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Greater Cooperation Among Competition Agencies in Latin America

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Greater Cooperation Among Competition Agencies in Latin America

Julián Peña[1]

I. INTRODUCTION

The past decade has shown an increasingly greater level of cooperation among competition agencies in Latin America. This increase in the level of interactivity among Latin American enforcers has played a key role in the fostering of competition law in the region and the strong network developed will certainly be a relevant tool for the competition agencies to overcome the different challenges they face in the enforcement of their laws. Such growing interconnection should be followed closely by those doing business in the region since there are already different sectors that have received a similar treatment in various Latin American countries because of the cooperation among competition enforcers of the region.[2]

The increase in the levels of cooperation among Latin American competition agencies in the past decade has been true in at least three levels: i) intense regional fora, ii) within the framework of trade agreements, and iii) through a growing number of bilateral agreements. The purpose of this paper is to reflect how these three levels have developed and continue to do so.

II. REGIONAL FORA

Besides the existence of international institutions such as the International Competition Network, OECD (where Chile and Mexico are members and Brazil, Colombia, and Peru are Observers to the OECD Competition Committee), and UNCTAD, where different Latin American countries participate in one way or another, there are a number of regional fora that focus more specifically on the agenda of the Latin American competition agencies.

In the past decade, new initiatives such as the "Ibero-American Competition Forum" (*Foro Iberoamericano de la Competencia*), launched in Spain in 2002; the "Latin American Competition Forum," created by the Inter-American Development Bank and the OECD in 2003; UNCTAD's COMPAL Program of 2003; and, more recently, both the "Inter-American Competition Alliance" and the "Centro Regional de Competencia para América Latina" created in 2011, among others, have greatly helped the different agencies exchange experiences on a wide variety of competition-related issues. In June 2013, Peru called for the creation of a South American Competition Forum of Competition.[3]

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[1] Partner, Allende & Brea, Buenos Aires, Argentina.

[2] For a deeper analysis on the matter please *see* Julián Peña, *The Role of International Cooperation in the Development of Competition Law in Latin America*, WILLIAM E. KOVACIC: AN ANTITRUST TRIBUTE—VOL. II, (Nicolas Charbit et al. eds., 2014)

[3] OECD, *Latin American Competition Forum, Contribution from Peru to Session 2*, DAF/COMP/LACF(2013)20, 3 (August 19, 2013).

A. COMPAL

The Competition and Consumer Protection for Latin America ("COMPAL") program is an UNCTAD-led technical assistance program on competition and consumer protection policies for Latin America supported by SECO (Switzerland). The COMPAL program assists Bolivia, Colombia, Costa Rica, Ecuador, Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua, Panama, Paraguay, Peru, and Uruguay in strengthening their capacities and institutions in the areas of competition and consumer protection laws and policies.[4] In other words, the only Latin American countries with competition laws that are not included in the program are Argentina, Brazil, Chile, and Mexico.

Through this program, UNCTAD is assisting different Latin American countries in relation to: a) promotion of cross-country experiences, b) preparation of sectoral studies, c) preparation of policy recommendations, and d) training activities.

Phase I of the COMPAL program started in 2003 and involved the assessment of the needs and priorities of the countries of the region in the areas of competition and consumer protection. In order to avoid duplication of international efforts, this phase also comprised a review of the status of technical assistance in the region. Phase II, which started in 2005 and renewed in 2009, involves the implementation of the objectivities and activities in these areas.

The COMPAL program has a regional component that includes the exchange of experiences and cooperation: "incorporating the three pillars of UNCTAD's approach, these being activities, analytical content of capacity building and technical assistance and consensus building."[5]

The different activities organized by COMPAL on competition law and policy deal with: a) programs on competition advocacy, b) preparation of sectoral studies used as reference for the design of public policies, c) support for the elaboration of competition laws, d) training for judges, e) training for officers in case analysis, f) advice on the establishment and strengthening of competition authorities, and g) implementing the recommendations of the Peer Review.

Within the framework of a COMPAL regional meeting held in June 2013, INDECOPI proposed to the other competition agencies from different South American countries the idea of creating a network of South American agencies in order to strengthen the cooperation to fight anticompetitive behaviors, especially transnational cartels.[6]

B. Latin American Competition Forum

The Latin American Competition Forum ("LACF") was a joint OECD-IADB initiative launched in 2003 "to foster effective competition law and policy in Latin America and the Caribbean" and over the years has become a concrete means "to promote dialogue, consensus building and networking among policy makers and enforcers."[7]

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[4] WELCOME TO THE COMPAL PROGRAMME 1, *available at* http://www.programacompal.org/e_welcome.html.

[5] WHAT IS COMPAL—COMPAL II 1, *available at* http://www.programacompal.org/e_COMPAL_II.html.

[6] Enrique Delgado, *Peru proposes cooperation against cartels*, GLOBAL COMP. REV. 203 (2013).

[7] LATIN AMERICAN COMPETITION FORUM 1, *available at* http://www.oecd.org/competition/latinamerica/aboutthelatinamericancompetitionforum.htm.

The main activities of the LACF have been their annual meetings and Peer Reviews.

The annual meetings were first held in Paris in 2003. Since then, they have taken place in Spain, El Salvador, Panama, Chile, Costa Rica, Colombia, the Dominican Republic, and Peru. These meetings have been attended by representatives from Argentina, Barbados, Bolivia, Brazil, Chile, Canada, Colombia, Costa Rica, the Dominican Republic, Ecuador, El Salvador, EU member states, Guatemala, Italy, Jamaica, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Portugal, Spain, Trinidad and Tobago, Uruguay, the United States, Venezuela, Andean Community, CARICOM, ECLAC, UNCTAD, the World Bank, and WTO.

The topics discussed in the meetings cover a broad variety of issues and in most of the meetings the agenda has included an in-depth Peer Review of a Latin American country. As Daniel Sokol states, "these meetings encourage norm diffusion to Latin American agencies, and also provide a learning opportunity through discussions with both similarly situated and developed world agencies that have enforcement experience. The annual forum also provides an opportunity for agencies to learn about each other's institutional structures and larger political-economic concerns."[8] The Forum, as Ignacio de León says, "promotes dialogue, consensus-building, and networking between competition policymakers and law enforcers, as well as the identification and dissemination of best practices in competition law and policy."[9]

The Peer Reviews have been done on Chile (2003), Peru (2004), Brazil (2005 and 2010), Argentina (2006), El Salvador (2008), Colombia (2009), Panama (2010), Honduras (2011), and updates and follow-ups of these reviews in 2007 (also updating the reviews made by the OECD Competition Committee on Mexico in 1998 and 2004) and 2012. These Peer Reviews include a very detailed report made by a competition expert that includes a set of recommendations on different aspects of competition law and policy. In a recent follow-up to the nine Peer Reviews made in 2012 and published in 2013, the survey showed that different recommendations were made to Chile, Argentina, Honduras, Panama, and Mexico, and "in all of these cases, the authority in question has taken steps to implement and put the recommendations into practice."[10]

Other OECD activities in the region include the Project to Reduce Bid Rigging in Latin America, with projects in Brazil and Chile, and a report on Mexico's Institute for Social Security's procurement regulations and practices in 2012.

Since 2009, the host agency of the LACF meetings also organizes their National Competition Day events.

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[8] Daniel D. Sokol, *The development of human capital in Latin American competition policy,* COMPETITION LAW AND POLICY IN LATIN AMERICA 18 (Eleanor Fox & Daniel D. Sokol eds., 2009).

[9] IGNACIO DE LEÓN, AN INSTITUTIONAL ASSESSMENT OF ANTITRUST POLICY: THE LATIN AMERICAN EXPERIENCE 87 (2009).

[10] Symposium OECD-IDB, Dominican Republic, July 15, 2013, *Follow-up to the Nine Peer Reviews of Competition Law and Policy of Latin American Countries—2012*, *available at* http://www.oecd.org/competition/follow-up-of-nine-latin-american-competition-reviews-2012.htm.

C. Ibero-American Competition Forum

In 2002, the competition agencies of Argentina, Brazil, Chile, Peru, Spain, and Portugal launched the Ibero-American Competition Forum in order "to promote debate and reflection on competition issues on a regional level"[11] among the Ibero-American competition agencies. This Forum organizes annual meetings of the competition agencies and an annual competition course that is held in Madrid. The Ibero-American Competition School is organized both by the Spanish competition authority and the IADB with the aim of training Latin American agencies' staff members.[12] As Maher Dabbah recognizes, "notable work has also been achieved"[13] with this school.

In their 2007 meeting in Puebla, Mexico, the authorities of the Ibero-American Competition Forum launched the Ibero-American Competition Network ("RIAC" or *Red Iberioamericana de Competencia*) with the idea of concentrating and promoting the information on competition cases in the region and exchanging information and experience among the participating agencies, helping to foster their capacity building by creating a knowledge network on competition law and economics issues.[14]

D. Inter-American Alliance

The Inter-American Alliance (*Alianza Interamericana)* is an initiative launched in 2011 by Mexico's Comisión Federal de Competencia. The alliance is a network of competition agencies in the Americas dedicated to "facilitate the discussion of antitrust related matters in the region and to foster cooperation among its members."[15]

The alliance members meet monthly through telephone conferences where the agencies discuss a pre-arranged topic that is presented by a representative of one of the member agencies. The topics cover a wide range of issues from general issues to specific sectoral problems. The first of these meetings took place in February 2011 and representatives from Argentina, Brazil, Canada, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Honduras, Mexico, Nicaragua, Panama, Paraguay, Uruguay, and Venezuela participated. In various occasions representatives from the U.S. Federal Trade Commission ("FTC") or the U.S. Department of Justice ("DOJ") have also participated.

E. Regional Competition Center for Latin America

The Regional Competition Center for Latin America ("CRCAL" or *Centro Regional de Competencia para América Latina*) was launched at the IX Latin American Forum Meeting held in Bogotá, Colombia, in September 2011.[16] The original members of the CRCAL were the

[11] INTERNATIONAL COMPETITION SYSTEM, 1, *available at* http://www.concorrencia.pt/vEN/Sistemas_da_Concorrencia/International_Competition_System/ Ibero-American_Competition_Network/Pages/Ibero-American_Competition_Network.aspx.

[12] X EDICÍON DE LA ESCUELA IBEROAMERICANA DE COMPETENCIA (2012), *available at* http://events.iadb.org/calendar/eventDetail.aspx?lang=Es&id=3485.

[13] MAHER DABBAH, INTERNATIONAL AND COMPARATIVE COMPETITION LAW, 407 (2010).

[14] RIAC, *available at* http://www.redeiac.org/quemsomos.asp.

[15] CRCAL, WHO ARE WE? (2013), *available at* http://www.crcal.org/alianza-interamericana/quienes-somos.

[16] *Id.*

competition agencies of Argentina, Chile, Colombia, Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, and Peru. Brazil, Ecuador, Panama, and the FTC joined the CRCAL afterwards; however, as of July 2014, Bolivia, Paraguay, Uruguay, and Venezuela have yet to become members.

The goal of the CRCAL is to "assist to the competition authorities in their capacity building and in the enforcement of their competition laws and policies."[17]

The different activities performed by the CRCAL since its recent creation include organizing a seminar next to the annual LARF Meetings, seminars dedicated to train judges from the region on competition law and economics, and the preparation of a series of guidelines and sectoral studies. The CRCAL is also working on setting up a regional database containing rulings from national competition authorities.[18]

F. South American Forum of Competition Agencies

In a June 2013 OECD meeting held in Lima, the Peruvian competition authority called for the creation of a South American Forum of Competition Agencies.[19]

The objectives proposed by Peru for the Forum were: a) to hold at least one annual work meeting to create a Virtual Platform for rulings and sanctions of anticompetitive practices with cross-border impact, b) to draft a "Master Co-operation Agreement for the Investigation of Anticompetitive Practices with Cross-border Impact" for the exchange of information and a "Handling of Information Agreement," c) to carry out joint investigations and actions, and d) to facilitate the exchange of officials among the agencies.

The invitation to create the Forum was sent to the agencies of Argentina, Brazil, Chile, Colombia, Ecuador, Uruguay, and Venezuela.

G. Lima Declaration

In September 2013, the competition agencies of Chile, Colombia, and Peru signed the Lima Declaration[20] where they agreed to create a space: (i) to exchange among these agencies experiences and training, (ii) to analyze both legal and economic issues of common interest, and (iii) to work together in improving the level of integration among the agencies.

This initiative was launched with UNCTAD's support, agreeing to facilitate the meetings and offering to share its database of competition case law.

Pursuant to the Declaration, all other Latin American agencies are invited to adhere as long as there is a prior unanimous approval by the existing members.

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[17] CRCAL MISSION VISION (2013), *available at* http://www.crcal.org/inicio/mision-vision.

[18] Aitor Ortiz, *Regional Competition Center for Latin America Presents: Regional Database Containing Rulings from National Competition Authorities*, COMP. POL. INT'L. (2012).

[19] OECD, *Latin American Competition Forum, Contribution from Peru to Session 2*, DAF/COMP/LACF(2013)20, 6 (August 19, 2013).

[20] LIMA DECLARATION (2013), *available at* http://www.fne.gob.cl/wp-content/uploads/2013/09/dec_lima_2013.pdf.

III. REGIONAL AGREEMENTS

A. Trade Agreements

Different trade agreements in Latin America, either regional or bilateral, introduced special competition norms. However, as we will address in the below section, the implementation of these signed agreements has not yet shown any progress.[21]

1. Mercosur (Protocol of Fortaleza)

In December 1996, the Mercosur members (Argentina, Brazil, Paraguay, and Uruguay) signed the Fortaleza Protocol of Fortaleza of Defense of Competition to be applied to anticompetitive conducts affecting trade among its members that had a local effect in one of them. The Protocol established an intergovernmental decision-making process that allowed the government of the infringing party to block the process at any time by just not giving its support.[22]

The Protocol was ratified by the Brazilian and Paraguayan congresses but was never approved by Argentina nor Uruguay. Furthermore, of the four original countries, only Argentina and Brazil had competition law regimes since it was not until 2007 that Uruguay had its own law and not until mid-2013 that Paraguay enacted its competition law. However, by the time Paraguay established its competition law regime, it was suspended from its Mercosur membership. Venezuela joined Mercosur in 2006.

Even though the Fortaleza Protocol was never ratified, the Mercosur working group for competition matters (CT Nº 5) kept meeting at least twice annually. In 2002, Mercosur adopted the Agreement on the Implementation of the Fortaleza Protocol. In 2004, through C.M.C. Decision Nª 4/2004, Mercosur approved the Consensus on the cooperation among competition agencies. In 2006, it approved CMC Decision 15/2006 establishing a system of exchange of information and consultation in the field of merger control. In 2010, Mercosur approved CMC Decision Nº 43/2010 an Agreement for the Defense of Competition in Mercosur which replaced the Fortaleza Protocol. This agreement has been ratified so far only by Argentina (in April 2011) and Uruguay (in January 2014).

2. Andean Community

In March 2005, the Andean Community, then composed of Bolivia, Colombia, Ecuador, Peru, and Venezuela, enacted its Decision 608/2005, creating the "System for the Protection and Promotion of Free Competition in the Andean Common Market" replacing Decision 285/1991 which itself replaced Decision 230/1987.

This legislation is only applicable to cross-border anticompetitive cases that affect Andean Community countries and is to be enforced by the Andean Competition Committee, a supra-national entity.

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[21] *See* Verónica Silva, *Cooperación en política de competencia y acuerdos comerciales en América Latina y el Caribe (ALC),* 49 CEPAL 1 (2005); OECD, *Latin American Competition Forum, Background Note by the IADB Secretariat*, DAF/COMP/LACF(2013)5 (August 28, 2013).

[22] *See* Félix Peña, *Una política de competencia económica en el Mercosur*, 12 BOLETÍN LATINOAMERICANO DE COMPETENCIA 3 (2001).

The members of the Andean Community, similar to the Mercosur case, have very different levels of competition law developments. In fact, Colombia has had a regime since 1959, while Ecuador only enacted its law in 2012. Even more unclear, Bolivia enacted a law in 2008 which might or might not protect competition.

None of Andean Community competition regulations has ever been applied in practice.

3. Sistema de la Integración Centroamericana ("SICA")

In 2006, the Vice-ministers of Economic Integration of Central America created the Central American Working Group on Competition Policy to design a regional competition policy in order to assure a greater transparency and open access to the economic agents that participate in the different inter- and extra-regional trade exchange activities. This group, later named the Central American Competition Network ("RCC" or *Red Centroamericana de Competencia*), has received technical assistance from UNCTAD, the FTC (with U.S. AID funding), ECLAC, the European Commission, and the Inter-American Development bank.

Since 2007, the RCC has organized annual meetings of the Central American Competition Forum, which gathers the competition agencies of different countries of the region. In August 2013, the conference took place in El Salvador. Competition authorities from El Salvador (Superintendencia de Competencia), Costa Rica ("COPROCOM" or *Comisión para Promover la Competencia*), Honduras ("CDPC" or *Comisión para la Defensa y Promoción de la Competencia*), Nicaragua (ProCompetencia, Instituto Nacional de Promoción de la Competencia), and Panama ("ACODECO" or *Autoridad de Protección al Consumidor y Defensa de la Competencia*) were participants, while the Dominican Republic (Pro-Competencia, Comisión Nacional de Defensa de la Competencia) participated as an observer. UNCTAD also participated during these events.

At the 2013 meeting, the authorities discussed the idea of having a regional competition regime authority, a compromise agreed to by the Central American countries in the Association Agreement. This also received signed endorsements from Central America and the European Union, with the support of the IADB.

Before the middle of 2013, there had been no international cooperation between the competition agencies though this platform.[23]

B. Bilateral Cooperation Agreements

In the past decade, a growing number of bilateral cooperation agreements between different Latin American countries, besides the existence of specific competition related chapters in bilateral or regional trade agreements, have developed.

Argentina and Brazil were among the first countries to sign bilateral cooperation agreements in 2003. Although it has been a very limited formal cooperation, there has been some sporadic, informal communication regarding specific matters either through the postal system or

[23] OECD, International Enforcement Cooperation, Paris, 2013, *Secretariat Report on the OECD/ICN Survey on International Enforcement Cooperation*, p. 90.

by telephone.[24] In June 2011, the CNDC requested some information from its Brazilian counterparts using the mechanism established in the bilateral cooperation agreement, and the Brazilian agencies responded in August of the same year, though no information has been given on the content of the request.[25]

Brazil later signed agreements with the competition authorities of Chile (2008), Peru (2012), and Colombia (2014),[26] and it is negotiating an agreement with Ecuador.[27] Chile has also signed cooperation agreements with Costa Rica (2003), Ecuador (2009), and El Salvador (2009).[28] Costa Rica has also signed agreements with Honduras (2009), El Salvador (2007), Nicaragua (2010), and Panama (2008).[29]

Within the region, Mexico has signed the most cooperation agreements. It has signed agreements with Chile (1994), Colombia (2012), the Dominican Republic (2012), Ecuador (2012), El Salvador (2007), and Nicaragua (2011).[30] Mexico also maintains cooperation frameworks in its Free Trade Agreements signed with Chile (1999) and Uruguay (2004). A recent example of collaboration among several agencies includes the agencies of Colombia, Chile, and Mexico. They analyzed the acquisition of Pfizer's infant formula business by Nestlé, which resulted in the divestment of that business in those three countries.[31]

In June 2013, Peru signed a cooperation agreement with the Dominican Republic[32] and Ecuador did so as well with Uruguay in November 2013.

Most of these bilateral agreements include technical assistance provisions as well as provisions about cooperation and information exchanges for enforcement.

Even though many bilateral cooperation agreements have been signed between the different competition agencies throughout the region, actual utilization of these agreements remains low. Though some informal cooperation has occurred, those cases are rare and did necessarily take place between agencies with signed, formal cooperation agreements, but rather took place between officials with good personal, informal ties.[33]

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[24] OECD-IADB, *Competition Law and Policy in Argentina. A Peer Review*. Policy Brief 1, 37 (2006); MARCO BOTTA, MERGER CONTROL REGIMES IN EMERGING ECONOMIES. A CASE STUDY ON BRAZIL AND ARGENTINA, 297-314 (Kluwer 2011).

[25] *See* CNDC NEWS SECTION (2013), *available at* http://www.cndc.gov.ar.

[26] CADE (2013), *available at* http://www.cade.gov.br/Default.aspx?2e0e0e121efc3f1b351e.

[27] Brazil's presentation at the OECD-IADB Latin American Competition Forum, Lima, Peru (Sept. 4, 2013), *available at* http://www.oecd.org/competition/latinamerica/SII-Brazil.pdf.

[28] FNE (2013), *available at* http://www.fne.gob.cl/internacional/participacion-internacional/acuerdos-america/.

[29] COPROCOM (2013), *available at* http://www.coprocom.go.cr/documentos/convenios_acuerdos.html.

[30] CFC, TRATADOS Y ACUERDOS (2013), *available at* http://www.cfc.gob.mx/index.php/cfc-quienes-somos/marco-juridico-cfc/tratados-y-acuerdos-internacionales-de-la-cfc.

[31] OECD, *Latin American Competition Forum, Background Note by the IADB Secretariat*, DAF/COMP/LACF(2013)5, August 28, 2013, p. 32.

[32] *Perú dará asistencia técnica para aplicar ley de defensa de la competencia en RD*, LISTIN DIARIO, June 26, 2013, *available at* http://listindiario.com.do/economia-y-negocios/2013/6/26/282200/print.

[33] OECD, *Competition Law and Policy in Chile,* 1, 37 (2011).

IV. CONCLUSIONS

During the past decade competition law enforcement in Latin America has seen a significant development and the greater cooperation among Latin American agencies have played a relevant role. This is a fact that anyone doing business in the region should be aware of since this new reality will increasingly have a greater influence in the way decisions are taken. The greater cooperation among competition law enforcers is a trend that will continue growing and will thus continue to foster competition enforcement in the region.

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

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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.

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Comments on the New Mexican Competition Law

Gerardo Calderon
Baker & McKenzie

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Comments on the New Mexican Competition Law

Gerardo Calderon[1]

I. INTRODUCTION

On July 7, 2014, a New Federal Economic Competition Law (the "New Mexican Antitrust Law") came into force in Mexico.

The New Mexican Antitrust Law maintains most of the concepts and provisions of the Mexican Antitrust Law in force since 1993, while strengthening the Federal Economic Competition Commission ("Cofece" per its acronym in Spanish) and introducing novel concepts aimed at increasing competition in all product and service markets.

The Mexican Antitrust Law published in 1992, and in force since 1993, represented a radical change in Mexican antitrust policy, and was intended to generate competition in an open market economy. The New Mexican Antitrust Law represents the consolidation of that policy and the Mexican government's efforts towards such objectives.

II. WHAT'S NEW?

The first accomplishment of the New Antitrust Law is the creation, within Cofece, of an "Investigating Authority" in charge of conducting investigations on monopolistic practices and illegal concentrations, where the Plenary (comprised of seven Commissioners) will remain as the body deciding the cases. Independence of and between these authorities is guaranteed by clear rules for appointing and removing the Commissioners and the Head of the Investigating Authority.

With respect to procedural issues, the following changes aim to increase Cofece's investigative powers to carry out more efficient investigations:

- Coercive measures have been strengthened. For instance, Cofece may order the arrest of individuals not cooperating with an investigation;
- New rules for conducting verification visits (so-called "dawn raids") have been established. Under these, Cofece may access any place, storage device, or any other source of evidence, get copies of information, and impound the same. Moreover, the rules include the possibility for Cofece to request explanations from any officer, representative, or member of the inspected company regarding such information;
- The decision to initiate an investigation will no longer be published in the Federal Official Gazette, limiting a target's ability to respond or defend itself. Under the 1993 law, potential targets of a Cofece investigation learned that an investigation was being

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conducted from such publication (although the name of the target was not disclosed, the information on the conduct being investigated as well as the involved markets most of the times sufficed to identify potential risks).

- Companies may now be facing dawn raids at any time without even knowing that an investigation has been initiated in the markets where they are active.
- The Investigating Authority will have powers to file a claim or complaint regarding presumed criminal conducts in antitrust matters, with no need to wait until a final resolution is issued by the Plenary in the administrative stage; and
- The administrative appeal ("recurso de reconsideración") has been eliminated.[2]

Under the New Mexican Antitrust Law, any indication of the existence of monopolistic practices, or prohibited concentrations, is enough to trigger an investigation, thereby increasing the likelihood of a Cofece-initiated investigation and resulting sanctions.

Another relevant modification will increase the likelihood of success for private actions for damages that an affected party may initiate, either as individual or class (collective) actions. Specifically, the term to claim for damages will be interrupted by the commencement of an investigation. Also, Cofece's final resolution will serve as the basis for processing complaints before Federal Courts specialized in economic competition issues to prove the illegality of the conduct of the undertaking engaged in the monopolistic practice or the prohibited concentration.

All of the foregoing will result in a substantial increase of Cofece's investigating activities; since, on the one hand, they will provide sufficient tools to start investigations *ex officio* and, on the other, there will be more incentives for those affected by anticompetitive conduct to file claims with the authority, as they will be able to obtain a resolution sooner.

Cofece's strengthening is accompanied by controls to prevent abuses, which include increasing transparency and accountability. For instance, the Internal Comptrollership was created, and rules for interaction of the economic agents with Cofece's officials, as well as the disclosure of such contacts and other acts of the authority (resolutions, plenary sessions, and rulings) were incorporated.

Under the New Mexican Antitrust Law, Cofece will now be obligated to respond to ruling requests and to issue general guidelines on free competition matters upon request by private parties. Although Cofece has always been obligated to issue an opinion upon request, it is only now that it has been acknowledged that it is necessary for such opinions to have binding effects in order for them to be effective. This is proven by the fact that, currently (without being binding and without having legal effects), the procedure is rarely used.

The New Mexican Antitrust Law incorporates novel definitions regarding conducts considered to be monopolistic practices. On the cartel side, the exchange of information between

[2] This particular change was introduced by a Constitutional amendment in June 2013, where also included the creation of (i) Cofece and the Federal Institute of Telecommunications (both authorities with antitrust enforcement powers); and (ii) Specialized Courts to deal with antitrust, broadcasting and telecommunications issues.

competitors has been incorporated as an independent absolute monopolistic practice when such exchange results from, or the purpose of which is, any of the other conducts classified as absolute monopolistic practices (price-fixing, supply restriction, market division, or bid-rigging). Before this incorporation, the exchange of information could be penalized only when it had resulted from, or had the purpose of, price-fixing. This exchange of information was also incorporated as a criminal offense in the Federal Criminal Code, and therefore a high level of uncertainty has been generated for those individuals potentially involved in these conducts, as they may face severe consequences (up to 10 years of imprisonment), even when the information exchange occurred without the intention of violating the antitrust laws; for instance, during due diligence processes in preparation of corporate transactions.

On the dominance side, two conducts has been incorporated as violations: (i) refuse, restrict, or grant discriminatory access to essential inputs; and (ii) margin squeezes (i.e. when the margin between the price at which a vertically-integrated firm sells a downstream product and the price at which it sells an essential input to rivals is too small to allow downstream rivals to compete).

Since the New Mexican Antitrust Law has no incorporated clear rules as to when or under what circumstances an input may be deemed an essential input, the incorporation of these conducts has generated some concerns.

Another issue that has generated some concerns is the authority given to Cofece to conduct studies to look for market power and to then order measures to eliminate "barriers to free competition" including the divestiture of assets. As in the case of essential inputs, there is no precise definition of the novel concept of "barriers to free competition," and the New Mexican Antitrust Law only indicates that they are:

> any structural characteristics of the market, facts, or acts of economic agents the purpose or effect of which is to impede competitors' access or limit their ability to compete in the markets; those that impede or distort the free competition process, as well as legal provisions issued by any level of the Government that unduly impede or distort the free competition process.

Cofece's officials have said that the New Mexican Antitrust Law imposes a high standard for a company or product to be found to have a dominant status before being regulated under the rules on essential inputs, margin squeeze, or barriers to free competition. However, the concepts themselves, as well as the proceedings to deal with the relevant cases, seems to be designed—or at least could be used—for over-regulating efficient companies.

The ability to conduct investigations into certain markets and then order a company to sell off parts of its business (despite no suggestion of any wrongdoing by the company) is not exclusive to Mexico. For example, the U.K, competition authorities have in the past investigated and then required divestments in the markets for airports, healthcare, and cement.

We will have to wait until Cofece issues its regulatory provisions and technical criteria to conduct a more detailed analysis of how, in practice, these concepts will be applied, as well as their actual impact on economic agents.

III. CHANGES TO MERGER CONTROL REGIME

The most relevant change to merger control regulations in Mexico is the migration to a suspensory merger control regime, eliminating Cofece's limit on issuing stop orders only for those transactions representing potential risks to the competition process. Under the New Mexican Antitrust Law, all transactions must now wait to obtain clearance before closing—even those transactions in which it is evident that no harm to the affected markets will be generated.

Closely related to the foregoing is the extension of the resolution period from 35 business days to 60 business days (maintaining the possibility to extend the term for 40 additional business days in complex cases). The 35-day term established in the 1993 Law has proven to be more than enough to substantiate the procedure; therefore, there seems to be no justification for such an extension. The negative impact is even greater considering that all transactions must wait until Cofece issues its authorization before closing.

The merger control thresholds have been modified to consider only annual sales originated in Mexico and/or assets in the Mexican territory of the parties, instead of such amounts at a global level, as set forth in Article 20(III) of the 1993 Law. Under this modification, a large number of transactions that were subject to notification will no longer be analyzed by Cofece, maybe missing an opportunity to prevent those with a negative impact on the market.

Last but not least, the regulatory burdens for the parties have been increased (e.g. elements have been incorporated into the list of "basic" information required, Cofece has been given powers to require information at any stage throughout the procedure, terms to require information have been extended, and additional formal requirements have been set for documents and translations). We believe these changes are unjustified considering Cofece might ask for all of them only in particular cases.

Finally, a positive addition is that, under the New Mexican Antitrust Law, Cofece will be obligated to inform the parties to a notification procedure of any possible risks for competition that might result from a transaction, allowing the parties to submit remedies or conditions proposals.

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Essential Inputs and Antitrust Barriers in the Mexican Economic Competition Regime

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Essential Inputs and Antitrust Barriers in the Mexican Economic Competition Regime

Víctor Pavón-Villamayor[1]

I. INTRODUCTION

On July 7, 2014 the new Mexican Economic Competition Law ("MECL") came into force; this is a legislation that replaces the antitrust law enacted in 1992 as one of the commitments made by the Mexican Government to sign the North America Free Trade Agreement with the United States and Canada. The new MECL embodies significant changes with respect to the previous competition regime, including, among others: (i) the creation of a new competition authority ("COFECE"), fully independent from the central government; (ii) a significant expansion of the antitrust authorities' powers to intervene "ex ante" in particular markets; and (iii) the enforcement of a tougher regime of sanctions for antitrust violations.

This article briefly discusses the virtues and risks associated with the two main economic concepts that have been introduced into the new MECL; namely, the notion of "barriers to competition and free entry" and the concept of essential inputs.

II."BARRIERS TO COMPETITION AND FREE ENTRY"

The Mexican reform introduced into the MECL a new economic concept associated with the notion of barriers: the so-called "barriers to competition and free entry." The definition of barriers to competition and free entry is better understood in two dimensions: one legal and one economic. Let´s discuss each of them in turn.

From a legal perspective, a barrier to competition and free entry is defined as any regulation or legal enactment that, having been issued by any municipal, state, or federal level of government, distorts unjustifiably the process of competition and free entry in a particular market. This conception, at least from its legal perspective, seems reasonable, since including the word "unjustifiably"explicitly recognizes that the implementation of some regulations and legal framings, even when they are able to distort the process of competition and free entry in a particular market, can be justified in terms of their impact on social welfare.

An example of this "justifiable" type of barrier are normatives that force specialized professions to pass highly demanding entry examinations and requirements in order to have the legal right to exercise that profession. Notwithstanding that this type of normative, in fact, restricts competition and free entry, its existence is considered to promote social welfare since it

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guarantees minimum levels of quality of service in highly specialized and socially relevant professions as medical or notary services.

From an economic point of view, a barrier to competition and free entry is defined as any "structural condition" of the market, fact, or market behavior having as a purpose, or having as an effect: (i) imposing restrictions on competitors to accessing the market or (ii) limiting their capacity to effectively compete in the market. According to the new law, a barrier to competition and free entry is also, literally, **anything** that limits or distorts the process of competition and free entry. Unfortunately, the economic dimension of this definition is at odds with standard economic antitrust thinking, for the following reasons.

First, the definition of barriers to competition and free entry embedded into the MECL provides, from an economic perspective, no real guidance about what a barrier of this type is. To say that anything that limits or distorts the process of competition and free entry is a barrier is of little practical use. Similarly, establishing that a barrier to competition and free entry is any structural condition of the market, fact, or market behavior that limits market access or the ability of competitors to compete is far too general to provide a functional conceptualization of the scope of this concept.

Second, when the definition of barriers to competition and free entry first appeared in the drafts of the new law, some economists argued that the definition should be linked with the notion of economic efficiency in order to provide a more precise and meaningful conceptualization.[2] The rationale of this proposal was that, in some cases, it is possible to identify barriers that, in principle, should not been seen as anticompetitive by themselves.

A basic but important example of this type of barrier is the presence of "economies of scale." Beyond the debate of whether economies of scale should be considered (or not) as a barrier from a dynamic point of view, it has been common to argue that economies of scale represent a barrier because they disincentive market entry. However, given the enormous efficiencies arising from the existence of these economies, it is absolutely clear that this type of "barrier" cannot be prohibited or punished by antitrust enforcement. Since the definition of barriers to competition and free entry contained in the new MECL has not been directly associated with the concept of economic efficiency, the new language leaves the general impression that all barriers, including ones such as economies of scale that are socially efficient, may be prosecuted.

Third, attempting to define "barriers to competition and free entry" also raises the question of whether this type of barrier should be understood as different from the more standard antitrust concept of "barriers to entry." Two interpretations are possible. The first is that "barriers to entry" and "barriers to competition and free entry" are understood to be equivalent. In this case, the new MECL seems to be conceptually inconsistent, since the same economic concept would then be sometimes referred to as a "barrier to competition and free entry" and other times only as a "barrier to entry." For example, the competitive analysis leading

[2] V. Pavón-Villamayor, *Analytical Contributions to the Federal Economic Competition Law*, Discussion Paper presented at the public hearings for the analysis of the Federal Economic Competition Law, Mexican Senate (April 2, 2014). *Available at http://works.bepress.com/victor_pavon_villamayor.*

to the determination of market power uses the notion of "barrier to entry" (MECL, Article 59), whereas in other parts of the law the notion of "barrier to competition" prevails (MECL, Article 94).

The second interpretation is that "barriers to entry" and "barriers to competition and free entry" are indeed different concepts. A first observation is that the simultaneous, but different, use of these two concepts makes the Mexican competition regime unique in the international arena, since there is no competition regime in the world in which these two concepts are simultaneously used. From this perspective, the Mexican competition regime departs from best international practices for the conceptualization and treatment of barriers for antitrust purposes.

And, as a second observation, if "barriers to competition and free entry" is a concept far more general than "barriers to entry," it is highly probable that the concept of barriers to competition and free entry will be used by COFECE as a primary tool for "ex ante" market interventions—in other words, there is a risk that COFECE will be regularly intervening in markets in order to break down obstacles that may represent a barrier to competition and free entry.

On the positive side, however, it is worth noting that the enforcement of measures to eliminate barriers to competition and free entry will always be subject to pass an "efficiency test." Indeed, according to Article 94 of the new law, COFECE is obligated to verify that the measures proposed to eliminate barriers lead, in all cases, to higher market efficiency. In other words, COFECE will be forbidden to implement any measure leading to the elimination of any barrier in cases where undertakings are able to provide evidence that the so-called barriers are the source of efficiency gains leading to an increase in consumer welfare.

Notwithstanding that the implementation of measures to eliminate barriers to competition and free entry requires satisfying an efficiency test, uncertainty still remains regarding how these new legal powers will be used in practice. As noted above, the fact that barriers to competition and free entry is a more general concept than barriers to entry significantly increases the risk of having more frequent market interventions by COFECE. Additionally, Article 94 of the MECL establishes that the burden of proof regarding the efficiency gains necessary to deter the implementation of measures that eliminate barriers should be provided by undertakings. Thus, undertakings face a two-fold risk: first, the possibility that COFECE rejects the (absolute or relative) existence of efficiency gains in the market analyzed and, second, the risk that undertakings may deal with complexities in the measurement of the impact of the different sources of efficiencies in the performance of the market.

In this sense, undertakings operating in Mexico are strongly recommended to start to develop economic methodologies that allow them to identify, classify, and quantify the economic efficiencies that may exist in the different stages of production, distribution, and commercialization where they operate.

III. ESSENTIAL INPUTS

From an economic perspective, the second substantial change implemented in the new MECL is the introduction of the concept of "essential inputs" in the national competition framework. According to the new competition law, COFECE should take into account the following elements in order to identify the presence of an essential input in a particular market:

1. Whether the input is controlled by one or more undertakings either having market power or being a "preponderant" undertaking in terms of the new *Federal Telecommunications and Broadcasting Law*.[3]
2. Whether the replication of the input is unfeasible from a technical, economic, or legal point of view by any other undertaking.
3. Whether the input is indispensable for the provision of goods and services in one or more markets and whether that input doesn't have close substitutes.
4. Whether the circumstances under which the undertaking ended up controlling the input were the result of risk-taking behavior or not.

Regarding the definition of essential inputs, it is worth noting that to identify essential inputs, undertakings should have market power, but it is unclear whether such market power should necessarily be observed in the relevant market to which the essential input belongs. Economic intuition dictates that this must be the case, but the law is ambiguous regarding this issue since it can also be interpreted that any undertaking having market power in **any** relevant market, and not necessarily in the relevant market in which the essential input belongs, satisfies the first condition. In this case, for example, a telecommunications operator having market power in the relevant market for mobile call termination may satisfy the first condition even when the essential input is identified in a totally different market as, let´s say, passive infrastructure.

Even when this last interpretation does not make much economic sense, it cannot be ruled out since the same (first) condition also states that an essential input can be identified when the input is controlled by a "preponderant" undertaking—a conceptual framework that only applies to the telecommunications and broadcasting industries. A preponderant undertaking is identified exclusively by the basis of its national market share either in the telecommunications or in the broadcasting sector. This implies that an essential input controlled by an undertaking having "significant presence" in a whole sector satisfies automatically the first condition which, by a logical extension, implies that in order to identify an essential input, it is not necessary to determine market power in the relevant market to which this input belongs to.

It is also worth discussing the implications of the last condition of the definition of essential inputs. This condition mandates COFECE to take into account the "circumstances" under which the undertaking ended up controlling the essential input. The Mexican Senate justified the addition of this fourth condition as a means to differentiate between different cases of input ownership. The idea is that ownership of essential inputs that derive from commercial risk-taking behavior should be treated differently from ownership that derive from other "circumstances"—although these other circumstances are not specified.

Regardless of the fact that this fourth condition still requires a more precise meaning, this condition is considered a positive feature of the new law, since it forces COFECE to treat

[3] In terms of the Federal Telecommunications and Broadcasting Law, officially enacted on July 14, 2014, a "preponderant" undertaking in Mexico is any firm that directly or indirectly controls, at least, 50 percent of the national market of the telecommunications or broadcasting "sectors."

ownership of essential inputs in a differentiated way. This may have positive effects on the deployment and investment of infrastructure, facilities, and distribution channels and can also be instrumental in fostering innovation in the production and commercialization of inputs in the whole economy.

Another important implication of introducing the concept of essential inputs in the Mexican competition regime relates to the characterization of two new unilateral conducts. First, according to the new MECL: (i) the refusal to give access, (ii) the imposition of restrictions to provide access, or (iii) the implementation of discriminatory access to essential inputs, may represent a unilateral conduct that violates competition law (MECL, Article 56). The second market conduct now intrinsically linked to the concept of essential input, and characterized as a unilateral conduct, is "margin squeeze," a subject that has been the source of intense debates in the context of the telecommunications sector in Mexico.[4]

The concept of essential inputs embodied into the MECL is not exempt from implementation risks. In the new Mexican competition regime, COFECE not only has legal powers to identify essential inputs in the whole economy—the exemption being the telecommunications and broadcasting sectors, where the Federal Institute for Telecommunications has exclusive powers to identify and to regulate essential inputs in these sector—but also has the power to regulate them (MECL, Article 12). To provide powers to a competition authority in order to identify and to determine essential inputs is hardly surprising, but to provide powers to COFECE to unilaterally determine tariffs and conditions of access to those essential inputs is controversial.

This controversial power is particularly evident in the case of network industries, which typically are regulated industries. According to the new MECL, COFECE has the power to determine tariffs, terms, and conditions of access to those essential inputs in **any** sector of the economy. And, most importantly, this power does not need take into account the technical opinion that a sector-specific regulator may have regarding the regulation proposed by the competition authority. COFECE´s design of access regulation to an essential input in a regulated sector may take into account the technical opinion of the sector-specific regulator, but following this expert opinion is optional—not compulsory.

The fact that COFECE may mandate access regulation to essential inputs without necessarily taking into account expert advice of sector-specific regulators creates enormous risk since the social costs of implementing regulatory measures ill-designed for sector-specific needs can be significant. A main source of risk is pricing. As has been discussed extensively in the antitrust literature, any debate pretending to discuss terms of access is forced to debate the extent to which access pricing should derive from the "intrinsic" or the "market" value of access. This discussion is particularly complex and is a real conundrum when the entity in charge of determining optimal prices is a competition authority ill-prepared to address this kind of issue.

As some authors have mentioned, engaging in access regulation is not a simple task since it implies that the competition authority should be prepared:

[4] V. Pavón-Villamayor, *Margin Squeeze in Mexican Mobile Telecommunications*, 8(2) CPI ANTITRUST CHRON. (August, 2011).

> …(1) to command that access be provided by others, to regulate the prices, terms, and conditions for the provision of such access, (3) to command the capacity expansion required to make such access feasible, and (4) to command that the service of the facility—as expanded to make access feasible—actually be provided to those who demand it.[5]

Since all these tasks are real challenges for any sector-specific regulator, it is not surprising that expectations for the implementation of optimal access regulation by a competition authority as COFECE are quite low.

IV. FINAL REMARKS

The introduction of new concepts as barriers to competition and free entry, and essential inputs, in the Mexican competition regime imposes important challenges. From the perspective of antitrust authorities, the "ex ante" and "ex post" powers to intervene in markets need to be used intelligently and responsibly to guarantee maximizing social welfare.

And from the perspective of undertakings, there is an urgent need to fully understand the scope of the new competition law and, most importantly, to work out the economics of the industry-specific efficiencies that, in most cases, will be the only answer to antitrust concerns deriving from the new competition framework in Mexico.

[5] A. Lipsky & G. Sidak, *Essential Facilities*, 51 STANFORD L. REV. 1187-1249 (1999).

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A Decade of Significant Changes in Competition Policies in Chile

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A Decade of Significant Changes in Competition Policies in Chile

Claudio A. Agostini & Manuel Willington[1]

I. INTRODUCTION

In the nineteenth century, John Stuart Mill stated that societies are economically successful when they have good economic institutions, and that it is these institutions that lead to prosperity. History has proved him right as both theory and the empirical evidence show that differences in economic institutions strongly explain the differences in growth and prosperity among countries.

While it is not easy to define economic institutions, there is consensus on the aspects primarily concerned with the ground rules and, in particular, with the structure of property rights and the existence of competitive markets. These latter definitions, which are more specific, make it possible to better understand the importance of economic institutions. On the one hand, property rights play the role of generating incentives to invest in both physical capital and technology, as well as in human capital. On the other hand, and complementarily, truly competitive markets allow for an efficient allocation of resources. Thus, the existence of a strong competition policy has positive effects on the economic growth of a country and helps its development.[2]

Along these lines and considering evidence for different countries, Edward Prescott & Stephen Parente argue—in the book *Barriers to Riches*[3]—that large income differences among countries are mainly due to the lack of free competition in the poorest countries. In many poor and developing countries, this lack of competition is linked to anticompetitive behaviors that go unpunished due to: (i) the nonexistence of an appropriate institutional framework, (ii) corruption, (iii) nontransparent practices that favor certain groups, and (iv) privileges that various lobbyists have obtained for many years.

In the case of Chile, antitrust legislation begins in 1959 when the first Act that punishes—with imprisonment—price-fixing, production quota agreements, and geographic market sharing is approved. At the same time, the Antimonopoly Commission, which aims to investigate and punish anticompetitive practices, is created.[4] The Commission consists of a Justice of the

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[2] J. Baker, *The Case for Antitrust Enforcement*, 17(4) J. ECON. PERSPECTIVES (2003).

[3] S. L. PARENTE & E.C. PRESCOTT, BARRIERS TO RICHES, (2000).

[4] To address a major inflationary crisis in the late 50s, the Chilean government hired U.S. consultant Klein-Saks, who made the recommendation, among other measures, to have antimonopoly legislation guaranteeing market competition.

Supreme Court, the Superintendent of Securities, and the Superintendent of Banks. Subsequently, in 1963 the Prosecutor position is created to act as public defender.

In the period 1959-1972, the antimonopoly commission had little work and persecuted only 120 cases. New legislation that increased the penalties and range of anticompetitive conduct that could be sanctioned was created in order to strengthen the free competition policy. New institutions created include the Consultative Commission, which was responsible for responding to queries and for trying to prevent anticompetitive practices, and the Competition Commission, which had the role of a court. Furthermore, the position of the National Economic Prosecutor ("FNE") was created to investigate and pursue cases on behalf of the public.

One of the main weaknesses of this institutional design was that the members of the Consultative and the Competition Commissions were appointed by the government or elected by lot (between the Deans of Economics and Law Faculties), worked pro bono, and dedicated only a few hours per week to the tasks related to the Commissions.

II. A DECADE OF SIGNIFICANT CHANGES

While in Chile the institutional framework against anticompetitive practices formally began in 1959 and gradually improved in some dimensions in subsequent decades, in recent years there have been significant changes. These changes have placed Chile at an institutional level equivalent to that of many developed countries.

A. Institutional Framework

The first significant change occurs in 2003 with an amendment to the Competition Act that creates the Free Competition Tribunal ("TDLC"). This entity consists of five specialized judges (three lawyers and two economists)—chosen by public tender and based on merit—who are paid and initially worked on a part-time basis. In terms of the sanctions levied, imprisonment—which previously existed for more serious cases such as collusion—was eliminated.

Later, a new reform in 2009 improved the operation of the TDLC. It perfected the listing of situations in which judges are disqualified to participate in certain cases and the listing of incompatibilities to become members of the court, all of which ensures greater independence. Additionally, in an effort to encourage the best lawyers and economists countrywide to apply for the posts of judges of the court, the salaries of the members of the court were significantly increased. The number of times that the court meets on a monthly basis also increased.

The 2009 amendment to the Competition Act introduced several highly relevant changes in terms of improving the enforcement of competition policies. First, it created a leniency program that allows for fine reductions or full immunity from antitrust prosecution to the first firm that offers collaboration on cartel cases. The leniency program has already been utilized in two cases: the international case of the refrigerant compressors (in Chile, Tecumseh benefited from the leniency program while Whirlpool faced a fine of approximately U.S. $4.5 million), and a local case of collusion among three firms to increase the bus fares on the Santiago-Curacaví route.

Second, with the reform, the FNE has also gained powerful tools to assist them in their investigations. They are now able to—with the authorization of the TDLC and a judge of the

Court of Appeals—conduct dawn raids on firms' premises to obtain physical evidence and wiretap suspected firms' managers (the aforementioned case of the Santiago-Curacaví buses was also the first case in which the FNE made use of this faculty).

Third, maximum fines that can be imposed by the TDLC in cartel cases were increased by 50 percent (from approximately U.S. $18 million to U.S. $27 million). However, the reform insisted on a cap on fines unrelated to the profits or sales of the infringing firm(s).

Finally, the reform also introduced the possibility that the FNE may "challenge" a merger through a non-adversarial procedure.[5]

On a last note, it is important to highlight that these policy changes have also been accompanied by the strengthening of the main institutions that defend free competition. In the last decade, the TDLC has increased its budget by 200 percent and the FNE by 260 percent (both in real terms).

B. Regulatory Certainty and Competition Advocacy

The FNE has been particularly active in recent years. They have generated guidelines that provide more information on the various analyses carried out internally and on the possible risks that different conducts can pose for free competition.

1. Horizontal Merger Guidelines

As is well known, it is generally not easy to determine the potential effects of a merger on the degree of market competition, since the difference in the degree of future market competition must be evaluated in circumstances both with and without a merger. Therefore, the decision to reject or approve a merger is a difficult one and it certainly creates uncertainty to the companies that are considering the possibility of merging.

One way to systematize the analysis required to try to answer these questions is to establish an explicit policy for evaluating mergers. This policy consists of an analytical framework used to determine the probability that a merger will reduce the degree of market competition.

The main objective of a merger policy is to design a methodology to be followed by institutions that promote and guarantee free competition. This methodology not only allows for a systemized analysis to assess whether there should be an objection to the merger, but it also allows involved private agents to anticipate the actions of these institutions. Accordingly, one of the advantages of having an explicit policy is that companies considering a merger face a more certain regulatory environment.[6]

To this end, first in 2006 and then in 2012, the FNE established an explicit policy to evaluate horizontal mergers, consisting of a four-dimensional analytical framework. First, the relevant market to be affected by the merger (it may be more than one market) is determined.

[5] *See* OECD, *Chile – Accession Report on Competition Law and Policy*, COUNTRY STUDIES (2010) for a detailed description of adversarial and non-adversarial procedures presented before the TDLC.

[6] For these reasons, there are several developed countries that have explicitly implemented a policy to assess mergers. Saliently, the United States had its first merger guidelines in 1968 (revised and amended in 1984, 1992, 1997, and more recently in 2010).

Second, the degree and the increase in the post-merger relevant market concentration are evaluated to establish whether the merger can generate anticompetitive effects on the relevant market (unilateral effects and coordinated effects). Then there is an assessment of the possibility of a likely, timely, and sufficient entry into the market to offset potential anticompetitive effects of the merger. Fourth, the efficiency gains produced by the merger are evaluated in terms of whether they can or cannot be achieved through means other than those of the merger and whether these gains more than offset the potential anticompetitive effects of the merger (in the case where they exist).

The first guidelines of 2006, as well as the 2012 version, have contributed to providing certainty to companies considering possible horizontal mergers since they describe the procedures and the different analyses that the FNE follows in the evaluation of the merger. At the same time, these guidelines have expedited the merger process.[7]

2. Vertical Restraints Guidelines

In June 2014, the FNE published a new guide, this time to describe the general guidelines used in analyzing vertical restraints and their potential anticompetitive and efficiency effects. In particular, it details the procedures used to analyze the anticompetitive risks associated with facilitating collusion at the supplier or distributor levels, and with blocking or delaying the entry or expansion of competitors. In addition, it describes the guidelines followed in analyzing the efficiency gains obtained with enhanced vertical coordination (avoiding double marginalization, removing hold-up, and optimally providing complementary services) and with greater competition between rival vertical structures.

To this end, the FNE establishes a categorization of vertical restrictions separating them by intra-brand restraints (minimum or maximum resale prices, exclusive territories, exclusive distribution, service requirements, and preferred customer clauses) and by inter-brand restraints (exclusive contracts, nonlinear pricing, tied sales, marketing access payments, and minimum purchase requirements). In the analysis of each vertical restraint, the FNE considers three stages: (i) market share of the economic operators subject to the restriction, (ii) actual or potential anticompetitive effects arising from the vertical restriction, and (iii) efficiencies that arise from the use of the restriction and are not possible to obtain with less restrictive measures for competition.

The vertical restraints guidelines provide a good guidance for companies, describing the risks of using certain types of restrictions in the different markets and providing more certainty on which practices will effectively be considered as anticompetitive by the FNE.

3. Professional Associations Guidelines

In developing countries such as Chile, it is common to see various professional and business associations strongly defending the interests of its members. This raises questions regarding the role they play in a market economy and its effects on market competition.

[7] However, it is important to note that the Free Competition Tribunal ("TDLC") is not bound by these guidelines. Moreover, not only the FNE but also any affected private party can challenge the merger before the TDLC.

On the one hand, the associations play an important role in collecting and diffusing market information that is difficult to obtain for each member, facilitating the adjustment to different shocks facing the industry. Additionally, they can facilitate the establishment of quality and safety standards as well as the comparison of products and services provided by the different companies.

On the other hand, associations facilitate collusion and price-fixing by bringing together a group of competitors. This risk is almost certain if the information shared is specific to each company and not aggregated for the entire market.

In August 2011, the FNE published the *Professional Associations and Free Competition Guidelines*. The main objective of these guidelines is to make clear the prosecution's views regarding the actions of various professional associations in the country and the possible risks that different conducts can create for free competition.[8] These guidelines describe and specify the practices associated with the risk of coordination among competitors as well as with other anticompetitive risks related to information sharing, establishment of common standards, professional associations membership conditions, provision of services to companies not affiliated to the association, and advertising and standard contracts. In addition, these guidelines provide a list of recommendations regarding the participation and record of association meetings and the hiring of specialized consultants by the association.

Although the *Guidelines* is mainly informative and has the goal of promoting fair competition among members of various professional associations, it has had an important impact in describing risky behaviors. It has also promoted the implementation of explicit policies to prevent those risks within companies.

III. THE ROAD AHEAD

Despite all the progress made in the last ten years, there are several aspects of antitrust enforcement in which Chile significantly lags behind more developed countries. The most important ones are highlighted in this article; most of them have been on the public agenda for the last few years.

Two issues regarding institutional aspects are on the public agenda. First, the judges of the TDLC are committed to their duties for a minimum of three days a week and it is currently being analyzed whether they should provide exclusive dedication, with a consequent increase in their salaries. This could help reduce the length of the trials that are presented before the TDLC. Today the trials last 630 consecutive days, on average, for contentious cases with a statement of evidence that end with a sentence.[9]

As it relates to the FNE, the appointment and, particularly, the removal or confirmation of the Prosecutor has been the subject of debate since it has not been possible to guarantee independence from political power. According to current regulations, the Prosecutor is chosen

[8] These guidelines are in line with similar documents produced by antitrust organizations in other countries: Australia (2010), New Zealand (2010), European Union (2010 and 2004), Spain (2009), Ireland (2009), Canada (2008), Holland (2008), United Kingdom (2004), and Japan (2001).

[9] TDLC (2014) webpage: http://www.tdlc.cl/DocumentosMultiples/Contenciosas%20-%20Duraci%C3%B3n.pdf.

by the President of the Republic from a shortlist defined through a selection process and is appointed for a four-year term, which is renewable for another four years.[10] At the end of the first period, the President of the Republic has the power to renew the Prosecutor for an additional four years. It is also the President who can dismiss the Prosecutor, when he/she is declared incompetent or negligent in agreement with the Supreme Court.

A. Horizontal Mergers

On the issue of horizontal mergers, there is no pre-merger notification requirement.[11] Despite the fact that the FNE's merger guidelines establish thresholds that determine whether the FNE will oppose, further evaluate, or approve a merger (much in the spirit of the U.S. Merger Guidelines), no matter the size of the merger there is no obligation for the parties to *ex-ante* notify the TDLC.

Voluntary consultation with the TDLC triggers a non-adversarial process. It has two important advantages for the merging firms: first, an adversarial challenge to the merger cannot be brought to the TDLC after it has ruled in a non-adversarial consultation process; and second, the Supreme Court cannot modify the TDLC ruling on a voluntary consultation process, although it can modify the remedies imposed by the TDLC. Despite the advantages of *ex-ante* voluntary consultation vs. an *ex-post* adversarial challenge, merging firms still face a trade-off as the *ex-post* challenge may not occur.

A set of clear rules that determine whether the TDLC must scrutinize mergers will bring certainty to the merging parties and also to the FNE and could save them valuable resources. These rules should establish thresholds on total sales and/or assets of the merging parties and should be industry specific.

B. Imprisonment and the Leniency Program

The most relevant modifications to the Competition Act introduced in 2009 were the increase of maximum fines and the introduction of a leniency program. A hotly debated topic was also the introduction of imprisonment for certain offenses, but these were ultimately not incorporated by the legislators.

The leniency program, which is detailed in a set of ad-hoc FNE guidelines, provides an exemption or reduction of fines to the company that makes the initial report and provides truthful and accurate information with respect to the collusive agreement.

In practice, however, the leniency program has encountered some difficulties with different jurisdictions of various courts. While prison sentences are not covered by the specific competition laws, criminal prosecutors have denounced executives from accused firms (condemned by the TDLC for crimes of collusion) and they could end up facing imprisonment; the resolutions of these processes are still pending. Logically, this uncertainty limits the

[10] The President selects a person from the shortlist provided or he can reserve the right not to select anyone, in which case a new shortlist should be proposed. None of the previous candidates can be included in the new shortlist.

[11] In fact, pre-merger notification (to the TDLC or regulatory bodies) is compulsory only in a few specific sectors. In a few cases, the TDLC has imposed, as a remedy to approve a merger, the obligation of notifying future mergers or acquisitions in certain markets.

effectiveness of the leniency program since the penalty reduction does not include those penalties determined by courts other than that of the TDLC.

These inconsistencies could be solved in two ways: by changing the law such that it is impossible to impose imprisonment for crimes against free competition or by making it clear that prison terms can be imposed in these cases and including any reduction or exemption related to these terms in the leniency program. In our opinion, this second option would be most effective given the large deterrent effect of imprisonment.

C. Maximum Fines and Damages

The TDLC is allowed to impose fines up to a maximum of around U.S. $27.5 million (this figure is 1.5 times the cap prior to the 2009 amendment). The fine is to the benefit of the government and is supposed to be related to: (i) the economic benefit obtained, (ii) the offense for which the company is being convicted, (iii) the extent to which the company has cooperated with the investigation, and (iv) whether or not the convicted company is a repeat offender.

Claims for damages (to consumers or other companies) are not processed by the TDLC but instead by the lower district courts only after the TDLC has found a breach of the competition law. In this civil trial, the amount of damages and the link between the violation and the damages (but not the violation itself) must be proved. This is to some extent inefficient—not only because court proceedings are duplicated, but also because there is failure to take advantage of a specialized court such as the TDLC. In general, an assessment of damages involves the use of econometric techniques and economic models, in which the TDLC has a clear advantage. The experience in compensation lawsuits is so far very limited. [12]

The relatively low ceiling of a maximum fine of U.S. $27.5 million, the difficulty to sue for damages, and the fact that the damages are only compensatory damages (excluding punitive damages) imply that, for certain industries or companies, any deterrent effect in favor of free competition policies is limited. Since the substantive law states that the fines imposed by the TDLC must be related to the extra profits that companies obtained from their illicit conduct, it would not be problematic to remove the absolute cap on the fines and set fines as a factor of extra benefits obtained.

D. Rule of Reason and Per Se Standards

The Antitrust Act establishes that the judges must assess the evidence according to the rule of reason standard (*sana crítica*), which requires the judges to evaluate the evidence based on their experience, formal rules of logic, and economic theory. There are no offenses that can be considered *per se* illegal, as is the case of price-fixing agreements in other jurisdictions.

This is clearly inefficient. With the new powers that were granted to the FNE since 2009, and that allow them to obtain hard evidence of potential agreements, it is not reasonable that

[12] Additionally, class actions are quite infrequent. They were introduced in legislation in 2004, but the legal procedures have been structured such that the incentives for initiation are scarce or nonexistent, *see* A. Barroilhet, *Class Actions in Chile*, L. BUS. REV. OF THE AMERICAS, 18, 275 (2012). These problems are worsened by the fact that treble or punitive damages are not contemplated in the Chilean legislation and "moral damages" are explicitly banned in class actions.

once such hard evidence on agreements is found, it has to be demonstrated before the TDLC that the agreement is anticompetitive. As Whinston[13] puts it, the "justification of the per se rule is really nothing more than an application of optimal statistical decision making."

The expected cost of sanctioning a price agreement that has pro-competitive effects does not compensate for the cost of having to analyze, and eventually condemn under the rule of reason, all other price agreement cases with anticompetitive effects.[14]

IV. TO CONCLUDE

The last decade in Chile has seen, more than in the previous 50 years, a significant improvement in terms of antitrust policies and associated enforcement institutions.

Still, there is a road ahead to follow in terms of several dimensions to protect competition and ensure the benefits of free markets on resource allocation of the economy. Hopefully, current and future governments will be willing to follow that road and prevent interest groups from blocking the reforms to protect their own economic resources.

[13] M. WHINSTON, LECTURES ON ANTITRUST ECONOMICS, (2006).

[14] The judges of the TDLC do not need to be convinced that the agreement actually harmed competition. If the agreement had the "objective" capacity of causing harm it is enough for a conviction, *see* OECD, *supra* note 5. This standard clearly facilitates condemning such violations (compared to the case in which the damage has to be proved), but does not significantly reduce the costs of administering justice.

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The New Brazilian Competition Law—Two Years On

Paulo Leonardo Casagrande[1]

I. INTRODUCTION

On May 29, 2012, Law n. 12,529/11—the New Brazilian Competition Law ("New Law")—entered into force, after being enacted as a result of more than seven years of discussions within the Brazilian National Congress. The New Law superseded the first effective competition statute of the country, Law 8,884/94 ("Previous Law"), enacted in 1994 concurrently with significant liberalization reforms.[2]

The most important changes established by the New Law concern merger review and the institutional structure of the authorities. The Previous Law had established a non-suspensory merger control regime in Brazil, under which parties were allowed to close transactions before the final decision of the competition authority. Besides being at odds with international experience, this resulted in difficulties to the authorities and many uncertainties to merging parties, especially in complex transactions. The New Law set up a pre-merger review system, consistent with the reality of most countries.

The New Law also consolidated the investigatory and the decision-making authorities into one single agency, in order to increase efficiency and support the new pre-merger review system. Such institutional reform also mirrors those adopted elsewhere in the world.[3]

What to say two years after the New Law entered into force? The present article aims at providing a brief overview of recent developments in the Brazilian competition law and policy as a result of the implementation of the new statute. It is organized in three sections: the first describes the institutional changes; the second explains the new pre-merger control regime, with some aspects of its enforcement in the last two years; and the third provides details of anticompetitive practices investigations, with a focus on cartels. A brief conclusion follows.

II. INSTITUTIONAL ASPECTS: THREE-TO-TWO MERGER OF THE COMPETITION AUTHORITIES

Under the Previous Law, three agencies composed the so called *Brazilian Competition Policy System—BCPS*: the Secretariat of Economic Law, within the Ministry of Justice (known by its Portuguese acronym, "SDE"); the Secretariat of Economic Monitoring, within the Ministry of Finance ("SEAE"); and the Council for Economic Defense ("CADE"), an independent

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[2] Brazil had a fairly comprehensive competition law since 1962 (Law 4,137), which, however, was not complemented by a consistent competition policy and effective enforcement by the government.

[3] *See*, for example, the integration of the investigative and the decision-making bodies implemented in France in 2008 (http://www.autoritedelaconcurrence.fr/doc/25years_uk.pdf) and in the United Kingdom in 2013/2014 (https://www.gov.uk/government/organisations/competition-and-markets-authority/about).

commission composed of seven members chosen by the President of the Republic and approved by the Federal Senate. The Secretariats were responsible for investigating mergers and behavioral matters, providing non-binding reports about them to CADE. After some rationalization measures taken by the Secretariats, SDE was primarily responsible for conduct cases—focusing its resources in anticartel efforts—while SEAE reviewed concentrations. CADE, by its turn, issued final administrative decisions, subject only to judicial review.

The New Law modified the structure of BCPS, with the aim of rationalizing its operations and avoiding overlapping functions. Under the New Law, the SDE and the investigative functions of SEAE were moved from their respective Ministries and merged with CADE, so that all functions were now centralized under a restructured "New CADE." The New CADE is now divided into four main internal bodies:

1. the *General Superintendence* ("Superintendência Geral" – SG), which inherited both SEAE and SDE's powers concerning investigation of anticompetitive conducts and mergers, and acquired additional responsibilities;
2. the *Administrative Tribunal*, composed of the seven Commissioners (as before);
3. the *Department of Economic Studies*, responsible for preparing economic reports as requested by either the SG or the Commissioners; and
4. the *Attorney's Office*, in charge of representing CADE in all judicial proceedings and providing internal legal assistance to the other bodies.

SEAE continues to exist and is still part of the BCPS, working as a competition advocacy bureau. It constantly evaluates the competitive effects of new regulations and trade measures, a role it had played under the old regime but that is now further emphasized with an enhanced legal mandate.

Another important provision of the New Law was the creation of 200 new permanent positions for the New CADE, a much-needed measure considering the well-known lack of human resources of Brazilian competition authorities.[4] Such positions have to be filled by means of competitive recruitment procedures organized by the Ministry of Planning and Budget (similar to the *concours* of the European Commission), the first of which is currently stalled due to an interim judicial order. Therefore, CADE is still short of the manpower necessary to accomplish its important institutional missions.

III. PRE-MERGER REVIEW PROCEDURE: MAIN ASPECTS AND RECENT DEVELOPMENTS

The New Law establishes a pre-merger review regime applicable to "economic concentration acts," which are defined by Art. 90 as transactions where (i) two or more previously independent companies merge; (ii) one or more companies partially or fully acquire control of one or more companies; (iii) one or more companies incorporate another company or

[4] "The most serious problem confronting the BCPS continues to be its lack of resources, which is compounded by a high rate of employee turnover. CADE had no permanent professional staff. SDE is also chronically understaffed, leading to a large backlog of investigations." OECD; IDB, *Competition Law and Policy in Brazil – A Peer Review*, 7 (2010).

companies; or (iv) two or more companies execute a consortium, a joint venture, or any other form of association agreement.

An exhaustive list of transactions subject to pre-merger control certainly increases legal certainty. Although typical merger transactions are caught under these hypotheses, it is not yet clear which sort of cooperative arrangements are caught, especially considering the very open ended "association agreement" concept. In view of that, in February 2014 CADE submitted to public comment a proposed regulation defining both vertical and horizontal arrangements which would be considered "association agreements" for merger control purposes, in an effort to further clarify the issue.[5] After receiving contributions from companies, trade associations, and the bar—many of which argued the proposal to be over inclusive[6]—CADE is expected to issue the regulation by the end of the year.

An "economic concentration act" is only notifiable if certain turnover thresholds of the parties' economic groups are met: (i) gross annual revenues in Brazil larger than BRL 750 million in the preceding fiscal year for one of the groups, and (ii) BRL 75 million for the other.[7] CADE issued Regulation 2/2012 in May 2012 in order to provide better guidance on how to calculate group turnover. The rules concerning investment funds were deemed too broad by the bar and financial institutions and, after two years, CADE also submitted to public consultation proposed changes aiming at better specifying such aspects of Regulation 2/2012.[8]

The appropriate definition of "economic concentration act" is extremely important in a pre-merger control regime, since transactions that are not notified, or that are closed before final approval by the authority ("gun jumping"), can be nullified, with the parties subject to a fine of up to BRL 60 million, according to Art. 88, §3 of the New Law. CADE has already applied the gun jumping fine at least four times.[9]

As per the procedure to review merger transactions, the New Law establishes a very clear and strict timeframe. The entire process must be completed within 240 days, counting from the day of the filing of a complete notification. This period can be extended only once, for the period of 60 days (300 days in total) if formally requested by any of the involved parties, or for 90 days (330 days in total) if CADE justifiably declares the case to be "complex."

Moreover, there are well-defined phases, provided by the New Law and further specified by CADE Internal Regulations (*Regimento Interno*), also approved in May 2012. After receiving a notification, the SG must analyze and decide on the completeness of the application, requiring

[5] *Consulta Pública 3/2014*, *available at* http://cade.gov.br/Default.aspx?94a7768392879d65b19eae81dd64.

[6] *See*, for example, the contribution by the Sections of Antitrust Law and International Law of the American Bar Association at http://www.americanbar.org/content/dam/aba/administrative/antitrust_law/at_comments_2014amendbrazil_en.authcheckdam.pdf.

[7] The new turnover thresholds led to a significant decrease in the number of merger notifications to CADE: according to public figures, there were 684 transactions notified in 2011 and only 377 in 2013, the first full calendar year with the New Law in force.

[8] *Consulta Pública 1/2014*, *available at* http://cade.gov.br/Default.aspx?e75bab7d94899f63b784d46ac488.

[9] Concentration Acts 08700.005775/2013-19 (OGX/Petrobras); 08700.008289/2013-52 (UTC/Aurizônia Petróleo); 08700.008292/2013-76 (Potióleo/UTC); and 08700.002285/2014-41 (Fiat/Chrysler).

the parties to amend them if any key information is missing. Once complete, the SG publishes a notice in the *Official Gazette* and starts evaluating the notification. If the transaction is uncomplicated and raises no competition concerns, it is approved by a simplified decision by the General Superintendent within 30 days from the notification—a timeframe consistent with most foreign jurisdictions for analogous cases. According to recent figures released by CADE, 90 percent of the merger filings have been approved under this expedited procedure.[10]

More complex cases may demand some investigation by the SG, which then requires further information from the parties, competitors, customers, and/or other government agencies. At the end of its deeper review, the SG issues a formal decision, either approving the transaction or challenging it before the Tribunal.

An approval decision by the SG—either under the simplified procedure or after some more detailed inquiry—can be appealed to the Tribunal within 15 days by any interested party or the relevant regulatory agency. Moreover, the Tribunal itself can request to review the matter within the same deadline.[11] If the SG's decision is not affected by these incidents within 15 days, it becomes final and the transaction, duly approved.

Whenever the SG decides to challenge a transaction, it must demonstrate the details of its concerns and recommend the Tribunal either approve the deal with restrictions or block it. In such case, the parties have 30 days to present a formal defense to the Tribunal. Afterwards, the Tribunal's randomly assigned Reporting Commissioner can ask for any extra information she deems relevant, including non-binding opinions by the Department of Economic Studies or the Attorney's Office. The final decision will be issued by the Administrative Tribunal in a formal and public judgment session by unanimous or majority vote.

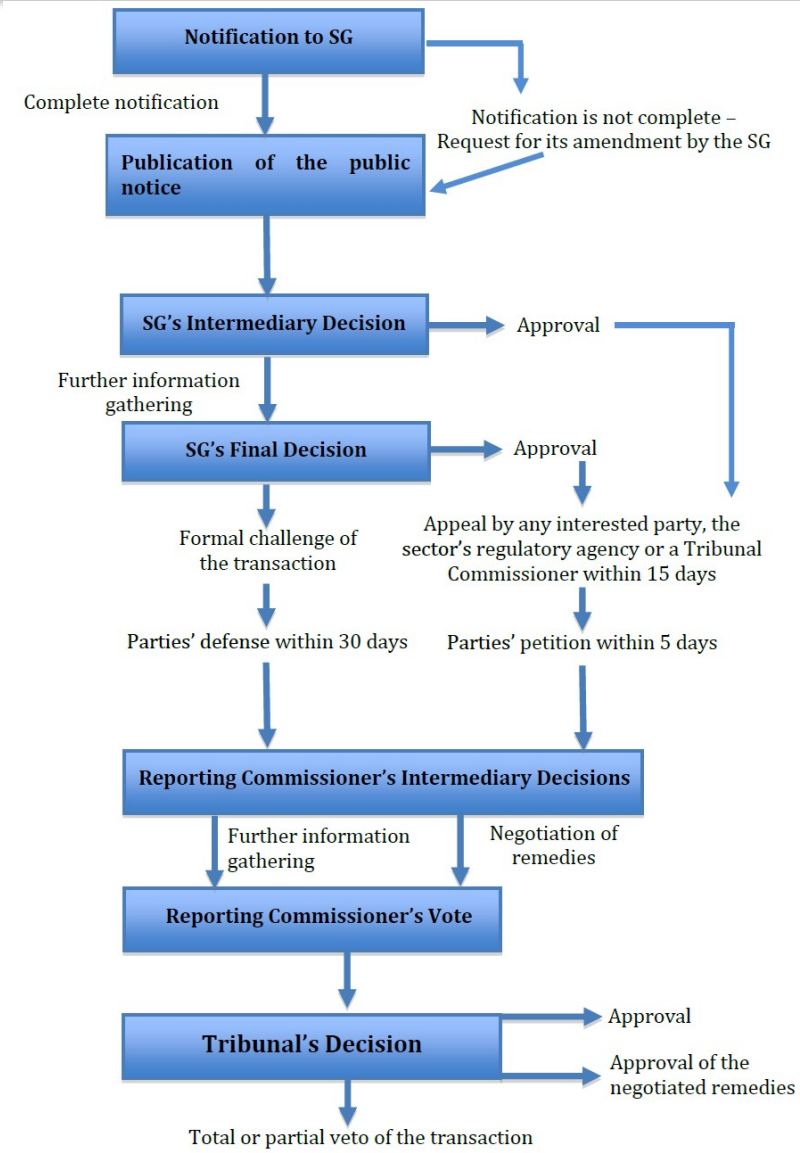
Parties are able to negotiate commitments with CADE to deal with possible competition concerns raised by the authority. Such commitments will be negotiated with either the SG or the Reporting Commissioner and must be approved by CADE's Tribunal. To date, all cases formally declared to be "complex" and judged by CADE have been approved with negotiated commitments,[12] which indicates the willingness of the authority to discuss and find with the parties reasonable remedies for potential competition concerns.

Figure 1 below provides an overview of the main phases of the merger review procedure under the New Law:

[10] CADE, *Balanço do biênio da Lei 12.529/11 e perspectivas da defesa da concorrência no Brasil*, May 2014, *available at* http://cade.gov.br/upload/Balan%C3%A7o%202%20anos%20nova%20lei.pdf (in Portuguese).

[11] CADE also published in February 2014 a third public consultation to better clarify some procedural aspects of these incidents (*Consulta Pública 2/2014, available at* http://www.cade.gov.br/Default.aspx?1a2dfd0b1a0fe52df9471936084d).

[12] Concentration Acts 08700.009882/2012-35 (Ahlstrom/Munksjö); 08700.009198/2013-34 (Estacio/UNISEB); 08700.005447/2013-12 (Kroton/Anhanguera).



IV. INVESTIGATION OF ANTICOMPETITIVE PRACTICES

The New Law brought some changes with regards to the administrative proceedings related to anticompetitive practices (e.g., cartels, concerted practices, exclusionary practices by dominant companies, etc.). However, these changes are minor in comparison to those involving merger control as described above.

Cartels are considered to be the most serious anticompetitive practice by CADE, an approach similar to other competition authorities around the world.[13] According to the New Law, a cartel is any sort of agreement among competitors to fix prices and/or quantities, allocate

[13] The tough approach by CADE concerning cartels can be exemplified by the significant fines it imposed to cement companies in May 2014, close to BRL 3.1 billion (Administrative Proceeding 08012.011142/2006-79), its largest ever penalty.

customers, and rig public bids (art. 36, §3, I). Cartels can also be characterized as a criminal offense, either under the Economic Crimes Law (Law 8,137/90) or the Public Procurement Law (Law 8,666/93), with prison sentences of up to five years. There is increasing criminal persecution of cartels in Brazil by Federal and State Public Prosecutor's Offices (*Ministério Público*), usually in cooperation with CADE.

Other horizontal practices can also be deemed anticompetitive, with CADE lately paying special attention to trade associations' suggestions of prices to member companies.[14] As per unilateral practices (or abuse of dominance by large firms), the law sets up a list of potentially anticompetitive conducts that have been construed by CADE similarly to its counterparts in other countries. Therefore, there have been a number of investigations and decisions involving predatory pricing, exclusive dealing, conditional discounts, refusals to deal, and other alleged abusive practices.

As indicated above, the General Superintendence is now responsible for all investigations of anticompetitive practices. The New Law provides a more detailed description of procedural rules concerning some aspects of the investigation, with a clearer distinction among three different sorts of proceedings: a *preparatory proceeding* to filter unsupported or frivolous accusations, an investigative phase in the form of an *administrative inquiry*, and *formal administrative proceedings* during which there is an adversary proceeding with all formal defense guarantees.

As per the investigative tools—usually employed more intensely in the administrative inquiry phase—the SG has inherited the SDE's power to carry out dawn raids to obtain evidence within the premises of investigated companies, after obtaining an injunction by a Federal Court. Since the enactment of the New Law, the SG has carried on eight dawn raids in several parts of the country, mostly concerning alleged local cartels. The requests for such injunctions are usually based on documents provided by one of the participants of an investigated cartel, under the most important investigative tool available to the SG: the *Leniency Program*.

The Brazilian Leniency Program offers companies and individuals who have infringed competition rules full or partial immunity from administrative penalties and full immunity from criminal penalties, in exchange for cooperation with the authorities in the investigation of cartels. The SG has the authority to negotiate and execute leniency agreements with applicants that meet the following conditions:

- be the first to come forward and inform CADE of an anticompetitive practice,
- confess participation in such practice,
- provide information of which SG is not yet aware on the practice itself and the co-participants, and
- immediately cease involvement in the anticompetitive practice and fully cooperate with the investigation conducted by the SG.

[14] *See* the decisions of the Tribunal concerning Administrative Proceeding 08012.009834/2006-57 (SDE v. Associação Paranaense dos Produtores de Cal-APPC); and 08012.006923/2002-18 (SDE v. Associação Brasileira de Agências de Viagens-Rio de Janeiro-ABAV-RJ), both published on 26.02.2013.

The New Law has excluded the prohibition of executing a leniency agreement with the leader of the investigated conspiracy. Moreover, the New Law has made it clearer that a duly fulfilled leniency agreement provides immunity from criminal liability related to several criminal statutes, including the Public Procurement Law and the Criminal Code.

After investigating the practice, the SG can only issue an opinion to CADE recommending the condemnation of a company or individual after formal proceedings where important due process guarantees are applicable, including those regarding publicity, opportunity to submit motions and evidence, access to files, and mandatory written reasonings of intermediary and final decisions. If, after concluding such proceedings, the SG still considers that there are grounds for a condemnation, it has to formally recommend it to the Administrative Tribunal in a reasoned opinion.

The case is then allocated by draft to a Reporting Commissioner, who has the duty to review the case and submit a written vote before the other commissioners. He or she can request additional information from the defendants and is obliged to offer them a final opportunity to submit their defense arguments. The decision is taken in a public and open session, during which the defendants' representatives are able to make oral arguments. A final decision is taken by majority of the Tribunal.

Under the New Law, fines can range between 0.1 percent and 20 percent of the company's gross turnover in the financial year preceding the beginning of formal proceedings in the "business segment" in which the conduct occurred. The previous law provided for a fining range of 1 percent to 30 percent of the company's gross revenue. CADE has been interpreting such change to imply smaller fines to companies.[15]

Individuals acting as managers can also be fined, with the amount ranging from 1 percent to 20 percent of the fine imposed to the respective company. The New Law expanded the list of alternative penalties applicable to individuals, including the possibility of exclusion from practicing trade on their own behalf or as a representative of a legal entity for a period of up to five years. Finally, employees as well as trade associations can also be fined if involved in the anticompetitive practice being sanctioned, with fines ranging from BRL 50,000 to BRL 2 billion—a much increased range compared to that provided by the Previous Law.

Before CADE reaches a final infringement decision, defendants can negotiate and execute with CADE a settlement agreement concerning the investigation, when there is usually the definition of a "pecuniary contribution" to be paid by the defendant (instead of a "fine").

Probably the most important development concerning behavioral cases are the new rules approved by CADE in March 2013 concerning the negotiation of such agreements when they involve cartel investigations (Resolution 5/2013). According to these new rules, if the settlement proposal is presented while the case is still at the SG, there are four predefined discounts for pecuniary contributions. The first defendant in a cartel investigation to execute a settlement agreement will have a discount from 30 percent to 50 percent of the applicable fine; the second

[15] *See* the decisions on Administrative Proceeding 08012.011027/2006-02 (SDE v. KLM, AirFrance, Lufthansa and others-Air Cargo Cartel), judged on 28.08.2013; and Administrative Proceeding 08012.006923/2002-18 (SDE v. Associação Brasileira de Agências de Viagens-Rio de Janeiro-ABAV-RJ), 26.02.2013.

one, from 25 percent to 40 percent; from the third onwards, the discount shall not be higher than 25 percent of the applicable fine.

The exact degree of discount depends on a number of factors, especially the degree of collaboration of the defendant with the investigation in terms of evidence and information. If the proposal is made before the Tribunal, the maximum discount is 15 percent. The defendant has to necessarily admit its participation in the investigated practice in order to execute the agreement—a requirement that was not established by the New Law and that has been criticized by professors and practitioners.

V. CONCLUSION

The enactment of the New Law represented a significant step for the improvement of Brazilian competition law and policy, as it provided the legal foundations for a more effective merger control regime and a leaner institutional structure.

CADE, with its now integrated configuration, has succeeded in implementing the new statute, especially when it comes to the modernized merger control regime. There have been visible joint efforts of the SG and the Tribunal to streamline the evaluation of simple cases, with very positive results. Moreover, the agency is paying attention to possible improvements suggested by the private sector, such as the need for a clearer definition of "associative agreements" and for adjustments concerning the calculation of group turnover in the case of investment funds.

However, some important challenges remain. The final wording of the upcoming regulation concerning "associative agreements" should avoid being too broad lest many irrelevant transactions be notified, further stretching the already insufficient human resources at CADE. It is also very important that at least part of the 200 positions are filled in the near future so that the agency can better manage and implement its enforcement functions. Finally, many of the decisions imposing substantial fines on cartel cases are being reviewed by the Judiciary, which will probably result in relevant guidance from the courts concerning the applicability of constitutional guarantees in anticompetitive practices investigations.

To sum up, the experience with the first two years of the New Law has been extremely interesting, with CADE adopting new rules and precedents applying the new statute and an important dialogue going on between the private sector and the authorities for possible improvements of the Brazilian competition law and policy.