

# **THE JUDICIARY AND THE ENFORCEMENT OF COMPETITION LAW IN THE EMERGING ECONOMIES. CASE STUDY ON BRAZIL**

*Marco Botta\**

## **ABSTRACT**

The last twenty years recorded the proliferation of the competition law regimes in several emerging economies. The article explores the issues related to the involvement of the judiciary in the enforcement of the competition law in the developing countries, taking Brazil as a case study. During the last years the Brazilian competition authority (CADE) pursued an active enforcement policy against cartels and other forms of anti-competitive conducts. Consequently, a large number of appeals against CADE's decisions were initiated in the Brazilian federal courts. The slowness of the Brazilian judicial system and the lack of understanding of competition law by the Brazilian courts has hampered the enforcement policy of CADE. A number of initiatives have been adopted in the country in order to solve these issues. The article critically analyzes these initiatives, and in the conclusion it proposes a number of policy lessons for other emerging economies.

## **INTRODUCTION**

Nowadays an issue discussed in the majority of the competition law jurisdictions around the world concerns the role of the national courts within the process of enforcement of the competition policy. The debate concerning the standard of review applied by the European Court of First Instance (CFI) to the decisions of the European Commission is very well known.<sup>1</sup> However,

---

\* Marco Botta, PhD candidate in the Law Department of the European University Institute, Florence (Italy). The author would like to thank Prof. Heike Schweitzer, Rozeta Karova, Pablo Ibañez Colomo, Danielle Da Costa Leite Borges and Mario Viola de Avezedo Cunha for their useful comments on previous versions of this article. The article was presented at the Competition Law and Economics Network Annual Forum at the University of Tilburg (The Netherlands) on 15<sup>th</sup> May 2009.

For any question, please contact the author at [Marco.botta@eui.eu](mailto:Marco.botta@eui.eu)

<sup>1</sup> During the last years, in fact, the CFI started to review more carefully the decisions adopted by the European Commission in the area of competition law. For instance, in the judgement *Tetra Laval* the ECJ ruled that, although it recognized the Commission discretion with regard to the economic assessment of the merger, “that does not mean

the question of the standard of review applied by the appellate courts when reviewing decisions of the national competition authorities (NCA) is not an issue concerning exclusively the European Community. During the last fifteen years new competition law jurisdictions have “bloomed” around the world.<sup>2</sup> In particular, several emerging economies in Latin and Central America, Eastern Europe, South East Asia and in a number of African States have recently adopted a competition law. The latter was perceived as one of those policies necessary to establish a market oriented economy.<sup>3</sup> The article aims at filling this gap in the literature, by analyzing the common problems faced by the judiciary of the emerging countries within the enforcement of the competition policy, and by suggesting a number of policy lessons in the conclusions of the article.

Several developing countries have opted for the European civil law approach to the enforcement of competition law, rather than the US one.<sup>4</sup> The European approach mainly relies on a public system of enforcement of the competition law, where an independent NCA conducts the investigations and it adopts the final decision related to the case. The latter may be appealed before an administrative tribunal. The competition agency often acts both as a prosecutor and as a judge of first instance. By contrast, the US Department of Justice (DoJ) conducts the investigations, but later it has to bring a case before a federal court, which would sanction the anti-competitive behaviour.

---

that the Community courts must refrain from reviewing the Commission’s interpretation of information of an economic nature” (para. 39).

In relation to the debate concerning the standard of review applied by the CFI and by the European Court of Justice (ECJ) in the area of merger control see for instance:

H. Legal., “Standards of Proof and Standards of Judicial Review in EU Competition Law”. In B. Hawk (ed.), *2005 Fordham Corporate Law Institute Annual Proceedings* (Juris Publishing, 2006) 107-116.

A. Svetlicinii., “Exploring the Role of Legal Presumptions Under the Convincing Evidence Standard in EC Merger Control”. (2008) 1 *Global Antitrust Review* 117-134.

C-12/03 P, *Commission v. Tetra Laval BV* [2005] ECR I-00987.

<sup>2</sup> A. B. Lipsky., “The Global Antitrust Explosion: Safeguarding Trade and Commerce or Runaway Regulation?” (2002) 26, *Fletcher Forum of World Affairs* 59-68.

Which confirms that "more than 100 countries now have competition law".

R. Whish, “Competition Law. 5th edition”, (Oxford University Press, 2003), 782.

<sup>3</sup> R. Lande., “Creating Competition Policy for Transition Economies”, (1997-1998) 23, *Brooklyn Journal of International Law* 341.

<sup>4</sup> One author who argues that the European administrative system of competition law suits better the developing country than the American one is D. J. Gerber., “Implementing Competition Law in Asia: Using European and US Experience”. In U. Immenga (ed.), *Wirtschafts-und Privatrecht im Spannungsfeld von Privatautonomie, Wettbewerb und Regulierung*, (Verlag C.H. Beck, Germany, 2006) 168-169.

---

Moreover, the number of cases of private enforcement of competition law is lower in Europe than in the USA.<sup>5</sup> Finally, judges from the common law jurisdictions have fewer restraints in interpreting the scope and the objectives of the legislations, and thus they can take a more active role in shaping the competition policy. One of the reasons for which the majority of the emerging economies have opted for the European model of enforcement of the competition law is related to the lack of expertise of their national courts in the field of competition law. However, even though the role of the courts in the enforcement of the competition law in the majority of the emerging economies is more limited in comparison to the US tribunals, they can still play an important role in reviewing the objectiveness of the NCAs' decisions.

At the moment there are few studies in the literature on the role played by national courts within the enforcement of the competition law in the emerging economies.<sup>6</sup> This lack of interest may be explained by the fact that there are relatively few cases of judicial review in the field of competition law in the majority of the developing countries, in comparison to the EU or the USA. In fact, in the majority of the emerging economies competition law has usually remained not enforced for a number of years after its introduction at the legislative level. Nevertheless, during the last years competition law has started to be more actively enforced in a number of emerging economies in different regions of the world. Countries like Mexico, Brazil, Chile, South Africa and South Korea are examples of emerging economies where competition law is today “aggressively” enforced by the NCAs. The latter

---

<sup>5</sup> For instance, unlike of the US judges, the European ones cannot grant treble damages to compensate the damages caused by an anti-competitive practice. Moreover, from a procedural point of view there are limitations to the right of the plaintiff to ask the defendant to disclose internal documents during the trial.

In relation to the reasons which hamper the development of private enforcement of competition law in Europe see: A. Renda., “Making Antitrust Damages Action More Effective in the EU: Welfare Impact and Potential Scenarios”. Report published on 21.12.2007 by the Centre for European Policy Studies, the Erasmus University Rotterdam and the University Luiss Guido Carlo. Report for the European Commission, contract DG COMP/2006/A3/012.

The text of the report is available at:

<http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html> (accessed on 10th June 2009).

<sup>6</sup> One of the few studies conducted in this sector was carried out by the International Competition Network (ICN) in 2006. International Competition Network, Competition Policy Implementation Working Group, “Competition and the Judiciary”. Report published in April 2006. The text of the report, is available at

<http://www.internationalcompetitionnetwork.org/index.php/en/library/working-group/16> (accessed on 10th June 2009).

actively conduct investigations on anti-competitive conducts and cartels, instead of reviewing only the notified economic concentrations.<sup>7</sup> As a consequence, the number of the NCA's decisions appealed to court is expected to grow in these countries during the next years. Therefore, the national courts will be more and more involved in the enforcement of the competition law in these countries.

## STRUCTURE AND OBJECTIVES OF THE ARTICLE

A number of questions will be discussed throughout the article. The first question discussed concerns the standard of review that should be applied by the national judges of the developing countries when reviewing the NCA's decisions: should it be limited to procedural aspects or should it also go into the merits of the NCA's decision? Furthermore, how can the NCA promote the awareness of competition law among the national judges, who are usually not familiar with the economic concepts underpinning the competition law? A final question concerns whether the judicial review may be better carried out by a single specialized court or by all State tribunals of the country, and which are the implications of this institutional choice.

The article aims at answering these questions through a case study on Brazil. In this emerging country a competition law has been enforced for more than fifteen years.<sup>8</sup> As it will be mentioned in the next section, during the last years the Brazilian competition authorities have focussed their attention on the detection of cartels. As a consequence, a large number of decisions sanctioning private parties have been recently appealed to the Brazilian federal courts. In the 1994, the year when the current competition law was adopted in Brazil, only seven decisions of the Brazilian NCA were appealed

---

<sup>7</sup> Further information concerning the enforcement activities of NCAs of these countries can be found at:

- *Comisión Federal de Competencia México*, <http://www.cfc.gob.mx/english/> (accessed on 10th June 2009).
- *Tribunal de Defensa de la Libre Competencia* (Chile), <http://www.tdlc.cl/Portal.Base/Web/VerContenido.aspx?ID=286> (accessed on 10th June 2009).
- *Conselho Administrativo de Defesa Econômica* (Brazil), <http://www.cade.gov.br/> (accessed on 10th June 2009).
- Competition Commission (South Africa), <http://www.compcom.co.za/> (accessed on 10<sup>th</sup> June 2009).
- Korea Fair Trade Commission, <http://eng.ftc.go.kr/> (accessed on 10<sup>th</sup> 2009).

<sup>8</sup> The current competition law enforced in the country was adopted in 1994. *Lei n. 8.884*, adopted on 11.06.1994. The text of the legislation is available at <http://www.cade.gov.br/legislacao/8884lei.asp> (accessed on 10th June.2009).

---

to court; meanwhile, in 2007 there were 460 cases of judicial review in the area of competition law in the Brazilian federal courts.<sup>9</sup> Nowadays, the Brazilian federal courts have to review a large number of appeals against the NCA's decisions, in spite of their lack of knowledge in the field of competition law. The case of Brazil will be relied upon to grasp a number of lessons applicable to other developing countries, which have just started to enforce their competition law in a more active manner.

The article will deal exclusively with the issue of the judicial review carried out by the national courts in the appeal proceedings to the decisions of the NCA. The issue of private enforcement of the competition law in the emerging economies is out of the scope of this article.

The case study is based on the analysis of the most relevant judgements held by the Brazilian federal courts in the area of competition law during the last years. Moreover, another useful source of information have been the interviews conducted by the author in June 2008 with a number of officers of the Brazilian competition authorities in Brasilia and with some competition lawyers in São Paulo.

The article will be structured in the following manner: after an overview of the Brazilian judicial system and of the competition law regime in Brazil, the problems caused by the growing involvement of the judiciary within the Brazilian competition law system will be analyzed. Afterwards, the solutions elaborated during the last years by the Brazilian competition authorities to solve these problems will be discussed. Finally, answers to the questions mentioned at the beginning of this section will be provided in the conclusions of the article.

## **INTRODUCTION TO THE BRAZILIAN JUDICIAL SYSTEM**

The Brazilian Constitution of 1988 established a system of federal courts parallel to the States' ones.<sup>10</sup> The lowest federal courts are the *Varas*

---

<sup>9</sup> CADE's Annual Report 2007. Table at page 68.

The original Portuguese version of the CADE's annual reports starting from 1996 is available at <http://www.cade.gov.br/Default.aspx?d859db24e827e9401036> (accessed on 10<sup>th</sup> June 2009).

This large number of cases did not concern exclusively the appeals against the decisions of the competition authority sanctioning cartels; it also included the appeals against the fines imposed by the competition authority due to the late notification of an economic concentration.

<sup>10</sup> M. T. Aina Sadek., "El Poder Judicial y la Magistratura como Actores Políticos". In L. M. Rodrigues., M. T. Aina Sadek (eds.), *El Brasil de Lula. Diputados y Magistrados*. Working paper n.11 (Instituto Torcuato di Tella, Buenos Aires, 2004) 27.

*Federales*, the first instance courts. In Brazil there are five federal appellate courts (*Tribunales Regionales Federales*, TRFs), which have jurisdiction over five groups of Brazilian States.<sup>11</sup> The highest federal courts are the *Superior Tribunal de Justica* (Superior Tribunal of Justice, STJ) and the *Supremo Tribunal Federal* (Supreme Federal Tribunal, STF). While the STJ is the last instance court for the appeals to the judgements of the TRFs on matters of law not on the merits, the STF acts as federal constitutional court of Brazil.<sup>12</sup>

After decades in which the military dictatorships restricted the human rights in the country, the Constitution of 1988 provided a long list of rights,<sup>13</sup> which should be protected by a judiciary system fully isolated from the other branches of the State.<sup>14</sup> The courts were given full control over their administrative functioning, disciplinary affairs and budget.<sup>15</sup> According to Santiso, “unlike in the rest of the (Latin American) region, the main question in Brazil is not whether the judiciary is sufficiently independent, but rather whether it has become too independent.”<sup>16</sup> Another peculiarity of the Brazilian judicial system is the fact that the Constitution of 1988 provided a

---

<sup>11</sup> The five TRFs are placed in Brasilia, Rio de Janeiro, São Paulo, Recife and Porto Alegre.

<sup>12</sup> Only a limited number of plaintiffs have access to the STF to directly challenge the constitutionality of a federal act: the President of the Republic, the *Mesa* of the Federal Senate and of the Chamber of Representative, the Federal Attorney General, the Governor of a Brazilian State, the Federal Lawyers’ Bar, any political party or trade union.

During the 1990s a number of opposition parties have exploited this right by challenging every act of the federal government in front of the STF in order to postpone the entry into force of the act.

*Supra*, M. T. Aina Sadek, 55.

An English translation of the Brazilian Constitution is available at:

<http://www.v-brazil.com/government/laws/titleII.html> (accessed on 10th June 2009).

*Supra*, M. T. Aina Sadek, 55.

<sup>13</sup> The Constitution of 1988 is a “long” Constitution. In fact, it contains 245 articles. Beside the civil individual rights, it provides a list of social rights and collective rights (e.g. protection of consumers and environment). Finally, it also contains a number of goals which should guide the action of the federal government, which are sometimes in contrast (e.g. as mentioned in the previous chapter, the original text of the Constitution defended the principle of free competition, but it was also in favour of keeping monopoly rights in certain economic sectors).

*Supra*, M. T. Aina Sadek, 12-15.

<sup>14</sup> C. Santiso, “Economic Reform and Judicial Governance in Brazil: Balancing Independence with Accountability”. In S. Gloppen, R. Gargarella (eds.), *Democratization and the Judiciary* (Frank Cass, London, 2004) 164..

<sup>15</sup> *Ibid*, 166.

<sup>16</sup> *Ibid*, 162.

---

broad range of legal actions that an individual may undertake in front of the federal courts in order to safeguard its rights.<sup>17</sup> In particular, in order to ensure the full compliance of the rights enshrined in the Constitution by the federal legislations, the judges of the *Varas* have the power not to apply a federal law that they consider unconstitutional.<sup>18</sup> Finally, according to Santiso, in order to safeguard the autonomy of every judge, the Constitution of 1988 did not introduce any form of *stare decisis*, even of a vertical nature, causing a *de facto* “balkanization” of the Brazilian judicial system. Following a constitutional amendment adopted in 2004, the STF today can adopt *súmulas*. The latter are summaries of the case law of the STF on a certain issue and they are binding for all the courts in Brazil and for the agencies of the public administration. This decentralized system slowed down the functioning of the Brazilian judicial system.<sup>19</sup> As we will see in the following pages, the slowness of the Brazilian judicial system has also negative effects on the enforcement of competition law in the country.

## OVERVIEW OF THE BRAZILIAN SYSTEM OF COMPETITION LAW

Brazil adopted its first competition law in 1962. The law established a *Conselho Administrativo de Defesa Econômica* (CADE, Administrative Council of Economic Law)<sup>20</sup> under the Ministry of Justice, in charge of investigating cases of cartels and abuses of dominant position. In practice, this institution was not active until the beginning of the 1990s. In fact, like in the

---

<sup>17</sup> For instance, any citizen can file one *acción popular* with the aim at annulling any federal law contrary to the public property, the administrative morality, to the environment and historical heritage (Art. 5. LXXIII of the Brazilian Constitution). Moreover, any individual or a group of individuals (e.g. political party or trade union) can ask one *recurso de amparo* to block a State’s measure which is illegal or result of the abuse of the State’s power (Art. 5. LXIX Brazilian Constitution).

<sup>18</sup> The *Ações Diretas de Inconstitucionalidade* (Acts of Unconstitutional Law) allow groups affected by the government’s decisions to submit petitions against federal law on constitutional grounds in front of almost any federal court.

*Supra*, C. Santiso, 173.

<sup>19</sup> For instance, between 1988 and 2003 there have been 3097 actions before the STF to challenge the constitutionality of federal legislations. During the same period of time, the STJ have received 16.493 appeals against the TRFs’ judgements. A gap between the cases decided and the new cases submitted started to appear in the 1990s. The growing stock of pending cases has slowed down the functioning of the judicial system.

*Supra*, M. T. Aina Sadek , 50-51.

<sup>20</sup> Law 4.137, adopted on 10th September 1962. Art. 8 The text of the legislation is available at <http://www.cade.gov.br/legislacao/4137lei.asp> (accessed on 10th June 2009).

majority of the developing countries, for a number of decades the price of the majority of goods was agreed by the local producers with the Brazilian Government. Moreover, the imports were restricted in order to promote the domestic production. Obviously, in such an environment the defence of the free competition in the market was not a priority in the country.<sup>21</sup>

Within the broad programme of liberalization of the economy undertaken in Brazil at the beginning of the 1990s a new competition act, the Law 8884/94, was passed.<sup>22</sup> Under the new legislation CADE became a federal independent agency (*autarquia federal*),<sup>23</sup> composed of a President and six Board Members. Under the Law 8884/94, CADE is assisted by two advisory bodies: the *Secretaria de Direito Econômico* (Economic Law Office, SDE),<sup>24</sup> part of the Ministry of Justice, and the *Secretaria de Acompanhamento Econômico* (Secretariat of Economic Surveillance, SEAE), part of the Ministry of Finance.

Another important reform brought by the Law 8884/94 was the introduction of a system of merger control, absent in the previous legislation.<sup>25</sup> In the field of merger control, the concentrations have to be notified to the SDE and SEAE. The latter elaborate a non binding opinion to CADE concerning the effect of the transaction in the market, which is in charge of taking the final decision.<sup>26</sup> On the other hand, in the field of anti-competitive behaviour SDE conducts the investigations.<sup>27</sup> The SDE later submits a report to CADE, providing the evidence gathered during the investigations. Like in the field of merger control, CADE is the only institution in charge of adopting binding decisions for private parties which could be appealed to court.

---

<sup>21</sup> In relation to the role of competition law in Brazil before the reforms of the 1990s see:

C. Monteiro Considera, P. Correa, "The Political Economy of Antitrust in Brazil: From Price Control to Competition Policy". In B. Hawk (ed.), *Fordham Corporate Law Institute Annual Proceedings*, (Juris Publishing, New York, 2001) 533-568.

<sup>22</sup> *Supra*, Law n.8884/94.

For a comment on the Law 8884/94 see:

S. Dallal., "Competition Law in Brazil", (1995) 16 *European Competition Law Review* 255-261.

<sup>23</sup> *Supra*, Law n.8884/94, Art.3.

<sup>24</sup> *Supra*, Law n.8884/94, Art. 13.

<sup>25</sup> For a detailed analysis of the Brazilian system of merger control see:

M. C. Andrade, *Controle de Concentrações de Empresas. Estudo da Experiência Comunitária e a Aplicação do Artigo 54 da Lei n.8884/94*. (Editora Singular, São Paulo, 2002).

<sup>26</sup> *Supra*, Law n.8884/94, Art. 54(4).

<sup>27</sup> *Supra*, Law n. 8884/94, Art. 30.

---

During the second half of the 1990s, CADE was criticized due to the long period of time needed to review the notified concentrations, even those ones which did not raise any competition concern.<sup>28</sup> Few decisions were adopted to sanction cartels and other anti-competitive conducts. This situation started to change in 2000, when the Law 10.149/00 introduced a system of leniency for cartels.<sup>29</sup> Following this legislative reform, SDE started to focus its enforcement priorities on the detection of cartels. For instance, the number of dawn raids conducted by SDE increased from 11 in 2003 to 84 in 2007.<sup>30</sup> The enforcement activities of the SDE in the fight against cartels have been recognized also at the international level. For instance, in February 2009 the SDE conducted a dawn raid among a group of companies producing cooler compressors in São Paulo. Due to the fact that the companies involved in the cartel were also foreign companies, the investigations were conducted in close cooperation with the Directorate General for the Competition (DG COMP) of the European Commission and with the US Department of Justice (DoJ).<sup>31</sup> Finally, in September 2007 CADE adopted the Resolution 46/2007 which introduced the possibility to negotiate settlements with the companies involved in a cartel case, in order to decrease the time of investigations devoted to a single case.<sup>32</sup> In order to provide the reader with an idea of the growing importance of investigations on anti-competitive conducts in Brazil, it is sufficient to mention that while in 2006 SDE sent to CADE 21 cases to be

---

<sup>28</sup> See for instance, W. H. Page., “Antitrust Review of Mergers in Transition Economies: A Comment, with some Lessons from Brazil”, (1997-1998) 66 *University of Cincinnati Law Review* 1124.

<sup>29</sup> Law n. 10149, adopted on 21<sup>st</sup> December 2000, which amended the text of the Law 8884/94. The text of the legislation is available at:

<http://www.cade.gov.br/legislacao/10149lei.asp> (accessed on 10th June 2009).

<sup>30</sup> SDE’s press release, “SDE Carries out the Largest Dawn Raid in Latin America and Fourteen Executives Were Arrested on Charges of Conspiring to Fix Prices”.

Published on 29<sup>th</sup> August 2008. The press release is available at

<http://www.mj.gov.br/main.asp?View={AE70F431-442E-44D0-9303-65BF6C217A48}> (accessed on 10th June 2009).

<sup>31</sup> SDE’s press release, “Operação internacional conjunta para combate a cartel”.

Published on 18th February 2009.

The text of the press release is available at:

<http://www.mj.gov.br/main.asp?ViewID={C39E3B8E-055D-4951-8385-0BC8DAF63DB2}&params=itemID={37FDC97E-4756-4651-A400-ABB1E29D1AD0};&UIPartUID={2218FAF9-5230-431C-A9E3-E780D3E67DFE}> (accessed on 10th June 2009).

<sup>32</sup> CADE’s Resolution n.46, adopted on 04<sup>th</sup> September 2007. The text of the resolution is available in Portuguese at

<http://www.cade.gov.br/legislacao/resolucoes/Resolucao46.pdf> (accessed on 10th June 2009).

decided, in 2007 this number rose to 90.<sup>33</sup> The consequence of this active enforcement action of the SDE has been the proliferation of the CADE's decisions to sanction cartels and forms of abuse of dominance, decisions which were later appealed to the Brazilian federal courts.

Under Art. 109 (1) of the Brazilian Constitution, the federal courts have jurisdiction to hear the cases where an autonomous Government's agency is involved, both as a plaintiff and as a defendant. As mentioned above, CADE is defined under Art. 3 of the Law 8884/94 as an independent agency, which has its headquarters in the Federal District of Brasilia. Under Art. 64 of the competition act, CADE's decisions can be executed either at the federal courts of the District of Brasilia or at the court with geographic jurisdiction over the domicile of the executed party. This implies that the appeals to the CADE's decisions can be heard in any federal court of the country. The competition act did not establish a specialized court with exclusive jurisdiction in the area of competition law.

Another institution established by the Law 8884/94 is the CADE's Attorney General (*Procuradoria do CADE*, ProCADE). The latter plays an important role in ensuring the execution of the CADE's decisions in the federal courts.<sup>34</sup> The Attorney General takes part to the two monthly plenary sessions of CADE (*Plenário*), but unlike of CADE's Commissioners he/she does not have any right to vote.<sup>35</sup> The Attorney General represents CADE in the federal courts, both to request the execution of the CADE's decisions and to defend CADE during the proceedings of appeal against its decisions.<sup>36</sup> Finally, the Attorney General provides legal opinions to the CADE's *Plenário*, if so requested.<sup>37</sup>

## **JUDICIARY POWER AND THE COMPETITION LAW IN BRAZIL: THE MAIN ISSUES**

An important issue debated today in Brazil concerns the degree of judicial review that the federal courts can exercise over the decisions of CADE. In Brazil the federal courts can exercise a different degree of review

---

<sup>33</sup> SDE's press release, "SDE Sobe no Ranking das Melhores Autoridades de Concorrência do Mundo". Published on 11<sup>th</sup> June 2008.

The text of the press release is available at:

<http://www.mj.gov.br/sde/main.asp?View={DF282882-D0CB-4D38-98C8-0EA6B037E370}&Team=&params=itemID={2F7AD3F5-9C20-472D-99C4-05CFF707119F}%3B&UIPartUID={2218FAF9-5230-431C-A9E3-E780D3E67DFE}> (accessed on 10th June 2009).

<sup>34</sup> *Supra*, Law 8884/94, Art. 10.

<sup>35</sup> *Supra*, Law 8884/94, Art. 11 (1).

<sup>36</sup> *Supra*, Law 8884/94, Art. 10.

<sup>37</sup> *Supra*, Law 8884/94, Art. 10 (V)..

---

depending on the nature of the administrative act that they have to review.<sup>38</sup> In particular, for the *atos discricionários* (discretionary administrative acts) the review should be limited to the compliance by the executive branch with the proceedings required by law. On the other hand, when the law defines boundaries to the powers of the executive branch to adopt an administrative act (*actos vinculados*), the federal court should exercise a full review of the act, including the substance of the decision. The Law 8884/94 did not point out whether the decisions of CADE are *atos discricionários* or *vinculados*. This fault has caused a debate concerning the standard of review that the Brazilian federal courts should apply in reviewing the CADE's decisions. Oliveira and Rosas have identified four criteria to define whether an administrative act is *discricionário* rather than *vinculados*:<sup>39</sup>

- The act is adopted on the basis of clear/undetermined legal concepts,
- The administrative act has the value of a technical regulation,
- The act respects the principles of rationality and proportionality and
- The act is/is not based on a decision of political nature.

The Brazilian competition act contains a number of not determined concepts (e.g. abuse of dominant position, market power...) and CADE enjoys a degree of discretion when applying these concepts to the real cases. However, according to Oliveira and Rosas the decisions of CADE are usually not guided by political considerations. Furthermore, CADE always follows the same technical criteria in enforcing the competition act and it binds itself to respect the principles of rationality and proportionality. As a consequence, the two authors conclude that the decisions of CADE are *atos vinculados*. However, the authors point out that the judicial review exercised by the federal courts faces some limitations. In particular, the judges can only check whether CADE has correctly exercised its technical discretion in the light of the principles of rationality and proportionality, but they cannot contest the evaluation on the substance of the case.<sup>40</sup> This approach is quite close to that one followed during the last years by the CFI in reviewing the European Commission's decision in the field of competition law.<sup>41</sup> Though the

---

<sup>38</sup> G. J. Oliveira., G. Rosas., *Direito e Economia da Concorrência* (Renovar, São Paulo, 2004) 324.

<sup>39</sup> *Ibid*, 326.

<sup>40</sup> *Ibid*, 328.

<sup>41</sup> For instance, in the judgement Tetra Laval the ECJ ruled that, although it recognized the Commission discretion with regard to the economic assessment of the merger, "that does not mean that the Community courts must refrain from reviewing the Commission's interpretation of information of an economic nature" (para. 39). C-12/03 P, Commission v. Tetra Laval BV [2005] ECR I-00987.

*Procuradoria do CADE* still pleads sometimes in the Brazilian federal courts that the CADE's decisions are *atos discricionários*, this approach has been accepted in theory by the majority of the federal judges who had the chance to review a decision of CADE.<sup>42</sup>

Even though from a theoretical point of view the approach proposed by Rosas and Oliveira has been accepted by the majority of the federal courts in Brazil, from a practical point of view the federal *Varas* and the TRFs are still reluctant to review the merits of the CADE's decisions. According to Olavo Chinaglia, former competition lawyer in São Paulo and current CADE's Commissioner, the Brazilian courts have been generally quite deferent to the decision of the competition authority. In the past, this was due to the fact that the federal judges were not comfortable with reviewing the application of economic concepts. However, during the last years, the legal quality of the decisions of CADE has improved, and thus fewer appeals have been successful.<sup>43</sup>

An interesting example of judicial review of one of the most relevant CADE's decisions during the last years is the judgement of the 4<sup>th</sup> *Vara* of the Federal District in the Nestlé-Garoto case.<sup>44</sup> After the prohibition of the concentration by CADE,<sup>45</sup> Nestlé appealed the decision to the first instance federal court of Brasília. Nestlé followed two lines of pleas: on the one hand,

---

<sup>42</sup> Meeting with José Inácio Gonzaga Franceschini, founding partner in the law firm Franceschini & Miranda Advogados, in São Paulo on 13<sup>th</sup> June 2008.

<sup>43</sup> Meeting with Olavo Chinaglia, former competition lawyer in São Paulo and current CADE's Commissioner, on 10<sup>th</sup> June 2008 in São Paulo.

<sup>44</sup> Judgement of the 4<sup>th</sup> federal *Vara* of the Federal District of Brasília on 16<sup>th</sup> March 2007. Proceedings n. 2005.34.00.015042-8 *Ação Ordinária*. Nestlé LTDA e Outro v. Conselho Administrativo de Defesa Econômica.

The judgements of the *Varas* of the District of Brasília are available at:

[http://www.df.trf1.gov.br/inteiro\\_teor/consulta.php](http://www.df.trf1.gov.br/inteiro_teor/consulta.php) (accessed on 10th June 2009).

<sup>45</sup> The acquisition of the Brazilian chocolate producer Garoto by Nestlé has been one of the most debated merger cases in Brazil during the last years. Due to the fact that Nestlé was already present in the Brazilian market before the acquisition of Garoto, the horizontal merger would have granted to Nestlé a market share of 63.10% in the Brazilian market for chocolate bars and 88.50% market share for solid chocolate toppings. CADE decided to block the acquisition, in spite of the political pressures received. Several politicians argued that following the acquisition of Garoto, Nestlé would have opened new factories in Brazil and, thus, it would have created new possibilities for employment for Brazilian workers. This has been one of the few cases of concentrations prohibited by CADE since the introduction of the system of merger control in Brazil in 1994.

OECD Secretariat, Peer Review of the Brazilian Competition Law 2005. 33-34.

The text of the report is available at:

<http://www.oecd.org/dataoecd/12/45/35445196.pdf> (accessed on 10th June 2009).

---

it argued that the decision of CADE was illegal, due to a number of procedural irregularities (e.g. the excessive time of review). On the other hand, Nestlé also argued that the decision was irrational and disproportionate in relation to the remedy imposed (the prohibition of the acquisition of Garoto by Nestlé). Such drastic remedy was contrary to the previous CADE's case law, which had followed a minimum interventionist approach in the past, and it had never prohibited any concentration since the introduction of the system of merger control in the country in 1994. Therefore, Nestlé suggested in its plea that the federal court should conduct a review of the merits of the CADE's decision. However, the judge did not follow this approach and it focussed its attention only on the procedural pleas. Under Art. 54 (6) of the Law 8884/94, CADE has 60 days to perform the review of the notified concentrations. However, in the past CADE not always complied with such deadline. In fact, by requesting additional documents to the parties, CADE can interrupt the time of review. The time of review of the Nestlé-Garoto case was particularly long, 441 days. During the appeal ProCADE argued that the case was particularly complex and thus, CADE was right to request additional information to the merging parties before taking any decision on the subject. On the other hand, Nestlé argued that in some circumstances CADE had exercised an excessive discretion in deciding when to stop the time of review. For instance, it interrupted several times the time of review in order to allow the competitors of Nestlé to submit further evidence against the concentration. The judge of the 4<sup>th</sup> *Vara* referred to the Brazilian law on administrative proceedings.<sup>46</sup> Under that law, every administrative act should state the facts and the legal grounds "...when it denies, limit or affect the rights or interests" of a private party.<sup>47</sup> According to the court, the decision of CADE to stop the time of review of the concentration had an impact on the interests of Nestlé. However, CADE did not state the reasons for which it stopped the time of review, and thus its decision breached Art. 54 (6) of the Law 8884/94. The 4<sup>th</sup> *Vara* declared the concentration approved, instead of sending back the case to CADE for a new examination. In fact, under Art. 54 (7) of the competition act, a notified concentration is automatically approved if CADE does not terminate the time of review within the 60 days. The judge did not go further in the analysis; the breach of the time review was a sufficient procedural

---

<sup>46</sup> Law on Administrative Proceedings n. 9.784 adopted on 29<sup>th</sup> January 1999.

An electronic version of the law is available at:

<http://www.jusbrasil.com.br/legislacao/49500/lei-de-procedimento-administrativo-lei-n-9784-de-29-de-janeiro-de-1999> (accessed on 10th June 2009).

<sup>47</sup> "*Os atos administrativos deverão ser motivados, com indicação dos fatos e dos fundamentos jurídicos, quando: I - neguem, limitem ou afetem direitos ou interesses.*" *Ibid*, Art. 50 (1).

infringement, which saved him from entering into the analysis of the substance of the case. The judgement of the 4<sup>th</sup> *Vara* stated that the decisions of CADE are not free; they have to be based on facts and reasonable arguments. As a consequence, the 4<sup>th</sup> *Vara* apparently accepted in this judgement the interpretation that the decisions of CADE are *actos vinculados*, which require a review on the substance by the federal court. However, the judge avoided that kind of analysis. This judgement has been appealed by ProCADE to the TRF1, where the case is pending at the moment.<sup>48</sup>

Another relevant case of judicial review in the area of merger control involved the Companhia Vale do Rio Doce (CVRD). In 2000 CVRD, a corporation operating in the area of production, transportation and distribution of minerals in Brazil, notified to CADE the acquisition of the five main steel mines in the country.<sup>49</sup> CADE cleared the acquisition subject to a number of structural and behavioural commitments.<sup>50</sup> However, the CADE's decision was appealed to the federal court of Brasilia. In Brazil, in fact, the remedies are often imposed on the merging parties by CADE, rather than being negotiated with them. This increases the chances that the merging parties will appeal the decision to a federal court. The decision of CADE was appealed to the federal *Vara*, then to the TRF1, and finally to the STJ. Before the STJ CVRD argued that the decision of CADE was void because it had been adopted during a session of the *Plenário* where only six Commissioners were present.<sup>51</sup> Three Commissioners voted in favour of the remedies and three against. However, the vote of the President of CADE was counted as double (the Minerva's vote). In 2007 the STJ upheld the decision of CADE, by ruling that under Art. 49 of the competition act the Minerva's vote of the President

---

<sup>48</sup> “Julgamento sobre Compra da Garoto pela Nestlé é Adiado”. *JusBrasil*, 21st January 2009.

*JusBrasil* is an online newspaper which provides legal news and access to law and case law in Brazil. See <http://www.jusbrasil.com.br/noticias> (accessed on 10th June 2009).

<sup>49</sup> AC n. 08012.000640/2000-09. Companhia Vale do Rio Doce – CVRD e Mineração Socoimex S/A. Relatório, 1-2.

<sup>50</sup> The CADE's decisions required CVRD to divest one of the mines acquired (Fresco). Moreover, it required CVRD to delete the exclusivity clauses included in the acquisition contract of Casa de Pedro and it restricted the CVRD voting rights in the boards of some of the acquired companies.

*Ibid.*, Acórdão.

<sup>51</sup> Judgement of the Superior Tribunal de Justicia of 12<sup>th</sup> September 2007. Recurso Especial Nº 966.930 - Df (2007/0156633-6). Companhia Vale Do Rio Doce – CVRD v. Conselho Administrativo De Defesa Econômica – CADE.

The STJ's judgements are available at:

<http://www.stj.jus.br/SCON/> (accessed on 10th June 2009).

---

of CADE was legitimate when there was parity between the votes of the Commissioners.<sup>52</sup> The CVRD judgement is not very interesting in relation to the interpretation of the competition law carried out by the STJ, an interpretation quite obvious by reading the text of the competition act, but rather due to the fact that the CVRD decided to go for an appeal to the last instance court in Brazil, though both the federal *Vara* and the TRF1 had previously upheld the CADE's decision. The objective of CVRD was probably that one to postpone as long as possible the implementation of the CADE's decision adopted in 2005.<sup>53</sup>

It is well known that judges usually have difficulties in reviewing merger control decisions, an area of competition law which strongly relies on economic analysis. However, also in the area of anti-competitive conducts the Brazilian federal judges faced difficulties in analyzing economic concepts such as the relevant market and the market dominance. An interesting case of judicial review in the area of anti-competitive conducts is the Xerox judgement of the TRF 1. The latter is a case of judicial review of one of the first CADE's decisions in the area of abuse of dominance.<sup>54</sup> Xerox was one of the main producers of photocopier machines in Brazil at the beginning of the 1990s. At that time the company was used to include in the sale contracts of its photocopier machines a tying clause: its clients were bound to purchase the toner produced by Xerox if they wanted to receive technical assistance by Xerox in case the machines had some technical problem. CADE decided the case under the old competition law of 1962.<sup>55</sup> In May 2008, the TRF1 upheld the CADE's decision of 1993. In its judgement the court did not carry out any detailed analysis of important issues in the area of abuse of dominance, such as the definition of relevant market and the concept of dominance. The judge relied exclusively on the data contained in the decision of CADE, stating that the dominance of Xerox in the market was obvious and it could not be challenged.<sup>56</sup> The evidence of the abuse was easily confirmed by the sale

---

<sup>52</sup> Under Art. 8(2) of the Law 8884/94, the President has voting rights in the CADE Board meetings, "plus a casting vote".

<sup>53</sup> CADE Annual Report 2006, 56.

<sup>54</sup> TRF 1, V Turma, judgement of 07<sup>th</sup> May 2008. *Apelação Cível 2001.01.00.036741-1/DF. Xerox do Brasil v. Conselho Administrativo de Defesa Econômica.*

<sup>55</sup> *Supra*, Law 4.137/62, as modified by the Law 8.158/91. Art. 2 CADE's decision n. 23/91.

<sup>56</sup> "The administrative proceedings also showed that Xerox held a dominant position in the markets for the supply of technical assistance, with a market share of 91%, and in the market for the spare parts for the photocopier machines, with a market share from 74% to 100%....It is not discussed the dominant position of Xerox in the market; the problem is that this company exercised its dominant position in order to abusively restrict the competition." ("No processo administrativo também provou-se que a

contracts which contained the tying clause and had the effect of foreclosing any possibility for the competitors of Xerox to increase their market share.<sup>57</sup>

The judgements discussed above show the limits of the judicial review carried out by the Brazilian federal courts in the area of competition law. Though from a theoretical point of view, the federal courts could carry out a full review of the decisions of CADE (which are nowadays accepted as *actos vinculados*), they often limit themselves to the review of procedural aspects (e.g. the Nestlé-Garoto case) or they strongly rely on the evaluation provided by CADE in its decision (e.g. the Xerox case). Therefore, unlike the competition law jurisdictions of the developed countries, where the courts are active in shaping the enforcement of the competition policy together with the NCA,<sup>58</sup> the impact of the judicial review on the enforcement of the Brazilian competition law is still quite limited.

A second problem which emerges from the cases of judicial review mentioned above is the slowness of the system of judicial review. For instance, the TRF1's judgement in the case Xerox was decided in May 2008, though the CADE's decision dates back to 1993 when the current competition act was not in force yet. Private parties rely on the slow functioning of the judicial system in order to postpone as long as possible the execution of the decisions of CADE. This was also the strategy pursued by CVRD.

The excessive reliance on legal recourses by the sanctioned companies has also caused a broad mismatch between the amount of fines imposed by CADE and the amount of fines which have been effectively paid

---

XEROX detém posição dominante nos mercados de locação e prestação de serviços de assistência técnica, com uma participação de 91%, bem como no mercado de material de consumo para equipamentos de fotocopiadoras, com participação de 74% a 100%....Não se discute a posição dominante da XEROX no mercado; o problema é esta empresa exercer sua posição dominante para eliminar abusivamente a concorrência.”)

*Supra*, TRF 1's judgement in the case Xerox.

<sup>57</sup> “In this case it has been clearly showed that the anti-competitive conduct of Xerox do Brasil had the objective to exclude its competitors, foreclosing the market and thus creating a prejudice for the consumer. Such acts are aggravated taking into account the dominant position in the market exercised by Xerox.” (“No caso em tela, ficou claramente comprovado que a conduta anticoncorrencial da Xerox do Brasil tem o condão de eliminar seus concorrentes, conduzindo a um verdadeiro açambarcamento de mercado em conseqüente prejuízo ao consumidor. Tais fatos agravam-se levando-se em conta a posição dominante no mercado exercida pela Xerox.”)

<sup>58</sup> Beside the case of the US courts, also the ECJ and the CFI have started during the last years to perform an active review of the European Commission's decisions in the area of merger control. See, for instance, the CFI's judgement in *Airtours* (T-342/99), in *Schneider Electric* (T-310/01), *General Electric* (T-210/01) and the ECJ's judgements in *Tetra Laval* (C-12/03).

---

by the companies. Sanctioned companies usually request not to pay the amount of the fine during the time of appeal by claiming a potential *periculum in mora*: the company would be damaged if it had paid in advance the fine imposed by CADE on the basis of a decision which could be later reversed by the court of appeal. For instance, between 2002 and 2004 CADE imposed fines for a total amount of 16.7 million Real, but it only collected 632.770,00 Real, equivalent to 3.78% of the fines imposed.<sup>59</sup> According to Pagotto, the great delay in the enforcement of CADE's decisions reduces the credibility of persuasion of the enforcement efforts of this institution.<sup>60</sup> The author asks himself the following question: "would a company be persuaded not to commit a violation (of the competition law)... if it was known in advance that there was a 50 % chance of success?"<sup>61</sup>

Another problem which has undermined the enforcement of the CADE's decision is the identification of the court which has jurisdiction to hear the appeal. As mentioned above, under the competition act of 1994 appeals against CADE's decisions may be initiated either in Brasilia or in the federal court of the State where the party involved is domiciled. Although the majority of the appeals are usually brought in Brasília, there have been some cases of appeals brought in other federal courts. For instance, some of the companies involved in the cartel case of the *vigilantes* (companies providing security services)<sup>62</sup> in the State of Rio Grande do Sul appealed the CADE's decision to the local *Vara* of that State, and then to the TRF4.<sup>63</sup> If the federal

---

<sup>59</sup> *Supra*, CADE's Annual Report 2006, 55.

<sup>60</sup> L. U. Pagotto., "Are the Brazilian Competition Authorities Being Responsive? An Analysis Based on the Benign Big Gun Model". (2006) 29, 2 *World Competition* 285-314.

<sup>61</sup> *Ibid*, 311.

<sup>62</sup> The case of *vigilantes* concerned a group of companies providing security services in the State of Rio Grande do Sol. The companies established a bid rigging cartel in order to coordinate their bids when they participated to private and public calls for tender. The case is relevant because it was the first cartel case decided by CADE in September 2007 under the leniency procedure introduced in 2000 (CADE's decision n. 08012.001826/2003-10).

For further information concerning the CADE's decision see:

M. O. Lubambo de Melo, "La Decisión del CADE en el Cartel de las Empresas de Vigilancia". (2008) 24, *Boletín Latinoamericano de Competencia* 19-24.

<sup>63</sup> Three companies involved in the cartel, EBV, MOBRA and EPAVI requested the TRF4 to block the payment of the fine during the judicial proceedings due to *periculum in mora*. The requests have been rejected by the chambers of the TRF4 which reviewed the case.

TRF 4, Agravos de Instrumento nº 2007.04.00.003701-7, 2007.04.00.003696-7 and 2007.04.00.031248-0. EBV,

MOBRA and EPAVI v. Conselho Administrativo de Defesa Econômica.

judges in Brasilia are not very comfortable to deal with competition law, such a problem is even more evident for the judges of other Brazilian States who only exceptionally have to review cases involving the application of the competition.

A final issue which emerged during the last years was of a procedural nature: most of the appeals against the CADE's decisions sanctioning cartels were treated by the Brazilian federal courts as separated, rather than joint appeals. If this element is taken in consideration together with the fact that both the appeals in the federal courts in Brasilia and in the State of residence of the party are possible, this fact increases the likeness of diverging judgements concerning the same CADE's cartel decision.

## THE SOLUTIONS PROPOSED

During the last years four kind of initiatives have been undertaken by CADE, ProCADE and by the Brazilian federal courts in order to solve the problems mentioned above. These initiatives indeed tackle some of the problems, such as the risk that the slowness of the Brazilian judicial system may hamper the execution of the CADE's decisions. On the other hand, these solutions neither fully tackle the issue of the quality of the judicial review carried out by the Brazilian federal courts, nor the problem of the conflicts of jurisdiction among the appeal courts.

The first initiative was a re-organization of the structure and of the tasks of ProCADE. CADE's Resolution n. 41 of 2005 modified the internal organization of CADE's Attorney General.<sup>64</sup> A new department of ProCADE in charge of taking care that the fines imposed by CADE were effectively paid was established by the Resolution (*Seção de Dívida Ativa e Precatórios*).<sup>65</sup>

---

The judgements of the TRF 4 are available at:

<http://www.trf4.jus.br/trf4/> (accessed on 10th June 2009).

<sup>64</sup> Originally ProCADE was divided in three departments: the *Coordenadoria de Estudos e Pareceres* (in charge of providing opinions to CADE in the concentration cases), the *Coordenadoria de Processos Administrativos* (it provided to CADE opinions concerning anti-competitive conducts and on a number of administrative decisions, like in the area of the public procurement competitions organized by CADE) and the *Coordenadoria do Contencioso* (in charge of representing CADE in front of the federal courts).

CADE's Annual Report 2001, 156.

<sup>65</sup> CADE's Resolution n. 41, adopted on 14.09.2005. Art. 13. The Resolution has been abrogated by the Resolution n. 45 adopted on 28.03.2007, which consolidates in one text a number of previous CADE's Resolutions.

The text of the Resolution is available at:

---

Moreover, in 2007 ProCADE concluded an agreement of technical cooperation with the SDE.<sup>66</sup> Under the terms of the agreement, in the merger cases which can be decided under the fast track procedure the ProCADE will submit an opinion to the *Plenário* of CADE concerning the payment of the filing fees by the merging parties and the compliance of the time of notification and other procedural formalities. Therefore, under the terms of the agreement, the ProCADE bound itself not to provide an additional opinion to CADE, in addition to the opinions from SDE and SEAE. This solution had the objective to avoid the overlaps among the legal opinions provided to CADE by these advisory bodies in the most simple merger cases. As a consequence, the merger review procedure would be speed up and ProCADE would be able to focus its limited human resources in representing CADE before the federal courts.

In order to speed up the appeal proceedings, ProCADE has also started to promote some court settlements with the companies sanctioned by CADE. The legal basis to conclude court settlement is provided by Art. 10 (IV) of the Law 8884/94. The later mentions among the tasks of ProCADE that one to conclude court settlements with the sanctioned parties, subject to the prior approval of the *Plenário* of CADE. The first court settlement was negotiated by ProCADE in the case Microsoft-TBA.<sup>67</sup> CADE sanctioned the agreement of exclusive distribution concluded by Microsoft with TBA Informática, a retailer of software in the Federal District of Brasilia.<sup>68</sup> The appeal proceedings would have been lengthy and only after several years the decision of CADE would have been enforced (see the case Xerox). The court

---

<http://www.cade.gov.br/Default.aspx?e344c44bd130f0491e3f> (accessed on 10th June 2009).

<sup>66</sup> Agreement of technical cooperation concluded between SDE and ProCADE on 19<sup>th</sup> July 2007.

The text of the agreement is available at:

<http://www.mj.gov.br/main.asp?ViewID={5C394253-B7F9-4E89-974E-CA56AC72DEBA}&params=itemID={827D7C2F-4E7C-4BF8-ABEF-6E45CC39F971};&UIPartUID={2868BA3C-1C72-4347-BE11-A26F70F4CB26}> (accessed on 10th June 2009).

<sup>67</sup> CADE's Annual Report 2006, 85.

<sup>68</sup> The case involved the system of exclusive distribution established by Microsoft in Brazil. Microsoft had chosen TBA as the sole distributor of its software in the Federal District of Brasilia. As a consequence of the exclusivity agreement, a competitor of TBA, IOS Informática Organização e Sistemas Ltda., was excluded by the calls for tenders to provide computers to the federal agencies based in Brasilia, which required the Microsoft operating system to be installed in their computers. In 2004 CADE condemned the exclusivity clause and it imposed a fine on the companies. See the CADE's decision in the case. PA n. 08012.008024/98-49. Relatório, 1-2.

settlement promoted by ProCADE simplified and accelerated the enforcement mechanism.

CADE has also tried to promote the understanding of the competition law among the federal judges. In fact, since 2004 it has organized periodical workshops concerning competition law for the judges of the Federal District.<sup>69</sup> This initiative can help the federal judges to become more acquainted with competition law concepts. On the other hand, these events only involve the federal judges of the capital, who usually have to review the majority of the competition law cases. A future challenge for CADE will be to involve the federal judges of other Brazilian States in this kind of initiatives.

Finally, the federal courts have accepted the principle that the appellants are required to lodge the amount of the fine imposed by CADE in a temporary bank account held by the court. Art. 65 of the Law 8884/94 clearly provides this kind of obligation. However, when the first cartel case decided by CADE was appealed (the steel cartel case),<sup>70</sup> the federal court did not require the companies to comply with such an obligation.<sup>71</sup> The court argued that the deposit of the fine in a temporary account would create *per se* a *periculum in mora* for the appellants. Following a judgement of the STJ in 2003 this is not the practice anymore.<sup>72</sup> Although pleas claiming the *periculum in mora* of the temporary deposit of the fine are still presented at the federal courts in Brazil by the sanctioned companies, these pleas are usually rejected by the courts.<sup>73</sup>

## CONCLUSIONS: LESSONS FOR OTHER EMERGING ECONOMIES

---

<sup>69</sup> CADE's Annual Report 2004, 74.

<sup>70</sup> The case involved a price-fixing cartel established between the *Companhia Siderúrgica Nacional*, *Companhia Siderúrgica Paulista* and *Usinas Siderúrgica de Minas Gerais*. SDE started the investigations on the case in 1999. CADE took its decision sanctioning the companies on 14<sup>th</sup> April 2004.

PA n. 08012.005924/2000-30.

<sup>71</sup> CADE's Annual Report 2006, 56.

<sup>72</sup> Judgement of the STJ, Recurso Especial nº 590.960 - DF (2003/0169770-6), submitted by the UNIMED Campinas Cooperative de Trabalho Médico.

<sup>73</sup> For instance, one of the preliminary judgements of the TRF4 in the case of *vigilantes* mentioned above, requested the appellant to comply with the obligation provided by Art. 65 of the Law 8884/94 by referring to the STJ judgement of 2003 in the case UNIMED.

Judgement of TRF4 of 18th September 2008. EBV Empresa Brasileira de Vigilância LTDA c. Conselho Administrativo de Defesa Econômica – CADE. Agravo de Instrumento n. 2007.04.00.003701-7/SC.

---

The re-organization of ProCADE, the introduction of court settlements, workshops for the federal judges and the obligation for the sanctioned companies to lodge in a temporary bank account the amount of the fine, have solved some of the problems mentioned in the previous section. The rationale behind these initiatives was to avoid that the judicial review carried out by the Brazilian federal courts become an obstacle to the enforcement of the competition law in the country. During the last years, CADE/SDE/SEAE have improved the quality and the speed of their technical analysis and they have strengthened their independence from the executive branch. The Brazilian competition authorities are recognized today as one of the best NCAs among the non-OECD countries.<sup>74</sup> On the other hand, the judiciary has not followed the same evolution of these technical bodies. The fact that private parties may exploit the slowness of the judicial proceedings in order to postpone as long as possible the execution of the administrative decision is an institutional problem faced by the majority of the emerging economies which have started to enforce actively a system of competition law. The four initiatives mentioned in the previous section had the objective to solve this issue. However, these initiatives aimed at solving this issue by limiting the scope of judicial review by the Brazilian federal courts; they aimed at improving mainly the speed, rather than the quality of the review. This was the underlining logic behind the introduction of the court settlement and the obligation for the private parties to submit the temporary payment of the fine. Due to the existence of court settlements, the tribunal loses its duty to review the NCA's decision. The latter becomes the exclusive enforcer of the competition law. A European lawyer would probably agree with the idea that the temporary deposit of the fine in the account of the court may damage the presumption of innocence of the private parties during the legal proceedings. In Brazil, on the other hand, the need to protect the presumption of innocence comes at a second stage in comparison to the need to guarantee a full and prompt execution of the decisions of the NCA. The quality and the speed of the judicial review seem two opposite goals, which are difficult to reconcile in an emerging economy like Brazil.

---

<sup>74</sup> For instance, the enforcement activities of the SDE against cartels have been prized by the Global Antitrust Review, law review published by the International Bar Association, in June 2008.

SDE's press release, "SDE Sobe no Ranking das Melhores Autoridades de Concorrência do Mundo". Published on 11.06.2008.

The text of the press release is available at:

<http://www.mj.gov.br/sde/main.asp?View={DF282882-D0CB-4D38-98C8-0EA6B037E370}&Team=&params=itemID={2F7AD3F5-9C20-472D-99C4-05CFF707119F}%3B&UIPartUID={2218FAF9-5230-431C-A9E3-E780D3E67DFE}>

(accessed on 10th June 2009).

In relation to the question concerning the standard of review applied by the courts in reviewing the decisions of the NCA, the Brazilian case shows that this debate is still rather theoretical discussion in the majority of the emerging economies. The judgements analyzed above showed that the judges of the emerging economies try to escape from the task of reviewing the decision of the NCA. They tend to limit their analysis to the compliance of the procedural aspects by the NCA, even though the scope of their review could be broader (see the Nestlé-Garoto judgement). Alternatively, the judges confirm the assessment of the NCA without any critical evaluation of the economic evidence brought by the latter (see the Xerox judgement). From this point of view, the workshops organized during the last years in Brazil for the federal judges does not seem to be very successful to solve this issue.

The four initiatives mentioned above have not tackled the second issue discussed in the previous section: the conflicts of jurisdiction among the different appellate courts. One solution which could solve this problem would be the introduction of one federal court with exclusive jurisdiction to hear all the appeals to the CADE's decisions. Some emerging economies have opted for this kind of solution. For instance, the South Africa Competition Act of 1998 introduced a Competition Tribunal<sup>75</sup> and a Competition Appeal Court.<sup>76</sup> These courts have the exclusive jurisdiction to hear appeals to the decisions of the Competition Commission. The single appeal court is a good institutional solution because it ensures that fully qualified judges revise the decisions of the NCA. For instance, in South Africa every judge of the Competition Tribunal and of the Competition Appeal Court have a background in law and economics.<sup>77</sup> However, this kind of solution is valuable only in countries where a sufficient number of competition law cases are judged every year, which is not the case in the majority of the developing countries. Even in South Africa up to date there are few cases which have been appealed to the Competition Appeal Court. In fact, like in the majority of the emerging economies, during the first years of its activities, the Competition Commission focussed its enforcement priorities in the field of merger control. As a consequence, few decisions have been appealed to the Competition Tribunal and only a limited number of cases were appealed to the Competition Appeal Court. The growing number of appeals to the decisions of CADE during the last few years shows that this country would be ready for the

---

<sup>75</sup> South Africa Competition Act, law n.89, published on the Official Journal on 30<sup>th</sup> October 1998, notice n.1392. Art. 26. The text of the legislation is available at: <http://www.info.gov.za/gazette/acts/1998/a89-98.pdf> (accessed on 10th June 2009).

<sup>76</sup> *Ibid*, Art. 36

<sup>77</sup> *Ibid*, Art. 28 and Art. 36(2).

---

introduction of such a specialized court.<sup>78</sup> Due to the fact that during the first years of the existence of the competition law few decisions of the NCA are appealed to court, a competition appellate court could be established at a later stage in comparison to the NCA. In addition, in some civil law countries, like Brazil, there could be procedural obstacles to the establishment of a specialized competition tribunal similar to that one existent in South Africa. An alternative solution could be to grant exclusive jurisdiction to one chamber of the tribunal which has jurisdiction to hear every appeal against the administrative decisions of the competition authority. For instance, the Italian competition act grants exclusive jurisdiction to the Regional Administrative Tribunal of Lazio (*Tribunale Amministrativo Regionale del Lazio*, TAR) over the appeals against the decisions of the Italian competition authority (*Autorità Garante della Concorrenza e del Mercato*, AGCM).<sup>79</sup> The TAR's judgements can be appealed exclusively to the Italian Supreme Administrative Court (*Consiglio di Stato*, CdS).<sup>80</sup> During the last years every appeal against the decisions of the competition authority was always analyzed by the same chamber within these courts, namely the first chamber of TAR, and the sixth chamber of the CdS. Consequently, even if these chambers are not specialized competition tribunals like those ones of South Africa, these chambers have developed during the last years an expertise in the field of competition law. Their judgements have clarified some unclear aspects of the Italian competition act,<sup>81</sup> and the quality of their judicial review has improved over

---

<sup>78</sup> Such solution was already proposed in 2004 by Carlos Ragazzo, former head of SEAE and current CADE's Commissioner. However, at the time Ragazzo argued that the number of appeals to the decisions of CADE was still too limited to justify the establishment of a specialized appeal court in the field of competition law.

C. Ragazzo, "The Standing of the Competition Administrative Authorities – The Judiciary in Brazil". (2004) 18, *Boletino Latinoamericano de Competencia* 37-39.

<sup>79</sup> Italian law n. 287, adopted on 10<sup>th</sup> October 1990. Article n. 33(1).

The text of the legislation is available at:

<http://www.agcm.it/> (accessed on 10th June 2009).

<sup>80</sup> <http://www.giustizia-amministrativa.it/> (accessed on 10th June 2009).

<sup>81</sup> For instance, through its case law the CdS has limited the involvement of the national regulatory authorities (NRAs) in the enforcement of the competition act. Under Art. 20 of the Law 287/1990, the Italian NCA should ask the opinion of the competent NRA when the competition law investigations concerned a regulated sector. For instance, in the judgement 5640/2002 the CdS ruled that the AGCM could undertake investigations on anti-competitive conducts involving banks and insurance companies, even though Art. 20(2) of the Law 287/1990 provided that in the banking sector the Bank of Italy enforced the competition law. According to the CdS, due to the fact that the present case concerned an agreement between banks and insurances, the overlapping jurisdiction of the AGCM and of the Bank of Italy could lead to diverging results. Due to the fact that the jurisdiction of the Bank of Italy within the

the years. After a first phase in which the TAR and the CdS upheld every decision of the competition authority without entering into the merits of the decision, today the TAR and the CdS review aspects such as the correct definition of the relevant market and of the market power by the competition authority.<sup>82</sup> This improvement was achieved due to the fact that the judges of the same chamber reviewed every decision of the AGCM appealed to court. Even though there are important differences between the Brazilian and the Italian legal systems (e.g. in Brazil there is no system of administrative courts) a number of lessons could be drawn from the Italian experience. In the countries where the establishment of a specialized competition tribunal would not be feasible, due to the procedural problems or due to the excessive costs connected with the establishment of such an institution, an alternative solution could consist in granting exclusive jurisdiction to one court already present in the country and within this tribunal every appeal against the NCA's decisions should be judged by the same chamber.

The case of Brazil is a good example of the problems which may rise in an emerging economy where competition law starts to be actively enforced by the local NCA and where, as a consequence, the judiciary becomes more involved in the enforcement of the competition law. The main issues which can rise are related to the low quality of the judgements of the appeal courts, the conflicts of jurisdiction among different appeal courts and the slowness of the judicial proceedings, which may hamper the execution of the NCA's decisions. The initiatives undertaken in Brazil during the last years mainly aimed at solving the last problem. However, the acceleration of the time of judicial review does not improve the quality of the judgements and it may put at risk the presumption of innocence of the defendant during the judicial proceedings. This article has argued that the problems mentioned above could only be solved effectively through the establishment of a specialized appellate court with jurisdiction on every appeal against the NCA's decisions. Obviously, such a solution should be evaluated in the light of the procedural

---

competition act was an exception to the general rule which granted exclusive jurisdiction to the AGCM to enforce the competition act, in that case the competence of the Bank of Italy should be excluded. This case law was important; in fact in 2006 the Law 287/1990 was amended and Article 20(2) of the Law 287/1990 was abrogated, by thus eliminating any competence of the Bank of Italy in enforcing the competition act.

<sup>82</sup> Initially the CdS and the TAR reviewed the compliance by the AGCM of the procedural requirements provided by the competition act. This situation changed with the judgement of the CdS 2199/2002. Following the case law of the ECJ and of the CFI, in this judgement the CdS stated for the first time that the duty of the administrative judge was that one to verify the truthfulness of the facts relied as evidence by the AGCM and to check the logicity of the AGCM's decision.

---

rules present in every country. Moreover, due to the low number of decisions adopted by the NCA during the first years of existence of the competition law, this institution could be established at a later stage in comparison to the NCA. Only when the NCA starts to actively enforce the competition law, the cost of establishment of such a specialized court may be justified by the higher number of appeals to the NCAs' decisions. Alternatively, the identification of a chamber within a tribunal not specialized in competition law could also be a feasible solution.