CPI COMPETITION POLICY INTERNATIONAL

CPI Antitrust Chronicle

July 2014 (1)

What's the Role of Judicial Review in Latin American Countries?

Paulo Furquim de Azevedo
Sao Paulo School of Economics

What's the Role of Judicial Review in Latin American Countries?[1]

Paulo Furquim de Azevedo [2]

I. INTRODUCTION

Competition authority decisions reviewed by sluggish courts—this is the fate of competition policy in several Latin American countries. Competition authorities in Brazil, Chile, and Mexico, among others, have made impressive progress in building technical capabilities, consolidating their bureaucracy, and even, in some cases, improving their competition law. Yet ultimate enforcement still depends on something that is harder to change: judicial reviews by courts are mainly driven by formalism, courts lack expertise in antitrust issues, and they take years to solve cases that, as a general rule, require urgency.

This article explores the effects of judicial review of antitrust decisions in an administrative system subject to this type of judiciary. The empirical evidence and some institutional peculiarities presented herein refer to Brazil, but I submit that the story is not that different in other Latin American countries that share the same institutional design for competition policy.

Judicial review is an essential part of competition policy. In countries where the competition agency is an administrative body—the majority of Latin American countries—judicial review may improve, mitigate, or completely modify administrative decisions, and is, as a consequence, ultimately responsible for the enforcement of competition law.

On the one hand, judicial review of administrative decisions forces discipline on the actions of competition agencies, and, since the judiciary is less likely to be subject to the pressure of interest groups, decreases the probability of capture. In addition, at least in theory, adjudication by a larger, separate body helps decrease type I and type II errors by improving the quality of the final decision. On the other hand, judicial review may directly mitigate the enforcement of competition law, postponing antitrust decisions, and may add conflicting signals to economic agents by increasing jurisdictional uncertainty.

II. UNDERLYING INCENTIVES AND LIKELY EFFECTS

The effects of judicial review depend on how firms act strategically given the option to challenge agencies' decisions in courts. Moreover, competition authorities may also change their behavior, and how they enforce competition law, given that their decisions may be revised by

[1] This article is partially based on a longer and more detailed study, which is part of the IDRC Report *The Regulatory State in the South, see* P.F. Azevedo, *Judicial Review of Antitrust Decisions: Incentives for Settlements?* THE REGULATORY STATE IN THE SOUTH. IDRC REPORT (M. Prado & R. Urueña, eds. 2014).

[2] Sao Paulo School of Economics and CNPq.

courts. To understand the likely outcome of this strategic interaction it is worthwhile to define the underlying incentives that guide firms and the competition authority.

The majority of Latin American countries base their competition policy on an administrative system, with an investigatory body and often with an administrative tribunal responsible for adjudication, normally composed of commissioners that serve a fixed term and cannot be removed by the executive. This tribunal makes the final administrative decision, which may be challenged in court by any interested party (e.g. companies, competitors, consumers). As judicial proceedings are usually subject to the review of at least two courts of appeals, scrutiny of administrative decisions may last years. To avoid this long and uncertain review by courts, some agencies, such as Cade (the Brazilian competition authority) may settle cases in the administrative sphere.

There are three different reasons why a company would prefer to challenge a case in the judiciary. First, the firm may assess that the agency has not adjudicated the case properly or, at least, that the judiciary would interpret the law differently. This is an instance in which there is a disagreement between the antitrust agency and companies as to what is the correct decision or what would be the final court decision. There is typically a legitimate, substantive reason to access the judiciary to solve this conflict; the reason is usually based on different interpretations of the competition law. As a consequence, moved by this difference, companies have expectations that the judiciary may overrule the agency's decision, but the final outcome is uncertain.

The second case occurs when regulated companies take an administrative decision to the judiciary to control a clear abuse of power by the antitrust authority, also a legitimate procedural reason for judicialization. An institutional design that assures the right to a judicial appeal has, as one of its primary roles, providing checks and balances on powers invested in the regulatory agency. As this case refers to a *clear* abuse of power, both the agency and companies expect the judiciary to overrule the administrative decision (i.e. the outcome of the judicial review is predictable). In equilibrium, agencies will refrain from abusing their power to avoid being overruled by courts. This is a latent positive effect of effective judicial review, inasmuch as it constrains the actions of agencies before the actual judicial review. The threat to take a case of clear abuse of power to courts is credible, since a judicial outcome against the administrative agency is predictable. As is expected when threats are credible, the agency constrains its actions *ex ante*. As a consequence, this motive to take cases to courts, although real and credible, is not actually observed.

Finally, companies may use the judiciary to postpone the enforcement of antitrust decisions, in what Fox & Trebilcock[3] call "undue process," an illegitimate motive to litigate. A lengthy time period between the administrative decision and the final judicial review—when the company will eventually have to comply with the agency's ruling—is valuable in some circumstances. For instance, a company that uses an exclusionary strategy to deter competition may profit from the judicial review of the administrative decision if the status quo is preserved

[3] E. Fox & M. Trebilcock, *The Design of Competition Law Institutions and the Global Convergence of Process Norms: The GAL Competition Project* (2012).

during the judicial proceedings. Even in cases where the anticompetitive strategy has ceased, the company found guilty may want to postpone the payment of fines.

When judicial review is too costly and time consuming, the parties seeking a judicial solution for legitimate reasons (i.e. the litigators that seek for the judiciary to solve a cognitive dissonance on the interpretation of the law in a concrete case, or to control the abuse of power or capture) will prefer alternative mechanisms that avoid the use of the judiciary. One of these mechanisms is to settle the dispute in the administrative sphere. Both the agency and companies have incentives to anticipate the expected decision in the judiciary, so they will try to design a settlement contract that approximates the final decision in all its dimensions, such as the amount of fines, disinvestment orders, and other related measures.

On the other hand, parties that demand judicial review for illegitimate reasons (i.e. to postpone the administrative decision) will be more willing to take a case to courts the more timing consuming the judicial proceedings. This interplay between an incentive to go to courts and the length of time of the judicial review causes an adverse selection of litigation. If the judicial review is too time consuming, firms that want to postpone administrative decisions (i.e. the bad litigators) will take their cases to courts when the benefits of doing so surpass the costs of litigation. In contrast, firms that have legitimate reasons to resort to the judiciary will try alternative mechanisms that avoid the time and the costs of using the judiciary.

III. WHAT THE BRAZILIAN EXPERIENCE TELLS US

In a comprehensive review of judicial and regulatory decisions in Brazil, Maranhão et al.[4] found that the average length of time of judicial proceedings involving Cade decisions is nearly five years, which is considerably higher than the international standards for competition matters, a difference that is especially notable since competition matters are particularly time-sensitive. In cases where the judiciary overruled administrative decisions, which presumably requires a deeper analysis, the average duration of judicial proceedings was double, almost 10 years. To put this in perspective, a survey of 27 countries, conducted by the International Competition Network in 2006, found that only three of them had an average time length of judicial review over three years.[5]

These figures, however, underestimate the actual expected duration of a regular judicial review of an administrative decision. As the enforcement of competition policy in Brazil is relatively new, the most complex cases are not yet closed. So the averages presented above are likely to increase, as currently they predominantly include only the simplest cases, which have already concluded.

Table 1 provides evidence of some important cases not yet concluded, all of them with more than eight years under review. Two cases are particularly striking: the steel cartel case, condemned by Cade in 1999, and the Nestle-Garoto merger case, blocked in 2004 and still

[4] *Direito Regulatório e Concorrencial no Poder Judiciário*. São Paulo-SP : Editora Singular (J. Maranhão, P.F. Azevedo, & T. Sampaio-Ferraz, eds. 2014).

[5] *Competition and the Judiciary: A Report on a Survey on the Relationship Between Competition Authorities and the Judiciary. ICN Report on Competition Policy Implementation. Available at*:<http://www.internationalcompetitionnetwork.org/uploads/library/doc594.pdf>.

pending judicial decision. In the latter case, it is likely that the courts will remand the case to Cade for a new decision—after about 10 years since the original decision. This length of time precludes any efficacy of competition policy towards mergers—a preventive intervention—since competition is a dynamic process, and competitors may have experienced irreversible fates during those 10 years. As a consequence, competition probably has been harmed by the delay in the enforcement of competition policy.

Table 1 – Selected Cases of Unfinished Judicial Review

CASE	Description
Steel Cartel	Condemned by Cade in 1999, it is still pending a final judicial decision. 24 preliminary injunctions in favor of the company have been issued. As of yet, the firms have not paid any fines.
Nestlé-Garoto merger	Merger blocked by Cade in 2004. Lower court reverted decision; higher court decided to return the case to CADE; this decision is under appeal. After 10 years, the case is still pending a final judicial decision.
Crushed Rock Cartel	Condemned by Cade in 2005, until now only one firm has paid the imposed fine (U.S. $ 1.2 million). This payment happened after a revision of the amount, which was reduced in an administrative appeal.
Iron Cartel	The enforcement of Cade's final judgment was obstructed by preliminary injunctions for six years. Cade's 2005 decision is still pending judicial review. In this case, the judge ordered companies to provide a collateral to guarantee the fine.

Source: Azevedo, FN 1

As for the rate of judicial deference, courts confirmed, on average, 73.9 percent of CADE's decisions. Moreover, the rate of judicial deference has been increasing since the mid 2000's, being over 80 percent since 2008. These figures are consistent with the hypothesis of adverse selection in judicial review. When the time length of judicial proceedings is too long, companies that demand the judicial services tend to be the ones who seek to simply postpone the administrative decision. They bring the claim to courts despite knowing they are going to lose the case at the end of the process. The observed long duration of judicial proceedings, and the high rates of judicial deference, are jointly consistent with a predominant use of judicial review to postpone Cade decisions.

Given the high proportion of cases that were taken to courts, it was no surprise that the agency, concerned with the enforcement of competition law, would react strategically to the likelihood of being reviewed by the judiciary. Indeed there is evidence of two major changes in Cade's strategy: an increased concern with due process and an explicit policy towards

settlements—both alternatives to avoid the use of the judiciary. Whereas the first effect is the expected and positive outcome of judicial review as a component of regulatory institutions, the second is an unintentional effect of the long duration of the judicial proceedings.

Cade has made some effort to improve internal administrative rules of due process and to avoid any procedural vices in its decisions, reducing the motive for firms to go to the judiciary. This strategy began in 2006, when Cade held public hearings for proposed bylaws. These hearings clearly emulated the routine and jargon of courts in order to improve communication with judges. Moreover the judiciary became one of Cade's primary targets for its competition advocacy efforts.

As for its settlement policy, Cade established in 2007 a specific procedure to orient defendants and merged companies. This procedure utilized public hearings, and was combined with a training program on negotiation techniques for its staff. The data speak for themselves. From 2003 to 2007 Cade had settled only eight cases, whereas in the following five years 47 cases ended in settlements. Of course, given the increased care regarding due process, along with the settlement policy, the proportion of cases taken to courts fell deeply, from roughly two-thirds to about 10 percent.

Results, however, are conditioned on the underlying incentives for parties to either settle a case or to challenge it in courts. Long and costly adversarial procedures associated with trial by court induces parties to negotiate and to reach an agreement. In particular, parties that value finality are especially prone to this type of solution. On the other hand, parties that benefit from postponing an antitrust decision prefer to pursue an adversarial procedure. Dynamically, courts tend to review cases in which parties seek to postpone an administrative decision, whereas settlements will be mainly used for cases where finality is highly valued. This adverse selection effect subverts the role of the judiciary, whose capabilities should be employed to adjudicate legitimate disputes and not to postpone a predictable outcome and, hence, unintentionally mitigate the enforcement of competition law.

IV. CONCLUSION

The judicial review experience concerning Brazilian antitrust decisions offers an interesting example of the interplay between competition agencies and courts. The outcomes observed in Brazil are, to some extent, representative of Latin American countries that share the same institutional design for competition policy.

On the whole, judicial review has had an ambiguous effect on the quality and enforcement of competition policy in Brazil. An awareness of the need to move to due process and transparency is certainly an important feature of regulation quality, and may be attributable to the threat of judicial review. Cade's experience is informative about how an agency may improve the formal aspects of its procedures if it wants to guarantee the effectiveness of its decisions. There is also evidence, however, that legitimate demanders of judicial services have been denied timely access to justice from courts overloaded with litigators that mainly seek to postpone antitrust enforcement.

Competition is a particularly time sensitive matter, and, as such, should receive a different treatment as to the duration of judicial review, so as to correct the current distortions. Meanwhile those that have legitimate reasons for having their case reviewed by courts will still

face the question: to settle and put an end on the matter, or not to settle and wait the lengthy trial.