Judicial Review of Antitrust Decisions: incentives for settlements?

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Abstract

Judicial review is an essential part of competition policy institutions. In countries where the competition agency is an administrative body, judicial review may improve, mitigate or completely modify the administrative decision, and is, as a consequence, ultimately responsible for the enforcement of competition law. This article highlights an additional effect of judicial review: the incentives to induce settlements between competition authorities and companies, both in merger or conduct cases. I argue that the perspective of long and costly adversarial procedures associated to trials induce parts to negotiate and reach an agreement. I provide quantitative and qualitative evidence that Cade, the Brazilian competition authority, reacted strategically to the judicial review of its decisions, both by strengthening rules of due process and by fostering settlements with merged companies or defendants. The overall effect of judicial review on the efficacy of competition policy is ambiguous. The awareness towards due process and transparency improve decision quality, and settlements reduce litigation costs. However there is also evidence of a crowding-out effect, i.e. dynamically courts mainly tend to review cases in which parties seek to postpone the administrative decision whereas settlements attracts companies that value finality. This adverse selection of litigants distorts the role of the judicial review, as legitimate demanders of judicial services avoid the judiciary and bad litigators overload it.

Keywords: Judicial review, competition policy, settlements

1. Introduction

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

The received literature highlights the main effects of judicial review. On the one hand, judicial review disciplines actions from competition agencies, and, since it is less likely to be subject to the pressure of interest groups, decreases the probability of capture (Elhauge, 1991; Seidenfeld, 2009). In addition, the adjudication by a larger body and multiple degrees aids in the decrease of type I and type II errors, by improving the quality of the final decision (Epstein and King 2002; Trebilcock and Iacobucci, 2002; Cole 2007;). On the other hand, judicial review may directly mitigate the administrative decision, postponing the enforcement of competition law, and may add conflicting signals to economic agents, by increasing jurisdictional uncertainty (Jacobzone, Choi and Miguet, 2007, Fox and Trebilcock, 2012).

In this article we investigate an additional effect of judicial review: the incentives to induce settlements (i.e. *nolo contendere* contracts) between antitrust authorities and companies, both in merger or conduct cases, as a strategy to avoid the judiciary. We argue that the possibility of long and costly adversarial procedures associated with trials by courts induce parties to negotiate and to reach an agreement. In particular, parties that value finality are especially prone to this type of solution. On the other hand, parties that benefit from postponing the antitrust decision prefer to pursue an adversarial procedure. Dynamically, courts tend to review cases in which parties seek to postpone the administrative decision, whereas settlements will be mainly used for cases where finality is highly valued.
We provide quantitative and qualitative evidence that CADE (Conselho Administrativo de Defesa Econômica), the Brazilian competition agency, reacted strategically to the judicial review of its decisions, both by strengthening rules of due process and by fostering settlements with merged companies or defendants. The overall effect of judicial review on the efficacy of competition policy is ambiguous. Settlements tend to reduce litigation costs and to anticipate the enforcement of competition policy. On the other hand, companies that want to postpone the antitrust decision may buy time by appealing against the agency’s rulings before a court of law. This adverse selection of cases that are taken to courts distorts the role of the judicial review, which may unintentionally mitigate or even offset the positive effects on the quality of the agency’s decisions.

The remaining of this article is divided as follows: The next section provides background information on the Brazilian competition policy system and on the underlying incentives for companies and third parties to challenge authority’s decisions. Section 3 provides empirical evidence on judicial review of antitrust decisions in Brazil. Section 4 investigates in detail the strategic reactions to judicial review, in particular the incentives for settling cases in the administrative sphere. Finally, Section 5 concludes and discusses some normative implications.

2. Brazilian competition policy and judicial review: background information

In this section, we provide background information about the Brazilian Competition Policy System, and on the underlying incentives to take antitrust decision to courts. The first part of this section presents the particularities of the Brazilian case, necessary to understand the empirical analysis on sections 3 and 4. The latter part explains why a
company may prefer to settle a case instead of challenging it in the judiciary, and hence explain the demand for judicial review. These underlying incentives play a key-role on the assessment of the consequences and policy implications of judicial review of antitrust decisions.

The Brazilian competition policy is based on an administrative system, having CADE (Conselho Administrativo de Defesa Econômica), an independent administrative autarchy, as its competition authority. Although the agency was created in 1962, by Law # 4137, it was only with the enactment of Law # 8.884, in 1994, that CADE received the means and power to enforce competition policy. Judicial review of antitrust decisions, therefore, came into place, with the exception of few isolated cases, after 1994, when the competition authority began to impose restrictions upon firms. In 2012, the new competition law (Law # 12.529) was enacted, with major changes in merger review and in the organization of the agency. The empirical evidence on judicial review provided in this study is mainly related to Law # 8.884, which was the applicable statute at the time of almost all judicial appeals against CADE collected in our database. Despite being focused on the previous statute, when appropriate, this article discusses the likely implications of the new competition law on judicial review.

Regarding its structure, CADE has an internal division, the General Superintendence, which investigates conduct cases and reviews mergers and acquisitions. When the General Superintendence closes an investigation, its opinion is submitted to CADE’s administrative tribunal, which is composed by seven commissioners with a four years mandate. This tribunal makes the final administrative decision, which may be challenged in court by any interested party (e.g. companies, competitors, consumers).
As judicial proceedings are usually subject to the review of at least two courts of appeals, the scrutiny of administrative decisions may last years.

CADE may settle cases in the administrative sphere, and, as a consequence, mitigate conflict and hence the judicialization of its decisions.\(^2\) Settlements are contracts between the competition authority and companies, both in conduct cases (i.e. defendants of an antitrust investigation) or in merged cases (i.e. merged companies in a merger review). As a contract, whereby parties voluntarily agree on its terms, settlements must be strictly preferred, both to companies and CADE, to the adversarial proceeding in the court of law. To understand what motivates parties to engage in a settlement with the competition authority, we next describe the underlying incentives to take CADE’s decisions to courts.

*Why do parties challenge CADE’s decisions?*

After a party is constrained by a CADE’s decision, it may decide to challenge it at the judiciary for three different reasons. First, the firm may assess that CADE has not adjudicated properly or, at least, that the judiciary would interpret the law differently. This is a case in which there is a disagreement between the antitrust agency and companies as to what is the correct decision or what would be the final court decision. This is typically a legitimate substantive reason to access the judiciary to solve the conflict between companies and the agency in accordance with the interpretation of the competition law. As a consequence, moved by this motive, companies have expectations that the judiciary may overrule the agency’s decision, but the final outcome is uncertain.

\(^2\) These settlements can still be brought to a court of law and some cases ended up in the judiciary anyway. The assumption here is that because they are voluntary, parties will only enter into this type of agreement when they prefer not to go to a court of law.
Regulated companies may also take an administrative case to the judiciary to control a clear abuse of power by the antitrust authority, a legitimate procedural reason for judicialization. The institutional design that assures the right for a judicial appeal has as one of its primary roles to check and to counterbalance the power invested in the regulatory agency. As this case refers to a clear abuse of power, both the agency and companies expect the judiciary to overrule the administrative decision (i.e. the outcome of the judicial review is predictable). In equilibrium, agencies will refrain from abusing its power to avoid being overruled by courts. This is a latent effect of effective judicial review, inasmuch as it constraints the actions of agencies before the actual judicial review. The threat to take a case of clear abuse of power to courts is credible, since the judicial outcome is predictable against the administrative agency. As it is expected when threats are credible, the agency constrains its actions \textit{ex ante}. As a consequence, this motive to take cases to courts, although real and credible, is not actually observed.

Finally, the third reason is not a legitimate one. Companies may use the judiciary to postpone the enforcement of antitrust decisions, in what Fox and Trebilcock (2012) call “undue process”. The length of time between the administrative decision and the final judicial review, when the company will eventually have to comply with the agency’s ruling, is valuable in some circumstances. For instance, a company that uses an exclusionary strategy to deter competition may profit from the judicial review of the administrative decision if the status quo is preserved during the judicial proceedings. Even in cases where the anticompetitive strategy has ceased, the company found guilty may want to postpone the payment of fines. This is likely when the legal counsel or the
executive board prefer to postpone the payment to a distant future, when they will probably not be working in the company, to bear the full costs of fines.

It is noteworthy that companies may want to postpone the enforcement of the law even when they are certain that courts will confirm the antitrust decision. The demand for judicial review will depend, in an extreme case, only on the length of time that it takes to have the final judicial solution, combined with the possibility of obtaining preliminary injunctions to suspend the effects of the administrative decision until a final decision is reached. This illegitimate demand for judicial review allows us to call those parties ‘bad litigators’.

Consumers and competitors can also challenge an administrative decision with the judiciary. They have incentives to pursue this strategy for two reasons that are analogous to the two that induce regulated companies to take their case to courts. First, they may assess that there is a disagreement between the agency and the courts, so the latter could, with some positive probability, overrule the agency’s decisions. Again, in this case the outcome of the final judicial review is unpredictable since it must decide about an open or controversial question. Second, consumers and competitors may use the judiciary to control agency actions so as to avoid its capture by regulated firms. As in the case of the abuse of power, a motive for regulated firms to appeal to the judiciary is to control capture, a key-aspect of the institutional design of regulation and judicial review. When capture is clear and uncontroversial, the agencies, on the one side, and consumers or competitors, on the other, have the same expectation as to the final judicial decision. In equilibrium, anticipating that their decisions may be challenged in the judiciary, agencies will refrains from acting in favor of regulated companies, and,
when judicial review is perfectly effective, cases of this type will not be taken into courts. Once again, this is a latent – and quite important – effect of an operative judicial review, not directly observable in judicial cases.

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

On the other hand, parties that demand the judicial review for illegitimate reasons (i.e. to postpone the administrative decision) will be more willing to take a case to courts the more timing consuming are the judicial proceedings. This interplay between incentives to go to courts and the length of time of the judicial review causes an adverse selection of litigation. If the judicial review is too time consuming, firms that want to postpone administrative decisions (i.e. the bad litigators) will take their cases to courts when the benefits of doing so surpass the costs of litigation. In contrast, firms that would have legitimate reasons to resort to the judiciary will try alternative mechanisms that avoid the time and the costs of using the judiciary. Moreover, consumers and competitors, that
presumably also do not want to postpone the administrative decision, will take few or no cases to the judiciary.

Next section provides empirical evidence on the judicialization of antitrust decisions in Brazil, and explores the hypothesis of the unintended effect of judicial review on settlements between CADE and constricted companies.

3. Judicial review of antitrust decisions in Brazil: empirical evidence

We collected data from all decisions of CADE, from 2004 to 2010, 734 in total, where the competition authority imposed some restriction or penalty to parties (i.e. cases in which parties had a motive to demand judicial review). We then collected the data from all cases that were reviewed by the judiciary (365 cases). We have information about the type of antitrust case (merger, unilateral conduct or cartel), the length of time for the administrative decision (a proxy for complexity), the type of restriction (fines, divestiture, ancillary clauses etc.), if the administrative decision was negotiated by means of a settlement or not\(^3\), number of appeals in the administrative sphere, judicial decisions in the lower and higher courts (if they confirm, modify or invalidate the administrative decision) and some other control variables.

Descriptive statistics provide initial evidence on the effect of judicial review on competition policy effectiveness. The average length of time of the entire judicial proceedings involving Cade’s decisions is 54 months (4 years and 6 months). This is considerably higher than the international standards for competition matters, which are particularly time-sensitive. A survey with 27 countries, conducted by the International

\(^3\) We updated the data on the number of settlements and number of administrative decisions to 2012 to have a more clear description of the dynamics of the settlement policy.
Competition Network in 2006, found that only 3 of them had an average time length of judicial review over 3 years (ICN, 2006). The average duration of judicial proceedings is higher (110 months, almost 10 years) in cases where the judiciary overrules administrative decision, which presumably requires a deeper analysis. These figures, however, underestimate the actual expected duration of a regular judicial review of an administrative decision. As the enforcement of competition policy is relatively new, the most complex cases are not yet closed. That is to say that the averages presented above are likely to increase, as currently they predominantly include the simplest cases, already concluded.

Table 1 provides evidence of some important cases not yet concluded, all of them with more than 7 years under review. Two cases are particularly striking: the steel cartel case, condemned by CADE in 1999, and the Nestle-Garoto merger case, blocked in 2004 and still pending judicial decision. In the latter, it is likely that the courts will remand the case to CADE for a new decision after about 10 years. This length of time precludes the efficacy of competition policy towards mergers – a preventive intervention – since competition is a dynamic process, and competitors may have experienced irreversible fates during those 10 years. As a consequence, competition probably has been harmed by the delay in the enforcement of competition policy.
<table>
<thead>
<tr>
<th>CASE</th>
<th>Description</th>
</tr>
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<tbody>
<tr>
<td>Steel Cartel</td>
<td>Condemned by CADE in 1999, it is still pending a final judicial decision. 24 preliminary injunctions in favor of the company have been issued. Until the present moment the firms have not paid any fine.</td>
</tr>
<tr>
<td>Nestlé-Garoto</td>
<td>Merger blocked by CADE in 2004. Lower court reverted decision; higher court decided to return the case to CADE; this decision is under appeal. After 10 years, the case is still pending a final judicial decision.</td>
</tr>
<tr>
<td>merger</td>
<td></td>
</tr>
<tr>
<td>Crushed Rock</td>
<td>Condemned by CADE in 2005, until now only one firm has paid the imposed fine (US$ 1.2 million). This payment happened after the revision of the amount, which was reduced in an administrative appeal.</td>
</tr>
<tr>
<td>Cartel</td>
<td></td>
</tr>
<tr>
<td>Iron Cartel</td>
<td>The enforcement of CADE’s final judgment was obstructed by preliminary injunctions for 6 years. CADE’s 2005 decision is still pending judicial review. In this case, the judge ordered companies to provide a collateral to guarantee the fine.</td>
</tr>
</tbody>
</table>

As for the rate of judicial deference, courts confirmed, on average, 73.9% of CADE’s decisions. Moreover, the rate of judicial deference has been increasing since the mid 2000’s, being over 80% since 2008. These figures are consistent with the hypothesis of adverse selection in judicial review, as stated in Section 2. When the time length of judicial proceedings is too long, companies that demand the judicial services tend to be the bad litigators, who seek to simply postpone the administrative decision. They bring the claim to courts despite knowing that they are going to lose the case at the end of the process. The observed long duration of judicial proceedings and the high rates of
judicial deference are jointly consistent with the predominance of bad litigators in the judicial review of CADE’s decisions.

Figure 1 presents information about the number of appeals against CADE (bars) and the judicialization rate (line), measured as the number of judicial appeals divided by the total number of CADE’s decisions applying restrictions to companies (i.e. remedies in merger review or fines and behavioral restrictions in conduct cases). Thus, while the bars represent the absolute number of judicial appeals, the line represents the number of judicial appeals as a percentage of the total number of CADE’s decisions. The judicialization rate is presented in a three year moving average, i.e. each value you see in the graph is the average of three years (the very same year, the year before and the year after). This technique reduces the effect of annual idiosyncrasies, showing more clearly the trends.

Figure 1 reveals two relevant facts. First, the judicialization rate of Cade’s decisions was extremely high during the first 10 years since the enactment of Law # 8.884, ranging from 60% to 70%. This means that, on average, about two thirds of the decisions has their enforcement postponed for about five years. This can have substantial effects on competition policies given that competition matters are particularly time-sensitive. Second, although the number of appeals was still high in 2007, the judicialization rate began to fall consistently after 2005, reaching about 10% in 2012, with a trend towards further decrease.
We claim that the sharp decrease on the judicialization rate was not due to any change in the judiciary, but to CADE’s increased rate of settlements, which were, in turn, induced by judicial review. Next, we present in more detail the effect of judicial review on the agency’s actions, analyzing in particular the hypothesis that it increased the occurrence of settlements in the administrative sphere.

4. Effects of judicial review on Agency’s actions

The high proportion of CADE’s rulings that were taken to courts in the first 10 years of Law # 8.884 mitigated the enforcement of competition law. In this context, it was expected that the agency would react strategically to the likelihood of being reviewed by the judiciary. In this section, we provide evidence of two different types of reactions,
one related to the quality of CADE’s formal procedures, and other related to alternative dispute resolution mechanisms.

CADE made some effort to improve internal administrative rules of due process and to avoid any procedural vices in its decisions, reducing the motives for firms to go to the judiciary. This strategy began in 2006, when CADE held public hearings for proposed bylaws, which clearly emulated the routines and jargon of courts. The basic idea was to replicate in the administrative sphere all the nuances of what the judiciary understands as due process. There was also an effort to improve communication with judges: the agency promoted seminars on competition policy, the first in 2006, co-organized with the Federal Judges Association (AJUFE) having the judges as their main audience and CADE’s commissioners among the speakers.

In 2007, CADE implemented its settlement policy, also preceded by public hearings and efforts to inform defendants and merged companies. Before this policy, CADE was allowed to negotiate remedies in mergers and in unilateral conduct cases, but not in cartel cases. This changed with an amendment in the competition law in 2007, which gave permission to CADE to also settle cartel cases.

In addition, before 2007, the agency did not have an explicit settlement policy. Replacing the ad hoc system increased the predictability of its settlements and, more importantly, built inside the agency the capabilities to negotiate and design the appropriate contract. Indeed, an internal committee was instituted to conduct negotiations with parties, and, as part of the settlement policy, formal training in
negotiation strategies was provided to public servants, particularly to those working on the internal committee.

The trend towards negotiated procedures has also been observed in other jurisdictions, such as Japan and European Commission, among others. As a consequence, one cannot attribute this trend only to the lengthy and costly Brazilian judicial review. International fora on competition policy issues, such as the OECD and the International Competition Network, have been disseminating the concept of negotiated procedures among their suggested best practices. Nevertheless, particularities of the Brazilian judiciary create additional incentives for parties to settle their cases in the administrative sphere, and, moreover, introduce the adverse effect of undue process in judicial review.

To have a more detailed picture of the effects of judicial review on CADE’s actions, the remainder of this section answers the following questions: a) ‘Do settlements indeed reduce judicialization?’; b) ‘Was there evidence of intentionality in the use of settlements to avoid judicial review?’; and c) ‘Do settlements explain the drastic fall in the judicialization rate of CADE’s rulings?’.

**Do settlements reduce judicialization?**

Settlements are a negotiated procedure as an alternative to the adversarial procedure of a trial. In that sense, settlements are direct substitutes for courts, and, as such, should reduce the judicialization of the agency’s decisions. Nevertheless, third parties can challenge a settlement in court if consumers or competitors perceived the settlement to be too lenient with a defendant or a merged firm. As settlements can be taken to courts, it is necessary to investigate if they really reduce judicialization and, hence, could be strategically used to avoid the judiciary.
To answer this question, we rely on the data on Cade’s decisions described in the last section. As already mentioned, from 1994 to 2010 Cade had 734 decisions that imposed restrictions or penalties on defendants or merged companies; from which 365 were challenged in the judiciary. This allowed us to ran a probit regression that estimates the probability of an administrative decision ending up in the judiciary, given several observable features of the case, e.g. if the decision was negotiated by means of a settlement. Our focus is on this variable, as we need to check if settlements are indeed associated to a lower incidence of judicialization.

Table 2 provides a summary of the econometric results, which absolutely corroborates the intuitive idea that settlements are an alternative to the judiciary, consistent with the hypothesis of a strategic response to the judicial review. Controlling for all observable features of CADE’s decision, settlement has a strong and negative effect on the probability of judicialization in two different specifications of the econometric model. In the second model, a temporal dummy splits the data in before and after 2005. It is noteworthy that the coefficient for this temporal dummy is also significant and negative, which means that the probability of judicialization decreased after 2005, even controlling for the occurrence of settlements. In short, the regression indicates that settlements reduced judicialization, but also that the judicialization was lower after 2005, net from the effect of settlements. This result is explored in more detail later in this article.
Table 2
Effect on the Probability of Judicialization of Cade’s decisions

<table>
<thead>
<tr>
<th>Variables</th>
<th>Model I</th>
<th>Model II</th>
</tr>
</thead>
<tbody>
<tr>
<td>Settlement</td>
<td>-0.7862** (0.3165)</td>
<td>-0.9655 *** (0.3153)</td>
</tr>
<tr>
<td>Control variables</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Dummy 2004/05</td>
<td>No</td>
<td>-0.9082*** (0.1405)</td>
</tr>
<tr>
<td>Pseudo R²</td>
<td>0.2956</td>
<td>0.3526</td>
</tr>
<tr>
<td>N</td>
<td>734</td>
<td>734</td>
</tr>
</tbody>
</table>

Was there evidence of intentionality in the use of settlements to avoid judicial review?
When CADE settles a case, the reporting commissioner has to produce a written statement indicating if the settlement terms are convenient and appropriate. This provides interesting material to identify if settlements were intentionally used to avoid judicialization, and hence to gather further corroboration to the hypothesis that CADE has used them strategically to avoid the judiciary.

Two illustrative cases from 2006 and 2007, previous to CADE’s explicit settlement policy, contain some excerpts that unequivocally lead to the conclusion that the commission, when settling a case, had the intention of avoiding the judiciary.

The Administrative Proceeding nº 08012.003048/2001-31 investigated a refusal to deal in the cable TV content market. The defendant, Globosat, the dominant provider of Brazilian TV content, was accused of strategically refusing to negotiate access to its

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Due to space constraint, the coefficients and complete description of control variables are herein omitted, and are available upon request.
sport channel (Sportv) with cable companies that were not affiliated with its economic group. Sportv had exclusive transmission of the vast majority of sport events, being an essential part of the competition among cable TV companies. In 2006, CADE and Globosat reached an agreement where the latter agreed to sell its content in a non-discriminatory basis. In his written statement, the commissioner said “the settlement has the advantage of immediate enforcement of pro-competitive measures to benefit consumers”. Although the judiciary was not mentioned when the commissioner substantiated his opinion, it is clear that settlements (not going to the judiciary) are preferred because of its immediate efficacy of “pro-competitive measures” as opposed to the usual delay of adversarial proceedings.

A second illustration is the Administrative Proceeding nº 08012.011142/2006-79, involving a cartel in the cement industry. One of the defendants, Lafarge, signed a settlement to end the investigation in exchange for the payment of a pecuniary contribution (equivalent to a fine) and some behavioral commitments, e.g. the adoption of an antitrust compliance program. This was the first settlement in cartel cases since the amendment of the competition law, in 2007, that conceded CADE the discretion to negotiate agreements with defendants on collusive acts. In his written statement, the commissioner expressed the question that guided his inquiry: “is the settlement preferred to the ongoing litigation all the way through the final decision by the judiciary?”. He subsequently stated that “the criterion to answer this question is the present value of the expected sanction [in the judiciary]”. This commissioner explicitly frames the settlement as an alternative to the judiciary, and provides some elements for the appropriate design of the settlement contract. When the commissioner takes the present value of the expected sanction in the judiciary as the benchmark for the sanction
embedded in the settlement, he acknowledges that the judicial outcome is an outside option available to defendants, while also maintaining that the present sanction will not be lenient with the signatories. This statement indicates that CADE did not offer a reduced punishment in exchange for an agreement to not take its decision to courts. Instead, it tried to replicate what would be the *present value of the expected sanction*.

In subsequent settlements in cartel cases, the amount paid by defendants were comparable to the actual fines for similar cases, with some discount in cases that the parties agreed to collaborate with the authorities with new evidence against the other cartel members (Azevedo and Henriksen, 2010). Arguably what has mitigated the level of punishment is judicial review; the settlement policy only tries to anticipate the timing of the punishment. That is the reason why settlements cause an adverse selection in the cases that are taken to courts. Defendants that prefer to settle their case in the administrative sphere are exactly those who value finality, and hence have an incentive to anticipate the final judicial decision. Defendants that want to postpone the administrative decision will pursue the judicial proceedings until the final opportunity of appeal.

*Do settlements explain the drastic fall in the judicialization rate of Cade’s rulings?*

There is evidence that the agency deliberately used settlements to avoid the judicialization of its decisions. The remaining question is to assess to what extent the settlement policy explain the drastic decrease in the judicialization rate shown in Figure 1. The probit regression presented in Table 2 was the first evidence that settlements accounted for a decrease in the judicialization rate, but were not sufficient to explain all of it. The results indicated that the judicialization rate was lower after 2005 even
without new settlement policy. Now we proceed with a descriptive analysis of the timing of settlements and on the proportion of cases that were settled in the administrative sphere, year by year, to have a more accurate perspective on the dynamics of the settlement policy.

Figure 2 presents the annual number of CADE’s decisions with any penalty or restrictions to defendants or merged companies (white bars) and the number of cases concluded with settlements (black bars) since the enactment of Law # 8.884. The black line represents the three year moving average proportion of decisions with settlements. At the beginning of the enforcement of competition law, CADE had few decisions, but a large proportion of settlements. That was a time, as shown in Figure 1, when about two thirds of Cade’s decisions were taken to courts. It seems that in the beginning, defendants were still testing how the judiciary would interpret CADE’s activities and rulings. The settlements by then were also qualitatively different, as none of them, even in cartel cases, included any type of penalty or pecuniary contribution, but just the obligation to restrict defendants to certain business practices and anticompetitive conducts. For instance, the alleged orange juice cartel ended up in a settlement, in 1996, that closed investigations without any fine and just restricted companies from jointly negotiating with orange producers (Azevedo, 2003).

Since 1999, CADE began to enforce competition policy more fiercely and, at the same time, the proportion of settlements was reduced to less than 5%. Settlements began to increase again in 2007, with the creation of the negotiation committee and an explicit settlement policy.

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5 In this article, whenever a figure related to CADE’s decisions is mentioned it refers to cases that were subject to remedies, fines or any sort of restriction to companies.
However, in 2012, the number of settlements was only around 20% of the cases. Given that the judicialization rate was about 10% in the same year, we roughly estimate that approximately 70% of CADE’s decisions have been complied with in the administrative sphere. In addition, the proportion of settlements began to increase in 2007, two years after the beginning of the fall in the judicialization rate. Both elements indicate that settlements alone cannot explain all the drastic fall in the judicialization rate, shown in Figure 1, a finding that corroborates the results of the probit regression, presented in Table 2.
Settlements, however, are more relevant to the decrease of judicialization than what is suggested by its small proportion vis-à-vis CADE’s decisions. Cases that are settled are by and large those that would be taken to courts, involving more substantive restrictions. In contrast, there is a large group of cases in which there are minor restrictions, such as non-competition clauses in mergers. These accounted for exactly 50% of CADE’s rulings in 2012 and are relatively costless to implement – it requires just a minor change in the purchase agreement. Moreover, the jurisprudence is solid and uncontroversial in favor of CADE. As a consequence, there is no leeway for a negotiated procedure. In addition, 24% of CADE’s restrictive decisions in 2012 were related to fines for delayed notification of mergers, for which CADE has a bylaw that specifies an equation for quantifying the fine. With tied hands, CADE does not have leeway for a negotiated procedure. As a consequence, more than half of CADE’s decisions that could possibly be converted in a settlement are indeed concluded with the agreement between CADE and the defendant or merged companies.

In sum, while settlements were an important part of CADE’s reaction to judicial review, several activities related to due process, advocacy and the quality of CADE’s bylaws also played a key-role in the decrease of the judicialization rate. That is probably what explains the beginning of the decrease in judicialization in 2005, two years before CADE’s settlement policy. Moreover, even cases that are not prone to negotiation, such as fines for delayed notification of mergers, have become less likely to be taken to courts.

6 This was, for instance, the case of the merger between Sadia and Perdigão, the two largest poultry and hog meat companies in Brazil, that created the BRFoods. Other examples include the Banco do Brasil exclusive dealing case and several international cartel cases.
5. Concluding remarks

The experience of judicial review of antitrust decisions in Brazil offers an interesting example of the interplay between regulatory agencies and courts. As an administrative system, the Brazilian competition policy is subject to judicial review. In the first 10 years of the enforcement of competition law, about two thirds of the antitrust agency’s decisions were taken to courts, where the administrative decision usually rested without enforcement for about five years in average. The length of time for a final solution in more complex and important cases is even longer, irrespective to how sensitive competition issues are to the timing of the enforcement of competition law.

This article focused on the strategic reaction of the Brazilian antitrust agency (CADE) to the judicial review of its decisions, what ultimately led to a drastic reduction in the judicialization rate faced by the agency. It is plausible that some measures within the agency, related to its bylaws, transparency and due process were responses to the high proportion of antitrust cases that ended up in the judiciary. There is also strong support to argue that the judicial review induced settlements between CADE and merged companies or defendants of antitrust offences, as an alternative to avoid the use of the judiciary. Whereas the first effect is the expected and positive outcome of judicial review as a component of regulatory institutions, the second is an unintentional effect of the long duration of the judicial proceedings.

As settlements take the final judicial decision as a benchmark for its sanctions, there is no reason to believe that agencies have been more lenient towards defendants. The judicial review, however, is still mitigating the enforcement of competition law because a settlement is limited: parties only agree to its terms when these are at least as
preferable as the final judicial outcome. As argued in section 2, just the defendants and merged companies that value an early solution will agree to settle their cases. On the other hand, companies that just want to postpone enforcement of the administrative decision will still prefer to litigate. The consequence is an adverse selection of judicial cases, with predominantly bad litigators going to courts.

Dynamically, as litigators that just seek to postpone the enforcement of competition law are also more likely to lose their cases, this adverse selection effect causes an increase in the degree of judicial deference towards the agency. That is to say, as legitimate litigators tend to settle their cases in the administrative sphere, the judiciary will increasingly tend to confirm the agency’s decisions.

On the whole, judicial review has had ambiguous effect on the quality and enforcement of competition policy in Brazil. The awareness towards due process and transparency are certainly important features of the quality of regulation and may be attributable to the threat of judicial review. CADE’s experience is informative about how an agency may improve the formal aspects of its procedures if it wants to guarantee the effectiveness of its decisions.

Judicial review has also unintentionally fostered settlements between the agency and defendants or merged companies. The costs of the judicial review have been a strong incentive for parties to reach an agreement and, hence, avoid the long and costly judicial proceedings. Although one can select interesting cases whereby a fair solution for a case was immediately implemented by means of a settlement, it is plausible that a party that values timing too much will prefer to wave off its right to justice for an early solution.
In addition, courts have been dealing with cases of parties that want to postpone an administrative decision, even if they know that they will lose the case at the end of the long judicial proceedings. This adverse selection effect subverts the role of the judiciary, whose capabilities should be employed to adjudicate legitimate disputes and not to postpone a predictable outcome.

In short, the complex interplay between the antitrust agency and courts has had positive effects on the quality of the agency’s rulings, but has denied access to justice for legitimate demanders of judicial services and overloading the judiciary with bad litigators.

Competition is a particularly time sensitive matter, and, as such, should receive a different treatment as to the duration of judicial review. Speedier judicial proceedings would be enough to correct the current distortions, by withdrawing incentives for bad litigators to appeal administrative decisions.

References


