BRAZIL´S EXPERIENCE AND LESSONS FROM REGULATORY OVERLAP: BANKING AND TELECOMMUNICATION CASES

EDUARDO LUIZ MACHADO
Federal University of São Paulo
Researcher of Institute for Technological Research
Coordinator of Study Group of Regulation, Competition and Trade (GERCC)
E-mail : edumach@ipt.br

INTRODUCTION

The institutional environment in Brazil was significantly altered during the nineties with less direct intervention in economic activity and the state taking on more of a regulatory role. Between 1996 and 2002, Brazil establishes independent regulatory agencies for infrastructure sectors as part of a large privatization program.

This regulatory transformation reflects the profound economic and social change of the past few decades in Brazil. Since then, the creation of regulatory agencies has been the subject of intense controversy. Specifically, the level of political and administrative independence and autonomy in relationship to the executive power has been the principal point of debate.

When countries undertake in regulatory reform in specific sectors, which aim at narrowing the scope of regulation and ensuring that it better serves public interests, an adequate definition of the relationship between sector regulatory authorities and competition oversight bodies is a core concern. A clear division of tasks and complementary approach between them, and cooperative behavior are prerequisites for the regulatory system to function properly as a whole.

The main goal of this paper is to devise an effective mechanism to clearly demarcate the jurisdiction of the regulatory bodies, specifically between competition authority and sectors regulators.

This paper is divided into four sections. The first section emphasizes the Brazilian economic history by exposing some main structural changes in the economic and political setting from 1990's to today. These structural transformations of the Brazilian economy are relevant to understand the evolution of the competition policy which precedes the emergence of regulatory agencies.

Section 2 there will be an overview of the Brazilian both competition authorities and regulatory agencies. This section provides a brief summary of both

telecommunications and banking sectors and its corresponding regulatory agencies, respectively Brazilian Telecommunications Regulatory Agency (ANATEL) and Central Bank of Brazil (BACEN).Also in this section, the paper will describe the Brazilian antitrust system. In Brazil, competition authorities are fragmented, and are part of the Brazilian Competition Policy System. An important point is that some conflicts emerge from this fragmentation.

The purpose of section 3 is to investigate the historical conflicts between the sector regulators and competition authority. First, it will demarcate the regulatory roles of each regulatory body. Second, it will present some mechanism adopted to minimize regulatory conflicts. Section 4summarizes the main results and presents some comments about conflicts resolution.

1. STRUCTURAL REFORMS: BACKGROUND FOR THE EMERGENCE OF REGULATORY AGENCIES

After a long period of state intervention, Brazil experienced a move towards liberalisation and privatisation in the early 1990s. According to Oliveira and Konichi (2006), there were four main structural changes that influenced the institutional changes Brazil. These changes were trade liberalization, privatization, regulation and stabilization. Additionally, the Real Plan (1994) created a favourable environment for regulatory reform with greater economic openness, institutional reforms, stable inflation and a modern competition framework (OECD, 2008).

Hudson (1997) study on the Brazilian economy states that on the 1950's the government adopted an explicit policy of import-substitution industrialization to change the structure of the Brazilian economy. Under the import-substitution model, the Brazilian government intervened in several economic sectors in order to induce industrialization. This model was characterized as a closed economy, which produces for the domestic market.

As a consequence, the Brazilian economy showed high growth rates that were sustained until the mid-seventies. However, after the oil shock this model presented several limitations due to lack of external funds and a fiscal crisis of the Brazilian state. By the eighties, inflation had already soared to triple digits and Brazil experienced hyperinflation. These factors, combined with falling productivity in the state sector, led to major changes in the policy regime.

The emergence of competition and regulatory agencies had not been a consequence of the natural evolution of a market economy. But, an attempt to correct state sector inefficiencies and to disseminate market institutions after years of import-substitution policy during which the state played a predominant role in the market.

The first structural change was the trade liberalization. The policy adopted eliminated special import regimes and reduced non-tariff barriers. The result of this change was a drop of the maximum tariff from over 100% to 38.1% in 1998.

The second change (privatization) reduced the state intervention in the market. In the first phase, the enterprises privatized had been acquired by the state owing to financial difficulties, and their privatization simply meant resale to the private sector. During the 90's decade, the program focused on privatizing enterprises in steel, petrochemicals and fertilizers that did not require major regulatory changes. In the third phase, under the first Cardoso administration (1995-98), the program comprised the sale of the state-owned enterprises most directly active in infrastructure sectors such as telecommunications, electricity and railroads. (Oliveira and Konichi, 2006)

In all, the privatization program represented gains of US$ 86.9 billion; of which US$ 70.3 billion corresponded to actual revenue from sales (Chart 1).

Chart 1: Brazil - privatization program data (1991-1998)

Sector	Number of companies	Assets sold	Debt Transferred	Total
Federal companies	81	46581	11326	57907
Steel	*8*	*5562*	*2625*	*8187*
Petrochemicals	*27*	*2698*	*1003*	*3701*
Electricity	*3*	*3907*	*1670*	*5577*
Railroads	*6*	*1697*	-	*1697*
Mineral extraction	*2*	*3305*	*3559*	*6864*
Telecommunications	*21*	*26970*	*2125*	*29095*
Others	*14*	*2442*	*344*	*2786*
State-government firms	26	23724	5311	29035
Total	107	70305	16637	86942

Source: Pinheiro and Giambiagi (1997)

Due to the importance of this policy and the elements of natural monopoly involved in many economic sectors, the regulatory issues became the central debate of the public policy agenda.

As part of the infrastructure was privatized, it became clear that the state would have to design specific regulatory frameworks. Note that in the U.S. many regulatory agencies preceded the antitrust authorities. In contrast, in Brazil they were created after

a competition law was in place. Antitrust bodies were the ones with certain expertise to deal with the vertical and horizontal problems which typically arise in regulated industries (Oliveira and Konichi, 2006).

The fourth change was the stabilization plan focus to control inflation in Brazil. Facing imminent hyperinflation and a virtually bankrupt public sector, the government introduced several stabilization plans to promote fiscal and monetary stability. But only in 1994, with the Real Plan, the inflation was controlled and Brazil started to attract foreign investments again. In this stage of the twentieth century, the Brazilian economy became a more open market.

In sum, the objectives of regulatory reform and privatization were to facilitate the environment for attracting new private investment, including from abroad, to increase efficiency and reduce the public debt.

2. CREATION AND FUNCTIONING OF THE BRAZILIAN REGULATORY AGENCIES

The Brazilian regulation policy is a reflection of structural and institutional changes mentioned in last section. Although it seems obvious that Brazil needs regulatory agencies and more competition to improve economic efficiency, there were several challenges and peculiarities to implement competition policy and regulatory agencies in developing countries.

The general characteristics of the institutional environment posed in the previous section show certain specificities depending on the sector that is regulated. Although most elements of institutional endowments are common to all sectors within a same country, regulatory design can vary across sectors. Empirical data show that there are a wide variety of government choices for regulatory design, producing different outcomes across sectors.

Creation of regulatory agencies accompanied the process of opening infrastructure sector markets to the private sector, either through total privatization (telecommunications and rail transport), or through partial privatization (electricity), or by means of a mere permission for private organizations to enter the market without privatizing the state enterprise. For instance, although the privatization program was one of the largest in the world in absolute terms, many state companies still have maintained dominant position in various markets, such as postal services, water and sewage and oil.

Chart 2 shows some different kinds of regulatory agencies in Brazil.

Chart 2: Different kinds of Regulatory Agencies

Others ANCINE – National Cinema Agency	
	ANATEL - Federal teleco
	ANEEL – Federal energy regulat
	ANP - National Petroleum Agency
	ANTT – National Agency
Natural Monopoly /	ANTAQ – National Agen
	ANA – National Agency of H
	BACEN - Brazilian Central Bank
CVM - Brazilian equivalent to US's SEC	CNSP – National Council of Private I
Infra-structure	Competition Policy
	CADE - Brazilian equivalent to Commission
ANS – National Agency of Supplemental	ANVISA - National Agency of Hea
Financial System	Copyright
	INPI – National Institute of Intellect
ADA –Agency for the Development of the Amazon Region	ADENE – Agency for the D

Fonte: Oliveira, Machado e Werneck (2004)

The "New Regulatory State" was defined by the country's Constitutional Amendments 5, 6, 7, and 8. These established the legal regime of natural gas exploitation by the states; research and extraction of mineral resources; air, aquatic and terrestrial transportation; and telecommunications services. Amendment 9abolished the legal oil and natural gas monopolies and created the regulatory agency for the oil and gas sector (OECD, 2008).

A common characteristic among these agencies is that they promote concessions for the use of public resources or they engage in the provision of services. Precise delineation of the functions of regulatory agencies is provided by the rules determining the ministerial connection of the agency, its attributes and the influence of other institutions in the decision making process. Ministerial connections of agencies were

conceived on the lines of a legal form of a quasi-independent government agency under a special regime, connected to a Ministry, but not hierarchically subordinated to it.

The creation of regulatory agencies as quasi-independent agencies under a special regime was important to ensure financial and structural independence, and avoid subordination to any particular Ministry. This enabled these agencies to enjoy political and decision making independence and to take decisions on the basis of technical rather than political criteria, as is frequently the case in bodies subordinated to Ministries.

In the Brazilian case, the role of regulatory agencies, as corporate entities under public law, involves supervising, regulating, rule making and implementing policies drafted by ministries. At times, agencies also perform arbitration and mediation. In the next subsections, the characteristics related to both petroleum and electricity agencies are closely specified.

In relation to the coordination, less influence of other bodies of the direct administration in decision making processes (as determined by their intervention in the procedures of the agency, such as the power to bring cases before the agency, proceed to conduct investigations, make agreements, etc) heightens the agency's degree of autonomy, since it will have greater authority to mediate or arbitrate disputes. An agency's credibility is greater when, after conducting all investigations and analyses, it has the authority to apply any sanctions necessary without them being reviewed by other instances of the administration.

The action of an agency will not necessarily be connected only to the sector that it is part of. In the cases involving more than one sector, decision-making requires coordination across agencies. However, there is no overall legal provision governing the relations between agencies and other organs of the Government, in particular with the competition policy authorities. Thus, an agency may delegate concessionary powers to another agency or work together with it in the decision making process, without constituting interference in the delineation of its functions, or in the extent of this agency independence from these other agencies. During President Lula´s Government there had been a lot of pressure of the Executive branch to regain at least part of the decision making ability of the agencies. The Government was quite successful mainly in ANATEL and ANEEL.

Finally, Brazilian government is setting up a Program for the Strengthening of the Institutional Capacity for Regulatory Management (PRO-REG). The main of PRO-REG is to increase the quality of regulatory system at introducing new mechanisms for

accountability, participation and monitoring from civil society and boost coordination among the institutions that participate in the regulatory process. This program has been developed with the support of the Inter-American Development Bank (IADB) with the purpose of contributing to the improvement of the regulatory system and co-ordination among the institutions that participate in the regulatory process. PRO-REG will introduce RIA to measure regulation quality of regulators.

A. NATIONAL AGENCY OF TELECOMMUNICATIONS (ANATEL)

According Mattos & Coutinho (2005), "*the reform of telecommunications in Brazil was one of the most well structured reforms in Latin America (LA) and arguably around the world in terms of transparency of the regulatory framework before privatization and the introduction of competition*".

When the privatization of TELEBRAS, the Brazilian state-owned holding entity the main regulatory rules had already been settled, including the General Law of Telecommunications (GLT). The concession contracts, published before privatization, contained several regulatory provisions. The telecommunications regulatory body, ANATEL, was already operating. Establishing ex ante the regulatory rules explains much of the success of the this sector reform (Mattos & Coutinho,2005).

ANATEL is administratively independent and financially autonomous, not hierarchically subordinate to any government agency. The regulatory agency has wide powers:

i. enact rules on the use,
ii. establishment and control of maximum tariffs and prices for services rendered under the public regime;
iii. apply sanctions;
iv. regulate interconnection;
v. issue licenses;
vi. manage radiofrequency and spectrum;
vii. settle disputes between service providers and between them and consumers;
viii. impose sanctions; and
ix. protect consumers' interests in the field of telecommunications.

The GTL determine that ANATEL is responsible for the enforcement of antitrust laws, determining, in Article 97, that every split-up, merger, acquisition, consolidation, decrease of the capital stock of the company and transfer of the company's controlling interest needs to be examined by it.

B. CENTRAL BANK OF BRAZIL (BACEN)

The BACEN was created by Law no. 4.595 of December 31st, 1964. It is an autonomous federal institution and part of the National Financial System (SFN).The 1988 Constitution sets down Central Bank's matters, such as the exclusive attribution of the Union to issue money, the need to submit both president and director of the Central Bank, appointed by the Republic President, to prior approval by the Senate, and the prohibition to direct or indirect granting of loans to the National Treasury. The 1988 Constitution also establishes the drawing up of a Complementary Law of the National Financial System, to substitute Law no. 4.595, dealing with varied and important aspects of the structure and activities of the agency.

The BACEN has regulatory responsibility for banks and other financial institutions. It exercises "prudential" regulatory control over new bank charters and bank mergers; sets requirements for capital, reserves, and investments; and mandates internal control and accounting systems. Separate regulatory bodies exist within the Ministry of Finance for the insurance and securities sectors.

OCDE (2000) noted that although banking is not exempt from the competition law, "*the Central Bank continues [to] exercise sole authority over competitive issues in the sector*." In particular, the Bank has demanded exclusive control over bank mergers on the grounds that it must assure the proper disposition of "*problem banks*" and enforce constitutional limits on entry by foreign banking institutions.

C. BRAZILIAN COMPETITION POLICY SYSTEM (SBDC)

As a part of the 1994 reforms, a new competition law (No. 8884) was enacted with the expectation that it could be employed to deal with inflated prices. Law 8 884 granted the CADE the status of independent government agency and legislated about the prevention and repression to infractions against the new economic order. The new law also implemented merger control and made important institutional changes.

In Brazil, competition authorities are fragmented. An important point is that

some conflicts emerge from this fragmentation. This system consists of three bodies:

a) CADE, the Administrative Council for Economic Defense, an autonomous agency which has dispositive adjudicative authority in SBDC cases;

b) SDE, the Economic Law Office in the Ministry of Justice, which has the principal investigative role; and

c) SEAE, the Secretariat for Economic Monitoring in the Ministry of Finance, which also has investigative authority but is primarily responsible for providing economic analysis in SBDC proceedings.

Chart 3 shows the evolution of the competition law.

Chart 3: Evolution of competition institutions in Brazil

LAW	4.137 (1962)	8.158 (1991)	8.884 (1994)	12.529 (2011)
INSTITUTIONS	CADE	SNDE CADE	CADE SDE SEAE	CADE SEAE
SCOPE	CONDUCT	CONDUCT	CONDUCT STRUCTURE	CONDUCT EX-ANTE STRUCUTURE
DEGREE OF AUTONOMY	-	-	**CADE** gets more independent; member have a two-years mandate	**CADE** achieves special autonomy; members have four years mandate

Fonte: Adapte from Oliveira, Machado e Werneck (2004)

Importantly to note that the regulatory framework of the competition defense in Brazil suffered recent amendment to the institutionalization of 12.529/11, that repealed the Law 8.884/94 and created a new institutional design to the SBDC. Now, CADE will be responsible beyond the judging processes, procedural instruction and economic analysis of mergers and anticompetitive conduct.

The main aspect is the diminution of bureaucracy. Under the new act, the function of the three authorities in relation to the competition defense will be consolidated into one single body, reducing the number of stages in the review process. From the previous three bodies, it would remain two (CADE and SEAE). In this new configuration, SDE would only regulate consumer protection, CADE would be the only to instruct and judge cases and SEAE would be in charge of the interaction of

competition policy with regulatory agencies and competition promotion.

Another essential change enacted was the requirement of prior review of merger, prevented the consummation of the transaction to a Council decision on it. The processes submitted to CADE will face more restrictive and coherent criteria. This measure that would certainly reduce the amount of cases judged.

The new legislation introduces more two important changes: amendment of the merger notification thresholds and new provisions concerning the enforcement of anticompetitive practices, particularly regarding the setting of fines for anticompetitive conduct and leniency.

The new institutional environment suggests a greater degree of autonomy of the CADE and some analysts at the time of promulgation of the new device, referred to the new institution as "Super-CADE". For the present study this means a step forward in allowing greater social legitimacy to the local authority reducing potential interference from entities such as the Executive.

3. OVERLAP ASPECTS

Brazil's regulation and antitrust policies are relatively recent, So it is expected to find problems related to overlapping jurisdiction between the various actors of the institutional system.

The focus of the competition agency resides in the non-competitive markets, in which there are a higher proportion of unlawful acts. A considerable portion of the problems, however, is associated with failures in regulation. Thus, the establishment of pro-competition rules can eliminate, or at least attenuate, market failures. The focus of the sectorial regulatory agency, on the other hand, resides in natural monopolies – a single company has ever-decreasing costs as its activity increases.

Competition policy and control of the monopoly power had larger importance in sectors that moved forward more in the privatization process and us which, for the following model and for the technological characteristics, the access to the essential infrastructure is shown decisive for the acting of the sector, as is the case, for instance, of telephony, electric power and even railroads. (Machado et al., 2004)

When some issue involves both the regulatory agency and the antitrust authority, cases of overlapping functions may occur and there is a need to cooperate. The analysis of a concentration act in a regulated sector is a classic example. In these cases, the

remedies that are available to the antitrust authorities may not be sufficient to establish competition, leading to suggestions for improving regulations. So it is necessary complementary role of the regulatory agency and the antitrust authorities with the need for them to co-operate. (OCDE, 2008)

As regards the interaction between the sectorial regulatory agencies and the antitrust authorities, the SBDC proposed that the law should provide that only its administrative bodies (SEAE, SDE and CADE) should have power to apply the antitrust legislation. It could also request to the sectorial agencies to issue one expert opinion on the sector, with the purpose of assisting the SBDC in the appreciation of the merger or the anticompetitive behavior. (ICN, 2004)

Moreover, institutional cooperation is important not only to avoid the duality of regulatory power, but also to ensure enforcement and credibility of regulation and to harmonize procedures and procedural rules. In other words, SBDC also considered that the regulatory agencies are required to request a legal opinion from administrative bodies on drafts of norms and regulations, before its disclosure for public consultation, so these could reveal on possible impacts on the competitive conditions of the sector.

This is not the case of ANEEL and ANP, for example. As show OECD (2008), actual the relationship between ANP and ANEEL is very distant, and the regulatory framework does not encourage dialogue even on matters that are highly relevant for both. For instance, ANEEL has jurisdiction over input for thermoelectricity but ANP is the natural gas regulator, and distribution is regulated at the sub-national level. A strong dialogue could help ensure that specific regulatory developments in each sector are mutually reinforcing and consistent regulators.

In addition, ANEEL legislation charges the agency by overseeing competition policy, making rules to curb market concentration and providing joint actions with the state agencies and the Secretariat of Economic Law. The competition policy and control of the monopoly power are of great importance within this sector. Due to the technological characteristics, the access to the essential infrastructure is decisive for this sector to operate. (Machado et al., 2004)

In the case of ANP, the legislation merely enjoins that the Brazilian antitrust authority must be notified of the matters involving infraction against the economic order.

A. TELECOMMUNICATIONS SECTOR

The telecommunications sector is regulated by Law No. 9472/97 (General Telecommunication Law), which created the National Agency for Telecommunication (Agência Nacional de Telecomunicações, ANATEL). In telecommunications sector, regulation of competition includes measures that require prior notification of any merger or acquisition among market agents, Moreover, incumbents were obliged to allow their competitors access to disaggregated elements and/or alternative points in their networks. The General Telecommunications Law (GTL) gives power the ANATEL to monitor market behavior, as in the case of interconnection agreements. Parties to these agreements seek to inhibit tariff subsidies by means that include artificially reducing tariffs, unauthorized use of information obtained from competitors, omission of technical information, obstruction, and restrain.

Although GTL has determined that ANATEL is responsible for the enforcement of antitrust laws, ANATEL's analysis do not replace competition law, as CADE remains, even in the telecommunication sector, as the Tribunal that decides whether the transaction is to be approved or not. Even though the GTL is not enough clear on this subject (as regards to Article 7, §§ 1º and 2º), SEAE and SDE have not been analyzing transactions in the telecom sector to send it to CADE, remaining ANATEL as the agency that is developing such work. So, the authority is in charge of supervising, preventing and repressing actions against the economic order except for those belonging to CADE. (ICN, 2004)

Briefly, the GTL establishes complementary competencies between CADE and ANATEL. The regulatory agency has specific rules related to competition aspects and observes the competition legislation when it does not divergence with the rules and principles established by the GTL. The agency also needs to consider competition principles when reaching decisions. (OCDE, 2008)

This reflects the tendency among OECD countries to allow for joint responsibility in the telecommunications sector between competition authorities and the sector-specific regulator. In certain cases formal mechanisms exist for co-operation, while they do not exist in other cases. In Brazil as in OECD countries, good co-operation between the two types of authorities is essential. At the moment, there is no formal co-operation agreement between CADE and ANATEL, but co-ordination seems to have operated well until now, based on informal procedures. In addition, ANATEL has taken several resolutions that regulate administrative procedures involving competition. (OCDE, 2008)

CADE and ANATEL had established a working group to address the potential problems presented by the overlapping jurisdictional provisions. CADE advises that, since 2000, the two agencies have successfully developed a cooperative working arrangement under which ANATEL assumes the role of SDE and SEAE in merger cases involving telecommunications services. (OCDE, 2005)

Resolution 76/1998 approves Norm 4/98 and establishes that ANATEL examines merger documents first and CADE issues final approval. ANATEL is the only agency with such authority to investigate merger cases, replacing SEAE and SDE in this case. SEAE and SDE only issue opinions if specifically requested by a commissioner from CADE. ANATEL has special units for general management of competition defense. Resolution 195/99 approves Norm 7/99 and establishes procedures for investigation of violations of competition rules. In the context of mergers, the responsibility would be with the competition authority. ANATEL has issued several decisions on these issues, such as the one that defines the concept of Significant Market Power. (OCDE, 2008)

Under the arrangement, ANATEL conducts the investigation and provides a technical opinion, while CADE makes the final decision. In the other hand, in conduct cases ANATEL shares concurrent jurisdiction with SDE and SEAE, so that any one or all three of those agencies may perform investigative functions and present recommendations to CADE. Over the years, CADE and ANATEL have signed several written cooperation agreements, each of which has subsequently expired. (OCDE, 2005)

CADE has considered numerous conduct and merger cases sent to it by ANATEL. In 2001, for example, CADE addressed an abuse of dominance claim against the Globo Group, Brazil's largest broadcast television network. Globo controlled both the Globo Channel, the prime broadcast channel in Brazil, as well as Sky TV, the most important Brazilian pay TV satellite company. The complainant was TVA, the owner of competing satellite company DirectTV (OCDE, 2005).

TVA asserted that Globo wrongfully refused to license the Globo Channel to TVA for satellite broadcast. ANATEL investigated and concluded that there was no abuse of dominance because the Globo Channel was not an essential facility for satellite TV service. CADE agreed and dismissed the case, observing that TVA was a viable competitor even without the channel and that requiring satellite TV services to share programming would reduce competition and retard incentives for innovation. In a 2002

merger case, CADE approved without restrictions a joint venture by Portugal Telecom and Telefonica Internacional to create the cellular service company Vivo.(OCDE, 2005)

In merger cases, ANATEL has statutory authority to issue an order preventing consummation of a transaction until review is complete. CADE may issue a separate precautionary measure to deal with aspects of a merger that are not within ANATEL's jurisdiction. For example, in the News Corporation, ANATEL issued an order preventing the two satellite TV companies from consummating the underlying transaction, while CADE issued an order barring the parties from establishing any new contracts providing for exclusive distribution in Brazil of television programming. (OCDE, 2005)

CADE has sometimes requested that SDE or SEAE (or both) provide supplementary technical opinions in merger cases falling within ANATEL's jurisdiction and in conduct cases that SDE and SEAE had not investigated. Likewise, opinions from both SDE and SEAE were sought in an abuse of dominance case against São Paulo Telecommunications (Telesp). The complaining firm in that case, Telecommunications Brazil Enterprise (Embratel), asserted that Telesp was charging discriminatory tariffs for accessing Telesp's network. SDE and SEAE agreed that the conduct was likely to be discriminatory and CADE issued a precautionary order following their recommendations.

SDE and SEAE also pursue both merger and conduct investigations into aspects of the telecommunications sector that are outside ANATEL's jurisdiction. Merger investigations in recent years have generally involved markets that are vertically related to telecommunications services. Acquisitions by land-line telephone companies of Internet service providers and by satellite TV firms of TV program suppliers have been a particular focus of interest. Thus, in 2002, SEAE examined another transaction involving the Globo Group, which (in addition to SkyTV) also owns SporTV, the prime Brazilian pay-TV sports channel. The transaction involved Globo's acquisition of a 25% stake in ESPN Brasil, a competing pay TV sports channel.

SEAE concluded that Globo was in a monopolistic position respecting the "premium sports channels for pay TV" market and in a monopsonistic position respecting the market for pay TV presentations of premium sporting events. Entry was difficult in both markets, and SEAE therefore recommended imposing certain restrictions to reduce the prospect that Globo could abuse its market power. SEAE's proposals were designed to prevent Globo from providing exclusive licenses to SkyTV

for the satellite broadcast of premium sporting events, or demanding exclusive broadcast rights for such events. (OCDE, 2005)

Conduct investigations by SDE and SEAE in markets related to, but outside of, ANATEL's jurisdiction include yet another case against the Globo Group. An abuse of dominance complaint by Associação Neo TV asserted that Globo was refusing to negotiate the license for SporTV channel to Globo competitors of satellite TV services (SkyTV and NET). SEAE's proposals were similar to those in the ESPN Brasil acquisition case. (OCDE, 2005)

According to the typology proposed by Oliveira (2001), the telecommunications sector presents a model of complementary jurisdictions. That´s the case in which more than one agency may have jurisdiction over subjects relating to a sector, though from different points of view. Such an arrangement institutional prioritizes high degree of specialization of both regulators and antitrust authorities since it is clear delimitation of powers between the two agents. Despite minimize duplication of decisions requires strong cooperation between authorities which can result in high transaction costs of bureaucracy, in the limit excluding the benefits generated by the complementarities.

B. BANKING SECTOR

The Brazilian financial system is the largest and most sophisticated in Latin America. In spite of its large size, Brazil is similar to other countries in terms of the degree of concentration, as well as the efficiency ratio and capital adequacy. However, credit is relatively low compared with other countries and a significant portion of bank assets is invested in government bonds (WORLD BANK, 2007).

The conflict of attributions between Central Bank and CADE started long after the creation of the two organs. Since the decade of the 60s until the mid-90s, CADE and the Central Bank had a harmonious relationship. In 1999, a task force with people from Central Bank and CADE was created for defining their respective functions in the markets in which financial institutions operated. However, these discussions failed to produce any practical results.

In 2001, the Federal Attorney General's Office issued a legal opinion concluding that the specificity of Brazil's banking law took precedence over the more general language in Law 8884, and thus effectively vested the Central Bank with sole jurisdiction over banks for all purposes. CADE has never assented to that opinion,

taking the position that competition law is applicable by its terms to all commercial enterprises, and that CADE is not bound by a legal opinion issued by the Executive Branch. (OCDE, 2005)

Two courts of first instance have considered the issue of whether bank mergers must be notified to CADE under Article 54. One court held that they did, concluding that Article 54 applied even where the merger had been reviewed by the Central Bank. A second court in a different bank merger held the opposite; on the grounds that the Central Bank's review was pre-emptive and that the Federal Attorney General's legal opinion bound the entire Federal Government, including CADE. (OCDE, 2005)

Negotiations between CADE and Central Bank were undertaken to resolve the controversy by agreement. A consensus bill provides that the Central Bank will have exclusive responsibility for reviewing mergers that involve a risk to the overall stability of the financial system. In all other merger cases, CADE will have dispositive authority. Authority for handling conduct cases in the banking sector will be lodged exclusively with the SBDC. CADE and Central Bank have long had a working agreement that is employed principally as a mechanism for exchanging information. (OCDE, 2005)

In this sense, there are complementary Law under consideration in Congress that divides authority among the organs, ensuring exclusivity analysis of mergers and acquisitions that offer systemic risk to the Central Bank, leaving the analysis of operations and other potential anticompetitive conduct in charge of the SBDC.

In 2010 some results show the increased convergence between antitrust authorities and the regulatory agencies, which were crucial to increase competition enforcement in the banking sector. In respect of merger filings concerning the banking sector, the Brazilian Superior Court rendered a decision establishing that only Central Bank has responsibility to oversee competition in the Brazilian banking market (the aforementioned transactions were overseen by CADE before the judicial decision). Good examples of this phenomenon are the cases in the banking sector, as the acquisition by the consortium Santander/Fortis/RBS of the ABN/Amro Bank group, the merger between Itaú and Unibanco and the acquisition by Banco do Brasil of the Nossa Caixa.

In the Itaú-Unibanco case, the opinions of the two organs (CADE and Central Bank) despite approving the merger went separate ways for the application of restrictions and terms of engagement performance. The Central Bank had chosen to restrict the merger in such a way that the new conglomerate would share with the civil

society of the gains of the transaction. For this the new organization should maintain their bank rates unchanged for a certain period of time. CADE cleared the transaction unconditionally. CADE concluded that the sector was characterized by sufficient rivalry to challenge any possible exercise of market power.

The other relevant transaction was the acquisition by Banco do Brasil of Nossa Caixa[1]. After the review by the Central Bank (BACEN) and the other antitrust authorities (SEAE and SDE), CADE concluded that, although some Brazilian cities in the São Paulo State would have units of only one of them, the transaction would not raise competition concerns. However, the transaction was approved with restrictions and a performance settlement agreement was executed between the parties and CADE, according to which Banco do Brasil undertook to implement free call centre services for customers in 157 cities in the São Paulo States, where overlaps were higher than 40 per cent.

Recently, in April 2012, Central Bank issued “Circular 3590” inaugurating a new phase in relations with the CADE in which both agents have the legal competence to analyze and judge the effects of mergers on competition in the financial sector specifically. According to this document, Central Bank had delegated itself as the antitrust agency of financial system beyond the already established competence of regulator.

According to Oliveira (2001) the position of the Central Bank formalizes an institutional arrangement known as concurrent jurisdiction in which the competition authority and regulatory agency exercising power over the laws of competition. This configuration requires a high degree of clarity in the rules regarding the division of powers in order to mitigate potential legal uncertainty.

It is important to note that the analysis methodology of competition as well as the scope evaluated by the Central Bank has different characteristics to those produced by the new competition law. While the former produces an ex-post evaluation of the merger, the second requires that economic agents involved providing information before the transaction.

Finally, the conflict of attributions between the Central Bank and CADE does not involve other sectors of the national financial system, as it is the case of insurance companies, whose activities are regulated by Superintendence of Private Insurance

[1] Banco do Brasil e Nossa Caixa are two importants public brazilian banks.

(SUSEP), or in case of health insurance, regulated by the National Agency of Supplementary Health (ANS).

CONCLUSION

The transparent, technical and open nature of antitrust actions in Brazil resulted with more proximity between the SBDC and the sector regulators (such as ANATEL, ANEEL, BACEN, etc), spreading some expenditure and antitrust expertise to the merger review in those branches. In other words, once a transaction affects regulated markets in Brazil, the responsible Agency participates in the antitrust analysis of the merger, usually giving a technical, but non-binding, opinion that will be regarded by CADE in the antitrust scrutiny of the case.

Regulatory decisions taken without any systematic or formal coordination are having a clear impact on the economic performance of the country. One major problem is the overlapping of regulatory competences, which in some cases is due to an unclear definition of responsibilities.

In the specific case of telecommunications industry, this paper suggested that the model of complementary jurisdictions applies. In this model there is no overlapping of the two authorities' functions. The division of tasks is clear and determines that the regulatory agency deals exclusively with economic and technical tasks, while the competition authority enforces antitrust law. The current efforts to coordinate activities between ANATEL and CADE, show that this model is the optimal institutional configuration. A similar scheme exists in almost all the mature jurisdictions in a more or less formal manner. The solution to avoid conflicts and delay in the resolution of problems resides in inter-institutional co-operation through operational agreements. It´s important to note that the telecommunications sector is the unique in the Brazilian regulated industry that the regulatory agency supplanted SDE and SEAE in the review process.

In banking sector, there are new Law under consideration in Congress that divides authority among the organs, ensuring exclusivity analysis of mergers and acquisitions that offer systemic risk to the Central Bank, leaving the analysis of operations and other potential anticompetitive conduct in charge of the SBDC. However, the "Circular 3590" of the Central Bank establishes the model of concurrent jurisdiction,

in which both the competition authority and regulatory agency exercising power over the laws of competition, as predominant institutional arrangement

REFERENCES

CORREA, P. et al. **Regulatory Governance in Infrastructure Industries Assessment and Measurement of Brazilian Regulators**. Washington DC: World Bank, 2006.

HUDSON, R.A. (Ed.) **Brazil:** A Country Study. The Economy. Washington: GPO for the Library of Congress, 1997. Available on: <http://countrystudies.us/brazil/62.htm>. Access on: 05 Oct 2009.

ICN (International Competition Network). interrelations between antitrust and regulatory authorities. Report to the third ICN annual conference, April 2004.

MACHADO, E. L.; OLIVEIRA, G.; NOVAES, L. M. Independence of regulatory agencies: evidence for the credibility hypothesis. In: RESEARCH WORKSHOP ON INSTITUTIONS AND ORGANIZATIONS, 3., 2008, São Paulo. **Anais Eletrônicos**.... São Paulo: FGV, 2008. p.19.

MACHADO, E. L. et al. **Regulatory design and competitiveness**: evidence from a sample of brazilian infrastructure sectors In: Competition, Competitiveness and Development: lessons from developing countries. Genebra: United Nations Publications, 2004. v.1, p. 111-142.

MATTOS, C. e COUTINHO, P. The Brazilian model of telecommunications reform.Telecommunications Policy 29, pp. 449–466(2005).

MUELLER, B and PEREIRA, C.;. **Credibility and the Design of Regulatory Agencies in Brazil.**Proceedings of Conference at the University of Kant at Canterbery, 2002.

OECD. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT. **Regulatory policies in OCDE countries**: from interventionism to regulatory governance. Paris: OECD, 2002.

OECD,ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, **Building Capacity for Regulatory Quality: Stocktaking Paper**,GOV/PGC(2004)11, Paris, 2004.

OECD,ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, **PEER REVIEW OF BRAZIL'S COMPETITION LAW AND POLICY**,DAF/COMP(2005)28, Paris, 2005.

OECD. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT. **Reviews of regulatory Reform: Brazil**. Paris: OECD, 2008.

OECD. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT. **Improving the Quality of Regulations**. Paris: OECD, 2009. (PolicyBrief)

OLIVEIRA, G.; MACHADO, E. L.; WERNECK, B. D. **Agências reguladoras:** a experiência internacional e a avaliação da proposta de lei geral brasileira. Brasília : CNI, 2004. 127p. Available on: <http://www.cni.org.br/produtos/diversos/src/agencia_reguladora.pdf> Access on: 05 Oct 2009.

OLIVEIRA, Gesner. Relações entre Defesa da Concorrência e a Regulação: a proposta de uma Superagência. In: OLIVEIRA, Gesner. Concorrência: panorama no Brasil e no mundo. São Paulo: Saraiva, 2001.capítulo 4, 59-74p.

OLIVEIRA, G.; KONICHI, C. **Aspects of Brazilian policy**. São Paulo: FGV, 2006. (Textos para discussão 150).

PINHEIRO, A. C.; GIAMBIAGI, F. Lucratividade, dividendos e investimentos das empresas estatais: uma contribuição para o debate sobre a privatização no Brasil. **Revista Brasileira de Economia**, v.15, n.1,1997.

PINHEIRO, A. C. **Regulatory Reform in Brazilian Infrastructure**: where do we stand?. Rio de Janeiro: IPEA,2003. (Texto para Discussão, n. 964)

PINHEIRO NETO. Boletim: Competition Law at a Glance, Edição Especial, Outubro de 2011. Available em: <http://www.pinheironeto.com.br/upload/tb_pinheironeto_boletim/pdf/071011154914Competition_Law_at_a_Glance_port.pdf>. Access at february 02, 2012.

PIRES, J.C.; GOLDSTEIN, A. Agências Reguladoras Brasileiras: avaliação e desafios.**Revista do BNDES**, v. 8, n.16, p.3-42, 2001.

PIRES, J.C.L. **The Reform Process within the Brazilian Electricity Sector**. Rio de Janeiro: BNDES, 1998.

WORLD BANK. “Brazil: The Industry Structure of Banking Services.” EconomicSector Work Report No. 40076-BR., 2007.