



COMPETITION COMMITTEE

**ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS
IN BRAZIL**

2003

1. Changes to competition laws and policies, proposed or adopted

1.1 Summary of new legal provisions of competition law and related Legislation

1. There are no new legal provisions of competition law and related legislation. Notwithstanding, representatives of the three antitrust governmental bodies have been discussing, since 2000, important amendments to the Brazilian antitrust law. A new structure for the Brazilian Competition Policy System is being designed in order to avoid some duplication of current activities. The amendments will also introduce some new important features, such as pre-merger notification system and early termination for simple cases. Together with the Bill for amendments to the Brazilian antitrust law, it will be a proposed for the creation of a career for technicians in competition and regulation.

1.2 Other relevant measures, including new guidelines

2. The major improvement regarding merger review has been the substantial reduction of the review period in the past two years. Since 2002, on an informal basis, SEAE and SDE have been introducing a "Simplified Procedure" for simple cases, which reduced in about 86 days the review period, as well as allowed the Secretaries to focus in on the more important cases. Currently, 50% of the caseload is being reviewed under the simplified procedure, which became a formal administrative provision in March 2003. In 2004, the Brazilian authorities added a new category of cases that are now eligible for the simplified procedure, which are those where the merging parties' turnover within Brazil is less than R\$ 400,000,000.00 reais (aprox. US\$ 133,000,000.00). In addition, as of January 2004, SEAE and SDE informally instituted a "Joint Procedure for Merger Review" that has also been significantly expediting the analysis. Immediately after the submission, staff members of both Secretariats started working together, with more or less intensity depending on the complexity of the case. Thus, when the case reaches SDE, the report will be immediately issued, as the analysis will have been already done together with SEAE.

1.3 Government proposals for new legislation

3. In addition to the new categories of cases analyzed under the "Simplified Procedure for Merger Review", it is also worth mentioning that as of July 2003, representatives of the three antitrust governmental bodies continued the discussion initiated in 2000 regarding important amendments to the Brazilian antitrust law. The proposed draft bill introduces a new structure for the Brazilian Competition Policy System, with SEAE and SDE merged into one Competition Agency. There are also some new important features, such as pre-merger notification system, early termination for simple cases, the participation of the Agency in the trials representing consumers' interests and the definition of cartel as a per se injury.

2. Enforcement of competition laws and policies

2.1 Action against anticompetitive practices, including agreements and abuses of dominant positions

a) Summary of activities of:

- competition authorities;
- courts.

4. New techniques for cartel investigation were implemented by the Brazilian authorities during 2003. An intelligence centre for cartel investigation was created together with the federal police and public

prosecution offices. The first dawn raid related to cartel investigation was successfully carried out, and six others followed; the first leniency agreement of the Brazilian Competition history was entered by SDE and SEAE and the use of wiretapping was intensified.. Besides, a larger number of conduct investigations were concluded and decided by CADE. Through the use of those new techniques, the increasing number of condemnations, the closer work of the SBDC with criminal authorities and the wide publicity done about all those actions, the SBDC has been able to show that the risk of engaging in anti-competitive behaviour is increasing.

5. CADE analyzed twenty-three cases of possible anticompetitive actions during 2003. Of those the main accusations were related to collusion, with eleven cases. Of these eleven cases denounced, two were condemned for formation of cartel. The remaining twelve cases encompassed various other forms of anticompetitive conducts.

6. Among the sectors in which the allegations of anticompetitive practices were more frequent, the most often cited was related to health insurance plans and medical services associations (nine), gas stations (two), metallurgic sector (one), food industry (one), civil construction (two), cattle breeding (one), retail commerce (one), transport (two), printing and publishing (one), pharmaceutical industry (one), and others (two).

7. From the total of twenty-three cases, ten were found guilty, resulting in the imposition of fines and others sanctions. Thirteen cases were considered not guilty, and the cases were consequently closed.

b) *Description of significant cases, including those with international implications*

Cartels

- Administrative Procedure nº 08000.021976/1997-51
(293 Ordinary Judgment Session, 07/02/2003)

Denouncer: SINAMGE – National Syndicate of Medical Companies

Defendant: Medical Association of the city of Londrina (AML) and “Sagrada Família” Infant and Maternity Hospital.

Reporting Commissioner: Roberto Augusto Castellanos Pfeiffer

6. Abstract: Denunciation regarding the use of dominant position by the Defendant while exercising influence upon competitors to adopt the same commercial conducts. Imposition of price schedule ordered by class entities.

7. Summary: Denunciation made by SINAMGE - National Syndicate of Medical Companies, against the anticompetitive practice of forcing the competitors to adopt the same conducts, and to accept the imposition of a Medical Procedures List. Conducts prohibited by article 20, combined with article 21 of Law 8884, of 1994.

8. The denouncer affirms that the goal of the Medical Association of the city of Londrina is to centralize and standardize all commercial procedures, aiming to certify all doctors as well as the various types of private health insurance companies via the medical companies group of that city.

9. The Reporting Commissioner proposed to the Council the imposition of a fine of R\$ 6,384.60 against the Medical Association of the city of Londrina, in accordance with subsection III, of the article 23 of Law 8884/94.

10. It was also determined that the defendant cease to distribute and publish price lists, or any other sort of information among its members which could influence them to adopt anti-competitive conduct procedures.

11. The defendant is also obliged to publish a Public Notice with CADE's decision, as written in article 24, subsection I, of Law 8884/94, in the most renowned newspaper of Londrina. The Defendant must inform its affiliated entities and associates of CADE's decision. The entity had to demonstrate to CADE its compliance with the determinations imposed, no longer than 30 days after publication of CADE's decision in the Federal Official Gazette.

12. Decision: The Council unanimously decided to remove the "Sagrada Família" Infant and Maternity Hospital from the investigation (Administrative Procedure) and only considered the Medical Association of the city of Londrina as subject to article 20, subsections I e IV, in addition to the article 21, subsection II, of Law 8884/94. A fine was imposed of R\$ 6,384.60, as well as other sanctions and determinations according to the Reporting Commissioner's vote.

- Administrative Procedure nº 08012.0004036/2001-24
(294 Ordinary Judgment Session, 07/23/2003)

Denouncer: Public Prosecution Ministry of the State of Santa Catarina – Public Prosecution Office of Consumer Defense of the Lages

Defendant: Mr. Osmar Dematé, Mr. Fernando Picinini, Mr. Álvaro Mondadore Júnior, Mr. Valmor Medeiros Júnior, Mr. José Antônio Granzotto Neves, Mr. Guido José Moretto, Mr. Pedro Fernandes Júnior, Mr. Jorge Córdova, Sadi Montemezzo. Gas Stations: A Roleta Auto Posto Ltda., Posto Central, Posto de Combustíveis Dematé, Posto Marechal, Auto Posto Raid, Postos Grazziotin, Posto Lageano, Posto Rex Ltda., Posto D. Pedro, Auto Posto Ouro Preto Ltda. and Union of Retail Holders of Petroleum Derivatives of the State of Santa Catarina – SINDIPETRO/SC.

Reporting Commissioner: Thompson Almeida Andrade

13. Abstract: Denunciation made by the Public Prosecutor's Office of the State of Santa Catarina to the Secretariat for Economic Law (SDE), based on evidence of a probable cartel formation, against retail fuel companies in the city of Lages, Santa Catarina, these having been influenced by the Union of Retail Holders of Petroleum Derivatives of the State of Santa Catarina – SINDIPETRO/SC.

14. Summary: The evidences constituted by telephone interceptions, bills of sale of gas stations in the city of Lages, press news and the monitoring of the prices by the National Petroleum Agency, demonstrated that the conducts led to price fixation among the accused gas stations, under the influence of the Union and its legal representative.

15. The taped conversations highlight the deliberate intention of prohibiting merchants to sell at prices lower than the ones established by the common agreement. The clear intention was to limit the charging of varying prices, thus reducing competition.

16. Any such behaviour which aims to fix prices would be highly prejudicial to the competitive environment and poses a clear obstacle to free initiative and competition.

17. The tape records clearly demonstrate that the defendants maintained conversations on a regular basis, almost always dealing with the resale prices adopted by each one. Each of the participants monitored the prices of the competitors, and any change was reported immediately to the representative of the Union at Lages. This demonstrates clearly the presence of a structured group formed by petroleum retailers in the

city of Lages, which proceeded in a coordinated way to artificially fix and standardize prices. Such behaviour clearly characterized the existence of a cartel which resulted in serious anticompetitive effects in the common gasoline retail sale market in Lages.

18. Decision: The council by unanimous vote in a preliminary analysis, decided to remove from the Administrative Procedure the company Postos Grazziotin. The council also unanimously considered the conduct of the Union of Retail Holders of Petroleum Derivatives of the State of Santa Catarina – SINDIPETRO/SC as typifying behaviour covered by the articles 20, subsections I, II and III, and article 21, subsection II, of Law 8884/94, and thus imposed a fine of R\$ 55,000.00. Regarding the other gas stations, the Council determined their conducts as typified by article 20, subsections I, II and III, and article 21, subsection I and XXIV of Law 8884/94, and accordingly imposed a fine of 15% of the company's annual receipt. In relation to the individuals involved, the Council applied a fine of 15% of the value of the fine imposed upon the respective gas stations controlled by each of the accused.

Other Anticompetitive Conducts

- Administrative Procedure nº 08012.001280/2001-35
(275 Ordinary Session of Judgment, 01/15/2003)

Denouncer: Sr. Yamil e Souza Dutra

Defendant: Unimed Encosta da Serra (health insurance)

Reporting Commissioner: Miguel Tebar Barrionuevo.

19. Abstract: Obstructive practice to free competition and abuse of dominant position. The UNIMED contributing doctors were prohibited from providing medical services to competing companies.

20. Summary: The Denouncer alleged that UNIMED was forcing its contributing professionals to attend patients using a different health insurance company, other than UNIMED.

21. The Reporting Commissioner decided that the exclusivity order to the medical professionals represented an obstacle to the proper functioning of the medical services and health insurance market, due to the imposition of indivisibility of available hours for its contributing doctors. The exclusive affiliation represents a contractual commitment that adds costs to doctors changing their jobs. The costs incurred in the disaffiliation process and to a possible new affiliation are factors that discourage the reallocation of medical services to areas where the demand is higher.

22. The exclusivity also allows for covert strategies of restricting availability of labour when the available working hours of the professionals to attend other companies are restricted. This strategy elevates the costs of entering the market to potential to competitors in the same market.

23. The health "plans" were determined to be similar to the health insurance plans.. Due to the uncertainty about health risks and due to the peculiarities of the relationship between doctors and patients, the consumers of health "plans" are in search of a larger variety of specialized treatment options as well as choice of professionals in each area. It is for this reason that in geographic markets of small dimensions, the practice of exclusivity of affiliation can become a significant barrier to entrance in the health "plans" market.

24. The imposition of exclusivity is against the determinations of Law 9656/98, that deals with private health "plans" and insurance plans.

25. Decision: The Council unanimously held the Defendant guilty for violating the dispositions of article 20, subsections, I, II and IV of Law 8884/94. UNIMED was condemned to pay fines of R\$ 225,384.00 and R\$ 331,698.00, among other sanctions determined in the vote of Commissioner Cleveland Prates.

- Administrative Procedure 08000.0023281/97-41
(281 Ordinary Session of Judgment, 03/12/2003)

Decouncer: Ms. Rosânia Emília Ribeiro da Cunha.

Defendants: Unimed of the city of Araguari and Unimed of the city of Uberlândia

Reporting Commissioner: Ronaldo Porto Macedo Júnior

26. Abstract: Obstructive practice to free competition and abuse of dominant position. The contributing doctors were prohibited from providing medical assistance to competing companies.

27. The Council unanimously held the Defendants guilty for violating the dispositions of article 20, subsections, I, II and IV combined with article 21, subsections IV, V and VI of Law 8884/94. The Defendants, based upon article 23, subsection III, as well as article 27 of Law 8884/94, were condemned to pay a fine of R\$ 63,846.00, totalling R\$ 127,692.00, among other sanctions.

- Administrative Procedure nº 08012.021738/96-92
(283 Ordinary Session of Judgement, 03/26/2003)

Denouncer: Sinamge – National Syndicate of Medical Companies

Defendant: COOPANEST/GO – Cooperative of Anesthesiologists of the state of Goiás Ltda.

Reporting Commissioner: Fernando de Oliveira Marques

28. Abstract: Imposition of price schedule upon the doctors. Transgression of article 20, subsections I, II and IV combined with article 21, subsections, II and V of Law 8884/94. Ceasing of the conduct. Fine imposed.

29. Summary: The infraction imputed to the Defendant's conduct relates to the imposition, through documentation sent to all of the affiliated anesthesiologists in the state of Goiás, of a price list covering anesthesiological procedures, called a "Reference List of Fees".

30. The Reporting Commissioner determined that there appeared to be no means to contract an anesthesiologist who does not charge the fees stipulated in the Reference List, which causes the same effects of a price list, a practice which is condemned by the Competition Council. It was also determined that the Defendant aggregated the majority of the doctors of the geographic market, which attests to its market power.

31. Decision: The Council unanimously held the Defendant guilty for violating the dispositions of article 20, subsections I, II and IV, combined with article 21, subsections II and V of Law 8884/94, characterizing the conduct of promoting the alignment of commercial behaviour among the associate companies through the adoption of a Reference List of Fees. Determined to be prejudicial to the economic order, the Council demanded that the Defendant: a) cease the conducts; b) pay a fine of R\$ 63,846.00, based upon article 23, subsection III of Law 8884/94 and; c) publish the decision in half a page of the most renowned newspaper in the capital city of the State of Goiás, for two consecutive days, during two

consecutive weeks. The payment of a daily fine of R\$ 5,384.00, based upon article 25 of Law 8884/94, was also determined to be instituted if the Defendant disobeyed any of the conditions of the decision.

- Administrative Procedure nº 08012.006397/97-02
(293 Ordinary Session of Judgment, 07/02/2003)

Denouncer: Committee of Integrated Closed Health Assistance Entities

Defendant: Doctors Association of the state of Piauí – APM

Reporting Commissioner: Roberto Augusto Castellanos Pfeiffer

32. Abstract: Imposition of price schedule of medical services by class entities. Relevant market defined as medical services offered in the state of Piauí. Violation of article 20, subsections I and IV, combined with article 21, subsection II of Law 8884/94. Existence of evidences regarding restrictive conducts to competition and its consequent damage to the market.

33. Summary: The Reporting Commissioner determined that the documentation brought to the process by the Denouncer is sufficient to prove that the Defendant influences its affiliated members to observe identical prices, based upon the price readjustment index decided by the Doctors Association of the state of Piauí, as well as the prices to be charged to consumers, and the adoption and usage of the Price List of the AMB (Doctors Association of Brazil).

34. The relevant market was defined as being medical services or medical assistance, sold through health “plans” and insurance. The geographic market was defined as being the state of Piauí. The Defendant’s behaviour sought to subvert the price formation mechanisms of the medical and hospital services, which characterizes clear violation of article 20, subsections I and IV, combined with article 21, subsection II of Law 8884/94.

35. Decision: The Council unanimously held the Defendant guilty for violating the dispositions of article 20, subsections I and IV, combined with article 21, subsection II, of Law 8884/94, and imposed a fine of R\$ 6,384.00, based upon article 23, subsection III, of Law 8884/94. The Defendant is prohibited from publishing a price list or furnishing any type of information about medical and hospital services prices to its affiliates, nor influencing them to any other behaviour that results in the uniformisation of conducts among competitors. The Defendant must publish the decision in half a page of the most renowned newspaper in the capital city of the State of Piauí, as posited by article 24, subsection I of Law 8884/94, for two consecutive days, during two consecutive weeks. A daily fine was also determined in the amount of R\$ 5,320.50, based upon article 25 of Law 8884/94, to be imposed if the Defendant disobey any of the conditions of the decision.

- Administrative Procedure nº 08012.004156/2001-21
(296 Ordinary Session of Judgment, 08/13/2003)

Denouncer: Sinamge – National Syndicate Group Medicine Companies

Defendant: UNIMED of the city of Macapá – Cooperative of Medical Works Ltda.

Reporting Commissioner: Roberto Augusto Castellanos Pfeiffer

36. Abstract: Abuse of dominant position by UNIMED through influencing the adoption of uniform commercial conducts or agreements among competitors.

37. **Decision:** The Council unanimously held the Defendant guilty for violating article 20, subsections I, II and IV, combined with article 21, subsections IV, V and VI, of Law 8884/94. The following penalties were imposed: a) fine, based upon article 23, subsection III, of Law 8884/94, of R\$ 225,384.00, considering the seriousness of the conduct, its effective consummation, the degree of harm to free competition and the economic situation of the Defendant (article 27, subsections I, IV, V and VII, of Law 8884/94); b) the sending of a copy of the whole procedure to the Federal Public Prosecutors Office, to the Public Prosecutors Office of the state of Amapa, and to the National Health Agency, for analysis and determinations they consider applicable; c) the determination that the Defendant must cease the conducts immediately, and remove the exclusivity clause from its social contract in a 20 days period after the publishing of the decision in the Federal Register; d) and also the ruling that the Defendant must publish the Council's decision in half a page of the most renowned newspaper of the capital city in the geographic market, as posited by article 24, subsection I of Law 8884/94, for two consecutive days, during two consecutive weeks; and also other procedural sanctions.

2.2 Mergers and acquisitions

a) Statistics on number, size and type of mergers notified and/or controlled under competition laws

38. CADE judged 526 cases of merger during 2003. Of this total, 484 were approved without any conditions imposed by the Authority. It is worth noting that CADE imposed fines in 17 cases of this group, because the firms submitted notifications after the legal time limit for filing was expired.

39. Eight cases were approved with conditions, including:

- a) limitations related to territorial aspects of non-competition clause – 2
- b) alteration of the geographic dimension of the non-competition clause – 1
- c) reduction of the non-competition clause for 5 years - 4
- d) exclusion of part of the contract clauses – 1

40. In relation to the rest of the cases of merger, 32 were closed and archived without judging their merits, due to their lack of application to the original objective.

41. An APRO (Accord of Preservation of the Reversibility of the Operation) was signed between CADE and the petitioner during 2003 (BR Participações e Empreendimentos S/A e G Barbosa & cia. Ltda.), in the Supermarkets sector.

b) Summary of significant cases

- Merger Act nº 08012.003158/2002-84
(298 Ordinary Session of Judgment, 09/03/2003)

Petitioners: Alcoa Alumínio S.A., BHP Billiton Metais, Camargo Corrêa S.A., Companhia Vale do Rio Doce e Votorantim Cimentos Ltda.

Reporting Commissioner: Cleveland Prates Teixeira.

42. **Abstract:** Formation of the Gesai Consortium – Entrepreneurial Group “Santa Isabel”, intending to operate in the electric energy sector.

43. **Summary:** Creation of the Gesai Consortium – Entrepreneurial Group “Santa Isabel”, intending to operate in the electric energy sector. The Consortium is composed of the companies Alcoa Alumínio

S.A., BHP Billiton Metais, Camargo Corrêa S.A., Companhia Vale do Rio Doce e Votorantim Cimentos Ltda..

44. The petitioners created the Consortium to explore the hydroelectric availabilities at the Araguaia River. It has a minimal installed energy power of 1087 megawatts. The Consortium signed a Concession Contract with the Federal Union – Electric Energy Agency, for the usage of a public good. According to the Contract, the Petitioners will be an independent producer, which will permit them to use freely their energy share for self-consumption or for commercialization, according to Laws 9074/95 and 9648/98.

45. The reports of the Secretariat for Economic Law and CADE's Prosecution staff or legal office were in favour of the operation's unconditional approval.

46. The market participation of the Consortium in the North Subsystem of electric energy generation will be 12,8%. The Petitioners, however, did not participate in this market before the operation. The Secretariat for Economic Monitoring of the Ministry of Finance concluded that the operation does not present or result in horizontal concentration, nor vertical integrations.

47. Decision: The Council, unanimously, approved the operation without imposing any restrictions.

- Merger Act nº 08012.006508/2002-64
(285 Ordinary Judgment Session, 04/16/2003)

Petitioners: Votorantim Participações S.A., Votorantim International Holding NV, Optiglobe Communications Inc, Optiglobe Brazil LLC, Energyworks do Brasil Ltda.

Reporting Commissioner: Cleveland Prates Teixeira

48. Abstract: Acquisition by Votorantim Group of the shareholder control of Optiglobe Telecomunicações S.A., representing 100% of its voting capital, and 97% of its total capital. The other 3% will be offered to EnergyWorks do Brasil Ltda.

49. Summary: Acquisition by Votorantim Group of the shareholder control of Optiglobe Telecomunicações S.A., representing 100% of its voting capital, and 97% of its total capital. The other 3% will be offered to EnergyWorks do Brasil Ltda.

50. The operation can be divided in three parts, which, by the end, results in the total acquisition of the shareholder control of the company Optiglobe by Votorantim.

51. The Votorantim Group informed that they were entering the national market of stored corporative data. However, it was verified that the Group has ordinary stocks of other players in this same market. However, Votorantim does not have administration power in any of the companies, which does not attribute to them a significant market power.

52. Decision: The Council, unanimously, approved the operation without the imposition of restrictions.

- **Merger Act nº 08012.006976/2001-58**
(309 Ordinary Judgment Session, 12/17/2003)

Petitioners: BR Participações e Empreendimentos S.A., G. Barbosa e Cia. Ltda. e Serigy Participações e Empreendimentos Ltda.

Reporting Commissioner: Cleveland Prates Teixeira

53. Abstract: Acquisition, by BR Participações e Empreendimentos S.A. (BRPAR) of the totality of the assets, stocks and credit rights of the sales with the “Credi-Hiper” card, of G Barbosa & Cia. Ltda. Company and Serigy Participações e Empreendimentos Ltda., related to the retail commerce.

54. Summary: According to the Secretariat for Economic Monitoring, the operation involves 16 geographic markets. Some barriers to entry in these markets were identified, such as: a) presence of economy of scale; b) irrecoverable costs with publicity, in order to introduce a new brand in the market; c) the necessary cost to reduce the degree of loyalty of the consumers; d) the location of the stores and the know how of each market.

55. It is previewed in the contract signed between the competitors a non-competition clause for a 5 years period, which is accepted within the limits of CADE’s jurisprudence.

56. Decision: The Council, unanimously, approved the operation with the imposition of the following restrictions: a) the alienation of 16 supermarket establishments acquired in the operation; b) the alteration of Clause XX of the contract signed between buyer and seller in 21 of January, 2001; in order to limit the special clause to the markets defined in the decision, and that it refers only to the supermarket and hypermarket market.

- Merger Act n° 08012.07861/2001-81
(295 Ordinary Judgment Session 08/06/2003)

Petitioners: NN Holding do Brasil Ltda. e Biopart Ltda.

Reporting Commissioner: Thompson Almeida Andrade

57. Abstract: The majority of the stocks of Biobras S.A. will be transferred to the property of NN Brasil. The operation is subsumed to paragraph 3 of article 54, of Law 8884/94, due to the “faturamento / billing” of the Petitioners.

58. Summary: As a result of the operation, the company Biommm S.A. was created, in part as a result of the division of the company Biobras, which will maintain the North-American patent for the production of insulin crystals by DNA technique; the contracts related to the patents and intellectual property; the additional contracts listed on the *Swap Agreement*, the goods related to the patents, certain employees determined and, the amount of R\$ 8.3 millions, in species. There is also a non-competition clause in the *Swap Agreement*, which represents that Biommm will only operate in the insulin market for 3 years.

59. The insulin market is highly concentrated in Brazil, and in other parts of the world, due to the reduced number of companies that produce and commercialize insulin. The know-how required for the production of the product is limited, which makes it possible only for a few companies to produce it. These market characteristics suggests that the analyzed operation was not responsible for the high concentration of the insulin market in Brazil, because it was already concentrated before the negotiations, even though it is clear that the operation strengthened the concentration.

60. It was important in the analysis to verify the existence, in the Brazilian market, of companies that could compete or, at least, demonstrate the ability to behave as a competitor.

61. For this reason CADE determined the exclusion of the non-competition clause of the contract, saving, with this measure, a competitor.

62. Decision: The Council, unanimously, approved the operation with the restriction of eliminating the non-competition clause from the contract. It was also recommended that the Commerce Department revised the antidumping measures imposed to Novo Nordisk and Eli Lilly.

3. The role of competition authorities in the formulation and implementation of other policies, e.g. regulatory reform, trade and industrial policies

63. In recent years, many sectors of the Brazilian economy, formerly characterized by state-owned or publicly sanctioned monopolies, are undergoing restructuring. State-owned assets have been privatized, government controls have been removed, and new entry has been permitted. In some sectors, new and independent regulatory agencies have been created (Electricity Sector, Oil, Medicines, Health Plans and Telecommunications). The pace of reform varies from sector to sector, however.

64. Law n. 8.884/94 (Main Competition Law of Brazil) applies fully to these regulated sectors and also to privatization in these sectors (transactions here are considered as mergers). This means that the competition protection function in regulated sectors is assigned to the competition authorities, which work in a cooperative basis with the independent regulatory agencies. Thus, as a general rule, there are no exemptions from the competition law for any of the regulated sectors in Brazil.

65. In the electricity sector, a regulatory agency responsible for the electricity industry was created in 1997 (National Agency for Electricity – ANEEL). This agency is overseeing the privatization and liberalization of the industry. However, it has been facing difficulties in promoting competition in the wholesale market in the shorter run, which would permit distributors and large consumers to contract directly with generators, and also difficulties in separating the different segments of the sector and in privatizing the existing large, vertically integrated state-owned utilities and re-working the many large, long term supply contracts that now exist. The law establishing the new electricity regime requires ANEEL to give effect to competition in the industry where possible. ANEEL has entered into co-operation agreements with all three competition agencies. The parties have agreed to share information and technical expertise; ANEEL has pledged to work with SDE in its conduct investigations, and it provides technical opinions to SDE and CADE on mergers and privatization in the industry, which are fully subject to the competition law. ANEEL has also pledged to develop relationships with the other national regulatory bodies, ANATEL (telecommunications) and ANP (oil).

66. In the natural gas and petroleum sector, the Hydrocarbons Law of 1997 created a regulatory agency to oversee these markets, the National Oil Agency – ANP. The state-owned firm Petrobras had been a monopolist in the production, refining and pipeline transportation of these products. The 1997 law officially ended that monopoly, but Petrobras, still state-owned, continues to be the dominant firm in these markets. ANP is implementing some reforms pursuant to the new law, but the progress is relatively slow. ANP has promulgated rules relating to cross-ownership and self-dealing, but currently they do not extend much beyond the obligation to report such relationships or transactions. An important issue facing ANP is ensuring open access to the transportation pipelines; capacity in the system is constrained at some locations. ANP is working on access regulations; currently, pipeline operators are required to publish information on available capacity. As in natural gas, ANP rules require that the ownership and operation of oil pipelines and oil production facilities be in separate legal entities, but the rules do not prohibit cross ownership of such entities. The competition law applies to the oil and gas sector in most respects. The hydrocarbons law explicitly requires the promotion of competition in the sector. As with telecommunications and electricity, working groups between ANP and the competition agencies have been created. There have been an increasing number of competition cases in oil and gas. Some mergers have come before the Competition Bodies of the SBDC. Recently, gasoline stations were condemned by CADE for behaving like a cartel.

67. However, there are some specific situations between the SBDC and certain regulated sectors. In the telecommunications sector, Seae and SDE are not in charge of the instruction phase. The competition law applies fully to the regulated sectors of the economy. The competition authorities are in charge of its enforcement and work in cooperation with the regulatory agencies, which, like Seae and SDE, prepare reports on the operation/case to be sent to CADE. CADE always has the final word on competition cases.

68. Notwithstanding, in the telecommunications sector, by law, only ANATEL, the sector-specific regulator, prepare a report to be sent to CADE. Seae and SDE do not issue an opinion regarding those cases.

69. With respect to the financial system, there is currently a legal conflict regarding the ability to analyse mergers and anticompetitive practices. The Central Bank claims that it is the institution responsible for this specific task, while CADE argues the same. There is a draft-bill still pending approval in Congress stipulating that the Central Bank will be responsible for mergers and anticompetitive reviews whenever a risk for the financial system's stability exists. If that is not the case, CADE will have this specific duty.

70. With regards to pharmaceuticals and health equipment, components, primary goods and services, ANVISA (the sector-specific regulator) has an overlapping function regarding the instruction phase of some anti-competitive conducts cases.

71. In general terms, up to now, the regulated sector personnel are still not fully aware of the importance of competition. In many instances, most concerns of the regulatory agencies are related to the economic performance of the regulated companies, i.e. the supply side. A competitive environment, where lower prices are charged, could harm these companies. Thus, regulated sector personnel may not always favour competition, if it affects negatively the economic performance of the regulated companies. However, in areas, which require public bids, it is mandatory by law that regulated sectors promote and charge the lowest fares and public prices as possible.

72. Competition advocacy promoted by the competition bodies in Brazil has been trying to promote the idea of competition in regulated markets. During the last few years, the Competition Authorities in Brazil have invited regulatory agencies to participate in seminars, meetings and discussions in most regulated sectors. These Bodies have also published studies of competition in regulated sectors. In addition to that, it is within the Competition Bodies' scope to participate of the elaboration of regulatory acts by the regulatory agencies.

73. However, the success of competition advocacy in regulated sectors in Brazil has been still very limited. In general terms, it has been difficult to change the behaviour of regulatory bodies, most of which tend to be influenced by the complaints of the enterprises acting in the regulated sectors. Naturally, most companies in regulated sectors face small competition due to the characteristics of regulated sectors (large and capital intensive companies, which require large amounts of investment). Their decisions on prices charged are often based on price-elasticity, not on costs. Thus, regulatory bodies may be relatively influenced by the characteristics of the sector and by the small number of large regulated companies. Nonetheless, it is necessary to say that the success of competition advocacy varies from sector to sector. While in telecommunication sector this matter is well developed, in others sectors, such as oil, gas and ports, many improvements must me done.

74. In 2003, it has been observed on the one hand that some sectors, which were going through competition improvements, have suffered a reverse process. The civil air transportation is an example. During the last decade this sector had been going through a path of liberalization until the beginning of the last year, when the Department of Civil Air Transportation decided to raise the barriers to entry and to control the supply of this service, despite all alerts of the competition bodies.

75. On the other hand, there were some cases of success regarding activities of competition advocacy for regulated sectors in recent years in Brazil. In the case of road concessions in 2003, the Ministry of Finance, in collaboration with the Federal Court of Accountings, has discouraged the methodology used in bids for roads concessions, which was based on restrictive criteria for the selection of competitors in the process. In fact, the Government body responsible for road concessions had established strict criteria for the selection of companies that could participate in the bid for new road concessions. Both the Ministry of Finance and the Federal Court of Accountings were against the criteria adopted in the bid process, because only a few large companies were able to participate in the process. Currently, the Ministry of Transportation has been creating a new methodology that could allow a much larger number of companies to participate in the bid process.

76. Best practices in regulated sectors are still under discussion worldwide. They depend specifically on the sector analyzed and they may change over time. Up to now, it has been particularly interesting for policy makers to participate in debates, seminars and international meetings that discuss the subjects. In 2003, the Brazilian Competition Policy System has worked together with the Presidency of the Republic to change the legislation of regulatory agencies in order to require that regulatory acts that affect competition have to be screened by the Competition bodies before their approval. Also, in 2003, the Secretariat for Economic Monitoring of the Ministry of Finance in Brazil started to discuss regulatory policies with the Federal Court of Accountings in Brazil, which is responsible for monitoring the privatization processes, and the conclusions reached by both parties after discussions have been the most useful in promoting competition in some regulated sectors, particularly for tolls charged in road concessions. It is worth mentioning that both parties were unaware of each other's activities in the promotion of competition until officials from both organizations met in seminars of regulated sectors.

4. Resources of competition authorities

4.1 Resources Overall

a) Annual Budget

| Secretariat for Economic Monitoring (SEAE) | Secretariat for Economic Law (SDE) | Administrative Council for Economic Defence (CADE) |
|---|--|--|
| SEAE: R\$6.992.848,00 * (US\$2,497,446.00) | SDE: R\$3.670.702,00 * (US\$1,310,965.00) | CADE: R\$ 9.554.449,00 (US\$ 3,317,517.00) |

* The amount reserved for salaries is not included in this sum.

b) Number of Employees

| Secretariat for Economic Monitoring (SEAE) | Secretariat of Economic Law (SDE) | Administrative Council for Economic Defence (CADE) |
|--|-----------------------------------|--|
| Economists: 52 | Economists: 6 | Economists: 17 |
| Lawyers: 7 | Lawyers: 25 | Lawyers: 33 |
| Other professionals: 12 | Other professionals: 3 | Other professionals: 18 |
| Support Staff: 93 | Support Staff: 15 | Support Staff: 54 |
| All Staff Combined: 164 | All Staff Combined: 43 | All Staff Combined: 122 |

4.2 *Human Resources*

a) *Enforcement against anticompetitive practices*

| | | |
|---|------------------------------------|--|
| Secretariat for Economic Monitoring - SEAE | Secretariat for Economic Law - SDE | Administrative Council for Economic Defence - CADE |
| SEAE assigns 6 professionals for anti-cartel enforcement. | 20 professionals | CADE does not assign a separate staff for anti-cartel enforcement. |

b) *Merger Review and Enforcement*

| | | |
|---|------------------------------------|---|
| Secretariat for Economic Monitoring - SEAE | Secretariat for Economic Law - SDE | Administrative Council for Economic Defence - CADE |
| SEAE assigns 59 professionals for merger control and other anticompetitive practices. | 8 professionals. | CADE does not assign a separate staff for merger control. |

c) *Advocacy Efforts*

| | | |
|---|---|---|
| Secretariat for Economic Monitoring – SEAE | Secretariat for Economic Law - SDE | Administrative Council for Economic Defence - CADE |
| SEAE does not assign a separate staff for advocacy efforts. | SDE does not assign a separate staff for advocacy efforts | CADE does not assign a separate staff for advocacy efforts. |

4.3 *Period covered by the above information: The year of 2003*

6. **Summaries of or references to new reports and studies on competition policy issues**

77. Two major reports were published in 2003 related to competition and regulatory policy issues in sanitation and in air transportation in Brazil.

78. The first report, *Regulatory Issues in Sanitation in Brazil (Questões Regulatórias do Setor de Saneamento no Brasil)* written by *Ronaldo Seroa da Motta*, states that regulatory policies in the sanitary sector in Brazil have been changing drastically in the last four decades.

79. Hyperinflation in the 1980s and the absence of incentives to promote efficiency in the sanitary sector have generated a high level of default in the state companies, which led to the bankruptcy of the system. With the end of the National Bank for Housing (BNH) in the beginning of the 1990s, the regulatory authorities have tried to improve government institutional framework, particularly the activities related to planning and regulation in sanitation. However, this attempt has never managed to be efficient and continuous. The macroeconomic stability initiated in 1994 has promoted investment and an adjustment in tariff levels. In 1999, the fiscal crisis faced by the government (municipalities, state and federal government) has reduced again the level of investments in the sector. This study analyzes the state of sanitation in Brazil and the evolution of the institutional and regulatory structures in the sector. It analyzes the level and the pattern of investment in sanitation in Brazil since 1996 based on data from the National System of Information on Sanitation (SNIS). The Study also analyzes the financial situation of companies belonging both to states and to municipalities and to the private sector. As a final suggestion, the Study

discusses the need to improve the calculation of fares/taxes charged in the water sector and the need to create a regulatory agency for the sector.

80. The second major report on competition and regulatory policy issues analyzes the regulation of civil air transportation in Brazil (*A Regulação do Mercado de Aviação Civil* by *Eduardo Augusto Guimarães and Lucia Helena Salgado*).

81. As stated in the report, air transportation in Brazil could not be categorized as a natural monopoly. The market for air transportation in Brazil is large; companies do not face barriers of entry and they do not need large amounts of initial investment. However, historically regulatory policies, which prevail in the market of air transportation, were based on the hypothesis that this sector represented a natural monopoly. Thus, regulations for this sector in the past have protected oligopolies instead of consumers.

82. During the 1970s, the deregulation of the civil air transportation sector started to take place in the United States and in Europe. As a result of the deregulation process, consumers had to pay lower airfares and airlines became more efficient. At the same time, the entry and survival of new airlines proved to be more difficult than initially expected by policymakers. In this context, policymakers in the United States and in Europe developed regulations to ensure the highest level of competition as possible with the objective to avoid anticompetitive practices and measures against market concentration. Brazil, to a certain extent, has followed regulatory policies to liberalize the market for civil aviation during the 1990s until the beginning of 2003. However, in March and in July of 2003, the Ministry of Defence in Brazil has issued two administrative measures forbidding the increase of airplanes in the country. As stated by this ministry, there was an excess of supply in the commercial flights in the country, which was undermining the profits of private companies. The abovementioned study concludes that there are no indications that airlines in Brazil are facing difficulties due to an excess of supply. It concludes that their bad performance is related above all to financial problems.