

Thursday, 20th September 2012
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So far, so good

The performance of Brazil's antitrust agency CADE in the first three months under the country's new law proves they were ready, the new chiefs of the agency tell Clare Bolton

Brazilian lawyers are often remarkable in international circles for their youth in attaining significant positions in their careers. Law students start work in firms or companies at 17, which means that making partnership in your mid-thirties is fairly common; the global general counsel of a number of Brazil's thriving multinationals are comfortably under 40.

Vinícius Marques de Carvalho and Carlos Ragazzo, respectively the new president and attorney general of the so-called 'Super-CADE' – the competition regulator formed from the merger of its three predecessors as part of a deep overhaul of the country's antitrust regime this year – conform to this trend, strikingly so for those used to the greater gravitas of the heads of international agencies. However, when they talk about the process of overseeing such a significant expansion in the size and scope of the agency, they do so with a calm which demonstrates a greater experience than their years imply.

This calm sails above the deep concern within the broader Brazilian antitrust bar over the last few months that CADE would just not be ready for the expansion in its tasks and powers demanded by the new law. The work has become more complicated, with stricter, tighter deadlines; problems with staffing, processes and organisation were highlighted by observers again and again. A number [feared](#) the system would bottleneck and then break down in the weeks after the law's implementation in May.

But, while there has certainly been a lot of work and some hiccups, the system is overall working well – as the new president is keen to make known. "We've worked hard over the last year, planning and preparing," says Carvalho, who was appointed as the head of the agency in May. "Our plan was well organised, which meant that we were able to implement it very rapidly."

The numbers back up his claims. Despite a rush of mergers filed before the new law came into effect by those companies and their counsel who were concerned about the implementation process of the new law, the agency is more than complying with its self-imposed deadline of 30 days to decide simple cases (the law allows up to 330 days, which was one of the frightening factors for the antitrust bar). Of the 37 cases presented to CADE in the first 100 days of the

new law, 21 have been cleared already, in an average time of 18 days – a decent showing on a global scale.

Clearing the backlog of cases filed under the old law is also a key part of the strategy. With these, the agency's tribunal is also moving at a good clip: in the last five sessions of the tribunal, 286 concentration acts have been passed. In early September, 212 mergers remained to be decided, alongside 442 relating to anticompetitive behaviour.

The market generally agrees that this introduction to the new law been well-managed. "These three first months were very successful in terms of what can be done under the difficult circumstances Carvalho and Ragazzo are facing, and facing well," says Tulio Coelho, head of competition at [Trench, Rossi e Watanabe Advogados \(associated with Baker & McKenzie\)](#). "They have been investing lots of their energy to build and consolidate the reputation of the new agency. They know that, if they lost credibility in the initial moments, it would probably be more difficult to recover it."

Of course the figures so far only relate to simple cases, and without doubt it is the complex ones, including the 16 non-fast-tracked cases already filed, which will be the proof of the its efficacy, particularly considering it will have to work in conjunction with other major jurisdictions. Moreover, fewer deals overall have been submitted over these months – not only because of the raising of the thresholds, but also because a general concern about the implementation of the new law had a chilling effect on the pace of M&A, already slowing down in a country with declining growth rates.

However, this early success shows that agency's triage system, set up to channel new submissions to the right team, and to identify their complexity, is at least working well. Cases are seen first by triage head Mario Gordillo, who came from SEAE; he assesses whether they can be fast-tracked or not, and assigns them to specialist teams: regulatory, industrial, services and differentiated products.

An institutional change brought in by the new law has also helped speed things up. Those cases which can be fast-tracked – between 70 per cent and 80 per cent, CADE estimates - no longer need to be seen by the agency's tribunal. Instead, they can be decided directly by the General Superintendence, and indeed thus Ragazzo himself has decided 20 of the 21 cases passed by the agency to date. Trench, Rossi's Coelho notes that the diligence and experience of the new attorney general will continue to have a beneficial effect on the agency's performance: "I believe that he can change significantly the way cases are investigated in Brazil, not only in terms of timing, which will probably shorter, but in terms of due process."

Another root of the success was also the team's responsiveness to the consultation conducted by the agency just before the new law was introduced. Brazilian companies were up in arms at CADE's proposed submission forms for merger control, which were long, complex, and required a serious amount of business-sensitive information. The general counsel of a number of Brazil's top

companies joined together under the banner of our sister publication, the Latin American Corporate Counsel Association, to respond to the consultation with strong concerns about confidentiality, and unnecessary bureaucracy.

“We listened,” says Carvalho simply. The ‘short form’ – used by counsel who believe their deal is simple and deserving of a fast track approach – is now much shorter; and while the ‘long form’ still asks for a great deal of information, Carvalho insists that in the complex deals they need it – thus acknowledging that for simple ones, they don’t. “We reduced and reorganised the form, and it is not creating these problems anymore.”

Ragazzo, with whom the buck stops on confidentiality, insists the agency has invested sufficient time and money in both internal systems and in IT to be able to effectively safeguard company information. He notes that Brazil’s due process and transparency rules are much closer to the EU’s than the US, and some parts of each case are open to the public by law. “However, all of our investment in IT has been focused on protecting [private] information, and we are catching up with the best international standards,” he says. “Due process, transparency and confidentiality were items we considered very carefully, in order to maintain and improve our standards.”

The idea that the agency is listening and responding to company needs is going down well in the business community, notes Tito Andrade of [Machado, Meyer, Sendacz e Opice Advogados](#). “CADE has opened a number of institutional channels to list to the opinion of both the legal and business community. This is particularly important at this moment when we have a new law and a new institutional framework in place. In other words, it is important to identify the mistakes and to quickly address them.”

The people problem

While progress so far is encouraging, issues remain on the horizon for the new, expanded CADE. The new antitrust law may allow for 200 new case workers to help cope with expanded demand, but the idiosyncrasies of the Brazilian system for hiring public employees – in which candidates study for a general exam to qualify them for public sector work and CADE competes with the likes of Banco do Brasil to attract those who pass it – mean any significant increase in staffing numbers will be a long time in arriving.

This system is an insoluble problem for the agency, and so it is responding by trying to shift the focus from recruitment to retention. “We have had a historical problem with staffing,” acknowledges Ragazzo. “The situation was unstable, with a high turnover and little sense of a career.”

Now, the new management are focusing on institutionalising the agency, with career plans for existing staff, and the likelihood of staying now a key consideration in hiring new staff. “We’re preparing for what will happen in the long term, choosing people carefully, and planning well,” he adds. “We’re bringing stability to the technical staff of CADE...which will mean the staff will be taken more seriously in the marketplace.”

A sign of how far the Brazilian system is from the ‘revolving door’ approach in the US and elsewhere emerges when the pair are asked if they can see such a revolving door developing in Brazil. Rather than considering the industry and private practice experience which could be brought in, the focus is instead firmly on the outwards flow – which is what needs to be stopped, in their eyes. “[The revolving door] becomes a problem when it becomes about the stability of the very agency,” says Carvalho. “Our staff needs to be strong and to be seen to be strong, and the departure of one person cannot be capable of changing that.” Agrees Ragazzo: “We want to generate an institutional memory, in which personal knowledge and experience comes in second place.”

Part of the push to generate an institutional memory is a plan to better use the agency’s own data on past decisions to improve future ones. This new database currently being mapped out will act as a counter-point to party-provided information, and inform and hone overall performance.

The planned database has another benefit – it could also be a useful tool with which to build bridges with other agencies with the government. Like in many other countries, the dividing line between sector-based regulators and CADE when deciding major deals in regulated industries has been hard to pinpoint in the past, creating some friction. Issues in the telecommunications industry have been particularly complicated, although troubles have arisen in banking and other deals too.

Carvalho agrees that working better with the other agencies is key, although he insists that the relationships function well and are a useful resource for his agency. Nonetheless, he points not only to the new database but also joint sector-specific training programmes as methods through which CADE can develop better interaction with other relevant bodies, particularly in resource-stressed times: “The sector specific agencies have a knowledge and experience which CADE can use up to a certain point – and this can help create a basis for dialogue.”

Phase Two

While staffing may be the key issue, other challenges loom, as [Caio Pereira Neto](#) of [Pereira Neto | Macedo Advogados](#) notes : “They need to fine tune procedural aspects of the merger system, as well as establishing new rules to deal with private equity funds and new language of the law (eg filings regarding “associative contracts” under the new law). But they seem to be aware of these challenges and are working on them.”

Indeed, the heavy focus on clearing the decks in the first few months has gone so well that Carvalho now talks of moving on to the “next step” – measuring the agency’s performance. “We have begun to assess the tribunal’s interventions and the agency’s analysis, to understand their effect on the market,” he says, mentioning the 2009 decision on *Coca Cola / Matte Leão* as one of the targets for analysis. Indeed, the agency has a specific section created under the new law, Departamento de Estudos Econômicos, which is just beginning to gear up. “This analysis is one of our main institutional concerns,” he adds.

This developmental work will have to be fostered within an environment of ever-growing complexity for the agency's output. Brazil's merger activity is slowly rebounding, especially now that the feared disaster over the implementation of the antitrust law has not materialised. As the end-of-year race to close new deals gathers pace, cases will grow both in number and in difficulty.

There are also concerns in the marketplace that CADE will lose its much-lauded recent focus on cartels and abuse of dominance work amid the heavy focus on merger control. However, Carvalho insists that will not happen. "This we have to maintain always – the important cartel cases are as central to us as ever," he says, adding that the team and the resources dedicated to cartels remain intact, and will continue to focus heavily on this work.

Of course, determination and reality are not the same thing, and once the complex cases kick in, CADE's team could look back on this implementation phase as child's play. But nonetheless, while challenges obviously lie ahead, the reformed CADE has got off to a very decent start. The team guiding the transition, while smaller than it should be according to the law, are well-prepared and energetic, and determined to make it work.