priorities. A Portuguese Perspective ' International Competition Network at Tem. Origins, Accomplishments and Aspirations (P. Lugard ed., Intersentia 2011)

Programa de Intercâmbio do CADE

Merger n° 08012.002018/2010-07, Camargo Correa S/A and Cimpor - Cimentos de Portugal SGPS S/A; and Merger n° 08012.001875/2010-81, Votorantim Cimentos S/A and CCB - Cimpor Cimentos do Brasil Ltda

with a risk assessment of possible outcomes of the review by the Brazilian antitrust authorities. Later, CADE executed an agreement with the parties (APRO), through which they committed to certain measures that would ensure the reversibility of the transaction, were CADE to block it or to impose any remedies, when adjudicating the case. Both the investigation and the merger analysis are still ongoing.

24. The cooperation with the PCA in the post merger review procedure facilitated the necessary institutional contacts that were important for a steady action by the BCPS during the first phase of the procedure.

Conclusion

25. Two decades ago, a limited number of countries had antitrust laws and in even fewer of these countries such legal provisions were effectively enforced. But since the midnineties, jurisdictions around the world embraced market principles, deregulation, respect for competitive forces, and introduced antitrust laws and institutions that strive to enforce them. Currently, over 90 countries have antitrust laws and it is broadly acknowledged that antitrust enforcement has an important role to play in national and global marketplaces.

26. As a result of that and of the impact of other economic reforms that were introduced along the same period, several agencies in different continents have reviewed numerous transnational mergers and have closely worked together to detect and prosecute international cartels. These developments indicate that cooperation between and among antitrust has become essential for effective law enforcement.

27. Since 2005, based on the two Protocols of Cooperation, the Brazilian and Portuguese authorities have relied on international cooperation for different capacity building projects. In addition, during the investigation of the acquisition of the Portuguese cement producer Cimpor, by the two Brazilian firms, Camargo Correa and Votorantim, through the 2010 Protocol, the Portuguese Competition Authority provided the Brazilian agencies with important assistance, by enabling the exchange of information between the SDE and the CMVM.

28. There are, still, a number of other areas where the Protocol of Cooperation can be useful to the authorities. For example, currently there is draft legislation pending approval in the Brazilian Congress that will introduce important changes to the current institutional framework of the BCPS⁷. Many of the changes are similar to those that took place in Portugal in 2003. The Portuguese Competition Authority could, therefore, provide important assistance during the implementation of these changes by the Brazilian authorities.

29. Moreover, Brazil's SDE has been specially active in the development of outreach initiatives to disseminate the importance of competition and, more specifically, to promote its anticartel enforcement program8. The Brazilian experience in creating public awareness for competition could be useful to the PCA, and is another area where the close relationship between the two agencies could advance

Among other initiatives, the SDE has issued full colored booklets on different topics such as its "Leniency Program", "Fighting Bid-Rigging", "Fighting Cartels in Trade Association", "Fighting Cartels in the Fuel Retail Sector "and commissioned a comic book for children, telling the story of a cartel among lemonade stands. The comic book featured the characters from the most popular comic book series in Brazil.

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