Judicial Review of Antitrust Decisions
incentives for settlements?

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Roadmap

• Judicial review is an essential part of competition policy
• CA’s strategic reaction to judicial review
  – Strengthening due process
  – Incentive for settlements
• Selection of litigants
  – Companies that settle their cases value finality
  – Predominance of ‘bad’ litigators challenging the CA
  – increasing judicial deference to the CA
• Ambiguous consequences on the enforcement of competition law; policy implications
Brazilian competition policy system: basic features

• Administrative autarchy: CADE
  – General Superintendence: investigates conduct cases and review mergers
  – Tribunal has the final administrative decision

• CADE’s decisions may be challenged in the judiciary by any party (e.g. companies, competitors, consumers) / Judiciary: civil law tradition – very formalist

• CADE may settle both conduct cases and merger cases
Why do parties appeal against CA’s decisions?

• Incentives for firms
  – Need of third party cognition to interpret the Law and adjudicate concrete cases (uncertain outcome)
  – To control abuse of power by the CA
  – To postpone antitrust decisions

• Incentives for consumers and competitors
  – Cognition to interpret the law
  – To control agency capture

• If judicial review is too costly and time consuming
  – Bias towards firms that want to postpone administrative decisions
  – Less appeals by consumers and competitors
Judicial review: some figures

• Average length of time of entire judicial proceedings on CADE’s decisions:
  – 54 months
  – 110 months when it overrules CADE’s decisions

• 73.9% confirm CADE’s decisions. More recently, over 80%.

• Long duration and the high rate of judicial deference are consistent with the predominance of bad litigators
Highlights

• Judicialization rate was about 2/3 in the first 10 years of the enforcement of competition policy
• After 2005 it fell consistently to about 10% in 2012, with tendency of further decrease

• Claim:
  • this was not due to a change in the judiciary
  • this was due to a change in CADE, induced by judicial review
How did Cade react to JR?

• Strengthening due process
  – Emulating courts routines
  – Advocacy

• Settlements (negotiated decisions)
Three questions

• Do settlements reduce judicialization?

• Was there intentionality in the use of settlements to avoid judicial review?

• Do settlements alone explain the decrease in the judicialization rate?
Do settlements decrease judicialization?

• Probit regression:
  – 734 decisions,
  – 365 challenged in the judiciary
  – Estimation of the probability of judicial review given observable features of CADE’s decisions
    • Settlement or not
    • Type of restriction
    • Case duration, etc
<table>
<thead>
<tr>
<th>Variables</th>
<th>Model 1</th>
<th>Model II</th>
</tr>
</thead>
<tbody>
<tr>
<td>Settlement</td>
<td>-0.7862** (0.3165)</td>
<td>-0.9655 *** (0.3153)</td>
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<tr>
<td>Duration</td>
<td>0.0002* (0.0001)</td>
<td>0.0002 (0.0001)</td>
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<td>Consensual</td>
<td>0.0616 (0.1965)</td>
<td>-0.1420 (0.2017)</td>
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<td>Ancilar restriction</td>
<td>0.0083 (0.1822)</td>
<td>-0.0307 (0.1887)</td>
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<tr>
<td>Divestment</td>
<td>0.3888 (0.3217)</td>
<td>-0.0307 (0.1887)</td>
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<tr>
<td>Administrative re-exam</td>
<td>0.4568*** (0.1335)</td>
<td>0.6556*** (0.1414)</td>
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<td>Administrative review</td>
<td>-0.6341** (0.3197)</td>
<td>-0.7643** (0.3329)</td>
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<tr>
<td>Condenmed</td>
<td>1.5491*** (0.2750)</td>
<td>1.2760*** (0.2803)</td>
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<tr>
<td>Notification Fine</td>
<td>0.4171 (0.2672)</td>
<td>0.5175* (0.2725)</td>
</tr>
<tr>
<td>Restrictions in mergers</td>
<td>-0.5569* (0.2858)</td>
<td>-0.5715** (0.2893)</td>
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<td>Conduct cases</td>
<td>-0.0032 (0.3165)</td>
<td>0.1360 (0.3209)</td>
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<tr>
<td>Constant</td>
<td>-1.6022** (0.6480)</td>
<td>-1.2915** (0.6541)</td>
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<td>Dummy 2004/05</td>
<td>-------------------------</td>
<td>-0.9082*** (0.1405)</td>
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<tr>
<td>Pseudo R²</td>
<td>0.2956</td>
<td>0.3526</td>
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</table>
Intentionality? Commissioners’ statements

• Administrative Proceeding nº 08012.003048/2001-31:
  – refuse to deal in pay-TV
  – Globosat refused to negotiate access to its channels to cable companies that were not affiliated to its economic group.
  – Settlement in 2006: Globosat agreed to sell its content in a non-discriminatory basis

• “the settlement has the advantage of immediate enforcement of pro-competitive measures to benefit consumers”
Commissioners statements 2

- Administrative Proceeding nº 08012.011142/2006-79
  - Cartel in cement industry
  - Defendant: Lafarge
  - 1st settlement in cartel cases in Brazil

- “The conclusion for the convenience of a settlement depends on the following question: is the settlement preferred to the ongoing litigation all the way through the final decision by the judiciary? The criterion to answer this question is the present value of the expected sanction [in the judiciary]”
Do settlements alone explain the decrease in the judicialization rate?
Conclusions

• There is strong support that judicial review induces settlements in the administrative sphere
• A side effect of the long duration of judicial review
• CADE’s settlement policy explains just part of the sharp fall of appeals against CADE.
• Some measures related to transparency and due process in 2006 are also likely explanations
Conclusions

• Dynamics:
  – Judicial review;
  – CADE more careful with due process and incentives to settlement;
  – Predominance of ‘bad’ litigators challenging CADE, and
  – increasing judicial deference to CADE

• Problem: the judiciary does not play its primary role of adjudication

• Policy implications:
  – Direct appeal to higher courts and time limit
  – Advocacy
END
Judicial review: anecdotal evidence

- **Crushed Rock Cartel** – condemned in 2005, until now only one firm has paid the imposed fine (US$ 1.2 million), after the revision of the amount under the administrative sphere.

- **Steel Cartel** – Condemned in 1999, it is still pending judicial decision, after 24 preliminary injunction and arguing. Until the present moment the firms did not pay any fine.

- **Iron Cartel** – the judgment was obstructed by judicial measures for 6 years. The 2005 decision is still pending judicial review. In this case, the judge ordered a collateral to guarantee the fine.

- **Nestlé-Garoto merger** – Blocked in 2004. Lower court reverted decision; higher court decided to return the case to CADE; After 12 years, the case is still pending judicial final decision.
Optimal institutional structure of Competition Authorities under reputation maximization: a model and empirical evidence from the case of Russia

S. Avdasheva, S. Golovanova, Y Katsoulacos

Comments by
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Highlights

• Very important and understudied subject

• Two contributions
  – **Positive theory of CA’s decisions** (rare, plausible, and appealing)
  – Empirical test of this theory for the Russian CA
Sketch of the argument

• CA cares about reputation
• Reputation is negatively affected by being overruled by the judiciary
• ‘Generalist’ CA has discretion to allocate its budget into different tasks, which may be associated to different probabilities of being overruled and different costs.
• Non proper antitrust decisions are less likely to be reversed and are less costly
• Bias towards NPA (and simpler tasks)
• Conclusion: Specialized CA perform better
Empirical analysis

- FAS

- Target variable: NPA vs PA (proper antitrust decisions)
  - Probit regression on the probability of enforcement success
  - Linear regression on the duration of litigation (as a proxy for the cost of investigation)
Point for clarification

• Model: Enforcement success affected by # of decisions not reversed (p. 10) (effectiveness)
• But on p. 17: “Enforcement success is measured by the share of infringement decisions that stay in force after judicial review (a very important performance indicator for FAS)
• Question: # or share?
Suggestions 1

• The same idea could be applied to a analogous problem

• Quality of CA’s decision is multidimensional (formalism and economic analysis; not only enforcement success)
  – Assume that the judiciary tends to overrule on formal grounds but not on the merits
  – CA will tend to allocate more effort on formalism.
Suggestions 2

• Model explores the institutional structure of CA: generalist and specialized authorities

• Empirical analysis of FAS (generalist)

• It would be nice to have a study with other jurisdictions, so as to explore the variability across CAs
Suggestions 3

• One cannot observe FAS decisions not appealed
• Bias against paper’s hypotheses (probability of appeal is lower for NPA), OK.
• Duration at the judiciary may not be a proxy for cost of decisions at FAS (H2). The CA can increase costs to prepare the case for judges.
• Suggestion: test the number of pages of the appealed decisions
Suggestions 4

• Table 1: Two dimensions for the analysis: policy portfolio diversification and performance assessment.

• It would be nice to include also the strength of incentives (effects of assessment on payoffs)
  – e.g. Cade resources and authorities terms do not depend on performance (weak incentives)
Final comment

• The case against “generalist CA” may be stronger (not only the bias towards simpler tasks).

• With discretion to use different principles (e.g. competition, consumer protection, industrial policy), CA becomes less predictable and, hence, the does not play its essential role of guiding behavior.
Minor points

• P. 13: Assumption that CA is constrained to undertake a minimum # of decisions per task. Not plausible in some cases (e.g. merger review) and could be substituted by convexity of cost and benefit functions

• P. 17: The average duration = 10 months(!). The whole judicial procedures (after all possible appeals)? The database tracks the path of a decision throughout all judicial phases?