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International cooperation as
an effective tool for competition
enforcement : The Brazilian and
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Mariana TAVARES

mtavares@concorrenca.pt

| *Director International Relations Bureau,
Autoridade da concorrência, Portugal*

Mariana TAVARES DE ARAUJO

mtavares@levysalomao.com.br

| *Partner, Levy & Salomão Advogados, Brazil*

Mariana TAVARES*
mtavares@concorrenca.pt

*Director International Relations Bureau,
Autoridade da concorrência, Portugal*

Mariana TAVARES DE ARAUJO*
mtavares@levysalomao.com.br

*Partner, Levy & Salomão Advogados,
Brazil*

Abstract

This 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 n° 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 n° 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 n° 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 n° 428/88, of 19th November. This legal framework was revised in 1993, with the Decreto-Lei n° 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 n° 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 n° 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 change, 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

¹ Memorandum of Understanding on specific economic policy conditionality for granting financial assistance to Portugal, 3 May 2011., p. 32, ss..

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 non-confidential 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 Príncipe, 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

² January 14th and 15th, 2010.

³ 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/declaracao_rio.pdf.

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 mid-nineties, 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 even further. ■

⁷ Bill of Law n° 6/2009

⁸ 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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