Competition Law and Policy in Latin America

PEER REVIEWS OF ARGENTINA, BRAZIL, CHILE, MEXICO AND PERU

The Inter-American Development Bank (IDB) and the Organisation for Economic Co-operation and Development (OECD) co-operate in competition law and policy to promote increased economic growth, employment and economic efficiency, and a higher average standard of living in the medium to long term. There is increasing consensus that sound competition law and policy are essential to achieving these goals.

IDB-OECD co-operation in competition law and policy centres on annual meetings of the Latin American Competition Forum (LACF). LACF meetings include substantive roundtable discussions and peer reviews of national laws and institutions. The OECD and the IDB are pleased to participate in this work as part of their efforts to promote a better business climate for investment in the countries of Latin America and the Caribbean.

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OECD

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Derecho y Política de la competencia en América Latina
Exámenes inter-pares en Argentina, Brasil, Chile, México y Perú
Foreword

The OECD has been active in promoting competition policy among countries in Latin America and the Caribbean and in recent years it has formed a partnership with the Inter-American Development Bank for this purpose. The principal feature of this partnership has been the annual Latin American Competition Forum, at which senior officials from countries in the region together with international experts discuss in roundtable fashion, issues of competition policy of interest to them. Also, each Forum features a peer review of one country in the region. To date, four countries have been reviewed: Chile, Peru, Brazil and Argentina.

“Peer review” is a core element of OECD work. The mechanisms of peer review vary, but it is founded upon the willingness of a country to submit its laws and policies to substantive questioning by other members of the international community. This process provides valuable insights to the reviewed country and promotes transparency and mutual understanding for the benefit of all.

The OECD Competition Committee has for some time been conducting peer reviews of the competition policy of both Member and non-Member countries. The benefits of this practice are particularly clear in this field. At one time there were significant differences across countries in competition issues. Those differences have narrowed considerably in the past several years, in part through the work of the Competition Committee. There is an emerging consensus on best practices in competition law enforcement and in applying competition policy principles to regulatory systems. Countries now co-operate regularly in such areas as anti-cartel enforcement and international mergers. Peer reviews are an important part of this process.

The OECD and the IDB are pleased to have participated in this partnership for the promotion of competition policy in Latin America and the Caribbean. This work is consistent with the policies and goals of both organisations. Sound competition policy will improve the business climate, promoting economic growth and prosperity, and bringing benefits to consumers in the region.
This volume comprises the four Latin American peer review reports, which have been produced to date in the framework of the Latin American Competition Forum as well as the peer review of Mexico held in the Competition Committee. Both organisations would like to thank the governments of Argentina, Brazil, Chile, Mexico and Peru for volunteering to be reviewed and for the co-operation of their officials in the process.

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IN ARGENTINA

A Peer Review

-- 2006 --
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   6.5 Increase efficiency in merger review.
   6.6 Review the current merger notification regime which permits the parties to consummate their merger before the competition authority completes its review.
   6.7 Until the Competition Tribunal is created, free the CNDC from as much political influence as possible.
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1. Foundations and Context

1.1 Economic context

Argentina is South America’s third largest country in terms of population – about 40 million, well behind Brazil and just behind Colombia. Its economy, in terms of GDP, is the second largest on the continent and 35th in the world. Situated at the southern end of South America, Argentina is also the continent’s second largest country in area (eighth in the world). The country’s borders encompass great diversity in latitudes; the climate in the north is subtropical, in the south, sub Antarctic. Argentina possesses rich natural resources and enjoys beneficial conditions for agriculture; much of its agricultural output is exported. It has a diversified industrial base and a high literacy rate, although a significant part of its population –34% in 2005 – remains below the poverty line. Argentina is a federal republic; there are 23 provinces and a federal district, which effectively is the city of Buenos Aires. Buenos Aires is by far the country’s largest city and one of the largest in the world. About 45% of the country’s total population live in the city and in surrounding Buenos Aires Province.

Argentina’s political and economic history in the period following World War II has been especially turbulent. Juan Peron served as president from 1946 until 1955, when he was ousted by a military coup. There followed a succession of military and civilian governments (including a brief return by Peron), culminating in the notoriously repressive military regime beginning in 1976. In 1983 the country returned to a constitutional government. The 1980s, however, were marked by hyperinflation. In 1991 the government addressed the inflation problem by imposing “convertibility” – pegging the Argentine peso one-to-one to the U.S. dollar. Convertibility had its intended effect; inflation was tamed. This result, combined with other aggressive economic reforms, including an ambitious privatisation programme, brought about a period of economic growth and relative prosperity, lasting most of the decade.

By 2000, however, the economy was once again out of balance. Public and private debt had exploded; the economy fell into recession and unemployment grew. While convertibility had controlled inflation, it had its own costs, making exports and debt service increasingly expensive. In December 2001 Argentina defaulted on $88 billion in debt, the largest sovereign debt default in history. In January 2002 the government abandoned convertibility, and the value of the peso plunged to as low as 3.9 to the dollar. This period was marked by social unrest and a succession of national presidents. The economy soon began to recover, however. Led by
strong exports, it grew robustly by 8-9% in each of the years 2003-05. Unemployment dropped from 21% in 2002 to 10% at the end of 2005. The peso strengthened to its current level of 3:1.\textsuperscript{1}

Inflation also returned, however. Since 2001, cumulative inflation has been about 70%, much of it occurring in 2002. Inflation was about 12% in 2005, however, and in that year the government began taking extraordinary measures to control it. It began entering into agreements with private sector participants limiting their ability to raise prices. The agreements are formal. They are not legally enforceable, but the parties are under considerable political pressure to observe their terms. They are made in some cases with the leading participants in a given sector, in others with the relevant business associations. In general the participants agree that they will not increase prices for a period of time, usually a period of months, with the important exception that they can pass on increases in their costs. As of early 2006 there were agreements in several sectors, including: supermarkets (covering 200 products), milk products, books, vegetable oils, cement, soda, private education, meat producers, transportation fuel, shoes, sugar, pharmaceuticals, other food products, paper and petrochemicals. These agreements have implications for national competition policy, which are discussed further below.

\section*{1.2 The competition law}

Argentina’s first competition law was enacted in 1923. Its first two articles closely resembled sections 1 and 2 of the United States Sherman Act. That law was replaced by another in 1946. Its first article prohibited generally the creation or maintenance of a monopoly, and the second article enumerated several types of conduct that were considered to be within the scope of Article 1, including various concerted practices. The law was enforced by the Ministry of Trade. Both of the first two laws were penal in character, punishable by criminal sanctions. Perhaps because of this, the laws were seldom enforced. In the 48 years from 1933 to 1980 a total of four cases resulted in sanctions under these laws.

Argentina’s modern era of competition law enforcement began in 1980 with the enactment of Law 22,262. Its two substantive articles were based on Articles 85 and 86 of the Treaty of Rome. The law did not provide separately for merger control; technically, mergers were subject to its conduct provisions, but in practice this was not done. For the first time the enforcement of the law was by administrative process; available sanctions included fines and administrative orders. The law created Argentina’s first competition law enforcement agency, the National Commission for the Defence of Competition (CNDC). The CNDC’s role was only advisory,
however. After a full investigation of the conduct at issue the CNDC submitted recommendations to a government ministry (initially it was the Secretariat of State for Commerce and International Economic Negotiations), which then rendered the final decision. The ministry’s decision could be appealed to the courts. Enforcement of the law was sporadic through the 1980s, but the pace had quickened by the mid-1990s, as the market-oriented reforms introduced earlier in the decade took hold.

Argentina’s current competition law, Law no. 25,156 for the Defence of Competition, was enacted in 1999. The two most important innovations in the new law were the introduction of formal merger control and the creation of a new, independent law enforcement body, the Tribunal for the Defence of Competition (Tribunal). The law provided that the Tribunal, a fully independent body comprising seven members, would be appointed by the country’s president after a competitive process conducted by a specially appointed jury.

Unfortunately, the Tribunal has never been constituted. An unusual, hybridized process exists: the substantive provisions of the 1999 law, including merger control, are fully applicable, but they are enforced by the CNDC. The procedures and powers afforded the Tribunal by the law are exercised by the CNDC, with the important exception that the CNDC continues as an advisory body only, within a government ministry. Its decisions must be ratified by a secretariat within the Ministry of Economy and Production. Until 2003 that secretariat was called the Secretariat for Competition, Deregulation and Consumers Defense; currently its title is the Secretariat for Technical Coordination. This situation creates both substantive and administrative uncertainty, which is discussed more fully in Section 3 below.

2. Substantive Issues: Content and Application of the Competition Law

2.1 Conduct

Sections 1 and 2 of Article I of law 25,156 set out the standards governing anticompetitive conduct under the law. The two sections are not separately organised according to agreements and concerted actions on the one hand and abuse of dominance on the other. Section 1 contains a general prohibition of anticompetitive conduct, specifically:

Acts and behaviours related to the production or trade of goods and services that have as their object or effect to limit, to restrict or to distort competition or constituting abuse of a dominant position in a market, in
a manner such that may result in harm to the general economic interest are prohibited …

The operative standard in section 1 is actual or potential harm to the “general economic interest.” The CNDC states that it applies this standard as mostly equivalent to consumer welfare. It cites two sources for this interpretation: Merger Guidelines adopted in 2001 (the merger control provision in the law, Article III Section 7, contains the same legal standard), and a 2002 decision by the Supreme Court of Argentina, the country’s highest court, in an abuse of dominance case. Other factors such as producer welfare, “fairness” and economic growth are said not to be primary objectives of the competition law, although economic benefits such as these are the inevitable results of efficiency enhancements brought about by the application of the consumer welfare standard.

Section 2 lists specific practices that are unlawful if their effect is that proscribed by Section 1. The list is not exhaustive, however. Conduct not listed in Section 2 can violate the law if it has the requisite anticompetitive object or effect. Section 2 practices include:

- horizontal agreements: fixing prices or output, allocating markets, rigging bids, exchanging information and restricting innovation;
- vertical practices: tying and exclusive dealing; resale price maintenance is not specifically prohibited, but it is considered to be a violation of Section 1;
- single firm conduct: obstructing entry or excluding persons from a market, discrimination, refusing without justification to accept orders or to do business “under the conditions prevailing in the relevant market,” and predatory pricing.

2.1.1 Horizontal agreements

As noted above, the CNDC became more active in the mid and late 1990s, but this was not reflected in cartel cases. There were several cases that involved horizontal restraints in the health care sector. There existed dominant associations of health care providers in several regions in the country. These associations effectively controlled entry into their markets by means of exclusive arrangements. In a series of cases the CNDC recommended, and the Secretariat approved, the elimination or modification of the exclusivity and in some cases the imposition of fines. There were other cases involving joint price setting by associations of health care providers. This series of cases caused the CNDC to conduct an in-depth study of the Argentine health care market and to issue a set of guidelines.
applying to competition in the industry. The guidelines provide a competitive analysis of various practices found to exist in the industry and they set out safe harbours – generally below 25% of a relevant market – within which certain collective activities by both providers and purchasers are presumptively permissible.10

In the five year period 2001-2005 there were a total of just 12 non-health care horizontal cases resolved (resolution includes a recommendation by the CNDC and a final decision by the Secretariat for Technical Coordination). Of these, four resulted in sanctions. One case in which a violation was not found, decided in 2001, involved simultaneous reductions by three international air carriers in the commissions that they paid to travel agents. While the respondents engaged in parallel conduct, there was no independent evidence of agreement, and the respondents’ actions were not considered as inconsistent with independent action.

Two price fixing agreements were sanctioned in 2003. One involved an agreement by four distributors of liquid petroleum gas in the city of San Carlos de Bariloche during a brief period in 1998. The evidence in the case was mostly circumstantial. The four respondents were fined a total of USD 150 000. In the second, several producers of sand used in construction in the city of Parana formed a cooperative through which they jointly sold their production during the period 1999-2001. The evidence disclosed that the price of sand had dropped significantly prior to the formation of the cooperative, and the purpose of the arrangement was to restore the price to former levels. The Commission ordered that the joint price setting be terminated and fined the sand producers a total of USD 450 000. (Virtually all of the CNDC’s recommendations have been accepted by the Secretariat in recent years. Henceforth in this report a reference to a decision by the Commission means that it was also approved by the Secretariat.)

In July 2005 two important cartel cases were handed down, one involving cement and the other, liquid oxygen used for medical purposes.
Box 1. Cartels

The Cement Case

Six cement companies were alleged to have engaged in a nationwide market allocation scheme for a period of almost 20 years. The investigation began in 1999, when a news article describing cartel activity in the sector was published in a periodical. The source of the information was allegedly a former employee of one of the cement companies. Because the source was not positively identified the information in the article could not be fully used, but the publication sparked an investigation, which ultimately generated sufficient evidence of the conduct.

Most of the evidence was circumstantial. The agreement was coordinated by the industry business association, the Association of Portland Cement Manufacturers – AFCP. Its members exchanged detailed, company-specific and current information on production, shipments and sales. Documents obtained from the association’s files – the CNDC conducted a dawn raid on the AFCP but not on any of its members – indicated that the members considered the information to be highly important to them. There were references to the information as a “tool” that was useless if produced “out of time,” when it would lose its “value.” There were occasional meetings of representatives of the four companies – the dawn raid generated evidence that these meetings took place, but not of the content of the discussions.

On three occasions The AFCP conducted audits of the information submitted by the companies. These audits coincided in time with alleged agreements by the companies on market shares. There was evidence that on one occasion the cartel punished a producer who was not observing the agreement: the cartel members collectively “invaded” the territory in which the cheating company was operating – in distant Patagonia – causing it to lose market share. Later they withdrew from that market. There was also some evidence of local price fixing agreements in the industry.

Five of the six producers were fined a total of USD 106 million – a record fine under the current competition law.

Liquid Oxygen

The investigation, begun in 2001, was prompted by complaints from hospitals that they were unable to secure contracts for liquid oxygen from competing suppliers. Usually they received bids only from their incumbent supplier; otherwise, when competing bids were submitted the incumbent was usually the low bidder. The complaints caused the Secretariat for Competition, Deregulation and Consumers Defense (the predecessor to the Secretariat for Technical Coordination) to instruct the CNDC to begin an investigation.

The market for this product was highly concentrated, and entry was difficult. There were effectively only four suppliers. The CNDC conducted dawn raids on the four companies, which were highly effective, producing strong documentary and electronic evidence of customer allocation and price fixing for a five year period. The four respondents were fined a total of USD 24.3 million.
The competition law provides the competition agency with sufficient investigative tools for anti-cartel work. As noted in the case descriptions above, it can conduct dawn raids. The agency must first receive court approval to conduct a raid. Dawn raids were executed to great effect in the oxygen case. Approval was obtained from three different courts, necessitated by the different locations of the four companies. The raids were conducted simultaneously, using close coordination. Information technology experts accompanied the investigators, and were able to secure highly relevant electronic evidence. The agency can also compel officials to attend hearings and provide evidence, and these procedures were also used in the oxygen case. It should be noted, however, that both cases took a long time to complete – six years in the case of cement and more than three in the case of oxygen. Moreover, both cases are now on appeal in the courts.

The competition law provides for the imposition of fines of up to AR$ 150 million (currently about USD 50 million) for conduct violations. In the case of recidivism the fines can be doubled. The factors to be taken into account in calculating the fines include the losses incurred by the victims of the conduct and the gains from the conduct realised by the respondents. The fines imposed in the two recent cases were large by historical standards, but except for the leader of the cement cartel they did not approach the maximum. It should also be noted that inflation has eroded the significance of the 150 million peso maximum, to the point that an upward adjustment (which would require an amendment of the law) may be in order. Finally, the law permits the imposition of fines on natural persons for conduct violations, subject to the same maximum, but no such fines were imposed in the recent cases.

There is no per se rule in Argentina. It must be shown that all violations have the requisite harm to the “general economic interest.” Agency officials do not view the lack of a per se rule as an impediment to their anti-cartel effort, however.

There is a suspicion, confirmed unofficially by participants in the private sector, that cartel activity is rife in Argentina. If this is so, it may be in part because the business community is not fully aware that such conduct is unlawful and that it could lead to the imposition of strong sanctions. In this sense, some of the cartel conduct, if indeed it exists, is “naïve.” There may also be doubts about the competition authority’s commitment to an anti-cartel effort. The recent cement and oxygen cases are very important in this regard, if they send the right signals to businesspeople and to the public. But these decisions have been viewed with scepticism in some quarters; they have been interpreted by some as merely a part of the government’s anti-inflation effort. The decisions do not translate, in the eyes of these observers, into a genuine effort on the part of the enforcement agency to prosecute and sanction cartel conduct as a serious infringement in its own
right. Follow-up cartel prosecutions by the authorities are obviously necessary to correct this impression, to the extent it exists.

It has been difficult for the Commission to develop an effective anti-cartel programme. Dawn raids, the most effective tool, have been used in only a few cases. The perception is that they are difficult to carry out, and resource consuming as well. There is no leniency programme in place and there had not been, as of early 2006, any significant movement to create one. The high staff turnover rate, discussed more fully below, results in a lack of institutional memory, which is especially important in the anti-cartel effort. Cartel investigations require highly specialised and sophisticated techniques, which usually can be developed only through experience.

2.1.2 Vertical restraints

Vertical restraints are encompassed within Sections 1 and 2 of the competition law, as noted above. The CNDC lists only three vertical cases as having been resolved in the 2001-05 period, none of which resulted in sanctions. Many of the CNDC’s dominance cases involved vertical practices, however, and those are discussed in the next section.

2.1.3 Abuse of Dominance

Article II, Sections 4 and 5, define “dominant position.” The definition is consistent with those found in other competition laws. Section 4 provides the general definition of dominance: when an enterprise is the only supplier or buyer in a market, when it is “not exposed to substantial competition” or when “because of vertical or horizontal degree of integration” the enterprise is able to exclude a competitor or participant from the market. The reference to “horizontal” integration is interpreted to refer to a situation in which multiple enterprises have a single owner or group of owners. Section 5 sets out three relevant factors in determining dominance: the degree of substitution for the relevant product or service by other products or services from domestic or foreign sources; the extent to which there are regulatory barriers in the relevant market; and the extent to which an enterprise can unilaterally set prices or restrict output. There is no reference in the law to a presumption of dominance based upon a certain market share, which exists in some other countries.

As noted above, Section 1 of the competition law specifically prohibits “abuse of a dominant position,” and Section 2 describes some vertical and exclusionary practices that could violate Section 1. There is no specific prohibition of exploitative practices by dominant firms, but it is clear that such conduct can be addressed under the competition law.
The bulk of the CNDC’s conduct cases are classified as dominance cases. The agency lists a total of 95 dominance cases resolved in the 2001-05 period, with five resulting in sanctions. As discussed below, the competition law permits private parties to lodge complaints with the Commission, which the Commission is obliged to consider. Most of these complaints involve allegations of abuse of dominance, but most of these do not rise to the level of a violation of the law.

Some of the complaints involve allegations of predatory pricing. The CNDC properly applies restrictive standards to the predation analysis. One of the most important predation cases considered by the Commission was the Impsat case, decided in 2004. The complainant, a provider of data transmission services, alleged that one of the incumbent land line services was pricing its competitive services below cost. The principal issue was the measurement of the relevant cost, and specifically the extent to which the costs of operating the incumbent’s land line network should be attributed to the cost of the data transmission service. The Commission took a conservative view of the relevant costs, excluding those network costs associated with the provision of basic telephone service. It concluded that the incumbent’s prices were not predatory.

Other dominance cases have arisen in the cable television sector. There is competition in cable television services in several geographic markets in Argentina. There is also some degree of vertical integration between cable operators and television content providers, giving rise to allegations of discrimination by vertically integrated cable operators against their non-integrated rivals in the provision of television content.

One of the CNDC’s most prominent cases in the cable TV sector, initiated *ex officio* by the Commission and decided in 2001, involved resale price maintenance in the broadcasting of soccer football matches. Two sports television networks, each having rights to televise national football matches, entered into contracts with cable television providers in the Federal Capital and greater Buenos Aires areas, which fixed the prices that the cable operators charged to their customers for receiving these matches. The cable operators apparently met jointly with the networks and agreed to these terms. The CNDC rejected the defences offered by the respondents, which included both the networks and the cable operators, finding that their conduct had the effect of eliminating competition in the televising of football matches. The Commission ordered the cessation of the conduct and imposed fines of USD 529,289 upon the networks (the maximum allowable under the pre-1999 competition law, which applied in this case) and lesser amounts on the cable operators. A court of appeals overturned the decision, however, and the case is now before the Supreme Court.
The most important dominance case decided by the CNDC to date was the *YPF* case.

### Box 2. Abuse of Dominance

**Yacimientos Petrolíferos Fiscales (YPF)**

The case, decided in 1999, was initiated *ex officio* by the CNDC after conducting an in-depth study of the market for liquid petroleum gas (LPG). The investigation was prompted by steady increases in the price of LPG, an essential source of energy for many residences, in the mid-1990s. The relevant market was determined to be the bulk supply of LPG nationwide. The supply of LPG was then effectively fixed, as it was a byproduct of the production of natural gas. YPF was the former state-owned petrochemical firm. It was found to be dominant in all phases of LPG production and supply, including natural gas production, refining, storage and transportation. Entry was considered to be difficult, and imports were not then a constraint on domestic producers.

The conduct that was the subject of the case was YPF’s practice of exporting what was considered to be a disproportionate amount of its production at prices that were lower than its domestic prices. Moreover, its export contracts prohibited the re-importing of the product. The CNDC concluded that this conduct was harmful to the general economic interest and therefore unlawful. The Commission ordered YPF to cease its price discrimination as between the domestic and export markets and also to eliminate the prohibition of re-imports in its export contracts. Under the law that applied to the case, YPF could be fined an amount equal to 120% of the gain that resulted from its unlawful conduct. The CNDC determined that the unlawful gain during the relevant period was USD 91 370 000, resulting in a fine of USD 109 644 000.

The CNDC’s decision, which was accepted by the Secretariat for Industry, Commerce and Mining, was upheld by the Supreme Court of Argentina.

The YPF decision is a clear instance of a case based on exploitative abuse of dominance. It has been criticized in some quarters for that reason, as many experts consider that exploitative abuse cases are ill advised, in that it is difficult to determine when a price is “exploitative,” and equally difficult to fashion an appropriate remedy for the conduct. The case is defended by others, however, as one that is based on a narrow set of facts – involving price discrimination – which, it is claimed, could be the subject of an effective remedial order. There does not appear to have been another case sanctioning exploitative abuse of dominance, although the Argentine government has been involved in price setting in a more direct way in recent times, as discussed below.
2.1.4 Procedures in conduct cases

The procedures that apply in conduct cases are set forth in Article IV, Sections 26-45 of the competition law. A conduct investigation can begin either as a result of a complaint lodged with the Commission or *ex officio* by the Commission. The Commission may also open an investigation at the request of the Secretariat, which is another form of *ex officio* proceeding, as discussed in part 3.3 below. Most conduct investigations, however, are begun by complaint. All complaints must be considered by the Commission.

The law sets forth the information that must be included with the complaint. If the Commission determines that the complaint involves a relevant issue under the competition law it notifies the subject of the complaint that it has been filed, and the subject has 10 days to respond. (All time periods under the law are stated in terms of working days.) Upon receipt of the response the Commission may decide that the answers given are satisfactory or that the evidence in the complaint is clearly insufficient to support a violation; in either event the complaint is archived. Many complaints proceed beyond this stage, however.

Each case is assigned to a single commissioner, who directs the investigation. At least one lawyer and one economist are assigned to each case. As discussed above, the CNDC has a broad range of investigative powers. Evidentiary hearings are fairly common. The hearings are usually conducted before the commissioner to whom the case is assigned. The respondent is notified of the hearing and may ask questions of the witness. The law, as modified by decree, provides that the investigation must be completed within 180 days from the date of the resolution that opens the proceeding. If the subject is accused of violating the law it has an additional 15 days to offer evidence in its behalf. The process of offering evidence must be completed within 90 days. The subject then has 6 days to present closing arguments, and the CNDC must then issue a decision within 60 days.

At the conclusion of the investigation the staff lawyer or economist prepares a report under the supervision of the investigative commissioner. The report is signed by the commissioner and initialled by the chief economist and chief lawyer, and submitted to the full Commission. Commission meetings are not public. A decision by the Commission requires a majority of three commissioners (there are five members of the Commission, including the president). After reaching a decision a recommendation is prepared and submitted to the Secretariat for Technical Coordination.

The Commission has the power in a conduct case to issue preliminary orders preventing potentially harmful conduct during the decision-making process. Section 35 of the competition law provides:
The Tribunal may at any stage in the proceedings request compliance with conditions set forth by said Tribunal or order that the detrimental behaviour be either discontinued or abstained from. Where serious detriment to the competition policy is likely to be caused, the Tribunal may adopt such measures as are deemed under the circumstances to [be] most convenient for the prevention thereof.

The CNDC has been active in issuing such orders. In the four year period 2001-04 it issued Section 35 orders in 26 cases. These orders can be appealed to the courts, and many are, but the order is not suspended during the appeal.

A private complainant who initiates a case has full rights of participation in the proceedings, including the right to appeal from a decision of the Commission. The law also provides for the participation of other interested private parties in the proceedings. The practice of the CNDC is to limit this third party participation to the ability to monitor the proceedings and to provide evidence. To date this has occurred in only a few cases.

Commission statistics show a much higher number of conduct cases begun each year than are completed. Following are data for cases opened and solved in the period 2001-05

<table>
<thead>
<tr>
<th></th>
<th>2001</th>
<th>2002</th>
<th>2003</th>
<th>2004</th>
<th>2005</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cases Opened</td>
<td>116</td>
<td>120</td>
<td>79</td>
<td>77</td>
<td>84</td>
</tr>
<tr>
<td>Cases Resolved</td>
<td>21</td>
<td>33</td>
<td>20</td>
<td>29</td>
<td>49</td>
</tr>
<tr>
<td>Cases Sanctioned or</td>
<td>3</td>
<td>5</td>
<td>3</td>
<td>2</td>
<td>7</td>
</tr>
<tr>
<td>Compromised</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Thus, although there are prescribed periods for completing cases, many stay open for a much longer time. There are several reasons for this. First and foremost is the lack of resources at the Commission’s disposal for handling its caseload, which is discussed in Section 3 below. A second important reason is that mergers have priority in time over conduct cases; the Commission’s heavy merger caseload has caused its conduct cases to languish. Also, for two periods in 2003 and 2004 there were only three commissioners, including the president, serving on the Commission. This inevitably contributed to the backlog. In 2005, however, the Commission was able to resolve more cases than in previous years, and it is continuing to make efforts to reduce its backlog.
Another factor contributing to the slow resolution of conduct cases, however, could be that the procedures for dealing with these cases may be inefficient. The Commission is required to consider all complaints submitted by private persons. It has some discretion to decide not to proceed with complaints that are clearly outside the scope of the competition law, or that do not provide the information required by law. In the period 2002-04 about 44% of all conduct cases that were resolved were summarily disposed of in this manner. In all other cases, however, a formal report and recommendation for the Secretariat for Technical Coordination are prepared by the Commission. This work obviously takes time and consumes resources. Since the great majority of cases do not result in sanctions or orders, the question presented is whether it should be necessary for the Commission and the Secretariat to resolve these cases in which no action is taken in such a formal manner.

The same issue exists regarding the Commission’s merger cases, most of which do not present competitive concerns. There are valid reasons for such formality, the principal one being the benefits of transparency in a country where scepticism about honesty in government persists. Those issues are discussed further below in the section on mergers.

2.1.5 Unfair competition and consumer protection

Most conduct considered to be unfair competition is subject to a separate law, the Commercial Loyalty Law no. 22,802. The CNDC does not enforce Law 22,802. The Secretariat for Technical Coordination does have responsibility for the law, however, and the agency to which enforcement responsibilities are currently delegated is the National Bureau of Interior Trade. Law 22,802 governs, among other things, accuracy in product labelling, false and misleading advertising, denomination of country of origin, and promotions employing prizes or games of chance. In 2005 there were a total of 505 interventions for presumed violations of the law.

The same situation applies to consumer protection. It is governed by a separate law, the Consumer Defence Law no. 24,240. It too is the responsibility of the Secretariat for Technical Coordination, with initial enforcement activities conducted by the National Bureau of Interior Trade. The law contains detailed provisions applying to many types of conduct in the marketplace, such as insufficient provision of information, breach of contract, lack of delivery, defective guarantees, insufficient technical service, unsatisfactory repair, failure to provide cost estimates, requirements for the provision of information with the supply of credit, and more. Sanctions for violating the law include both remedial orders and fines. In 2005 there were a total of 355 cases sanctioned under the law.
Cases under both unfair competition and consumer protection laws may begin with private complaints to provincial consumer offices. Those with merit are forwarded with recommendations to the Secretariat for Technical Coordination. On occasion the Secretariat may perceive a possible violation of the competition law and refer the matter to the CNDC. Most often such cases involve allegations of predatory pricing. The CNDC resolved 14 such cases in 2001-05, none resulting in the imposition of sanctions.

2.2 Mergers

Formal merger control was introduced with the enactment of Law 25,156 in 1999. Article III, Sections 6-16 of the law deal with merger control. The substantive standard is found in Section 7:

Economic concentrations the object or effect of which is to reduce, restrict or distort competition, in a manner which may be prejudicial to the general economic interest are hereby prohibited.

2.2.1 Notification

Section 8 of the law imposes notification requirements. Transactions must be notified to the CNDC when the total turnover in Argentina of the participating firms exceeds AR$ 200 000 000 [USD 67 000 000]. Currently there are no notification fees. Section 10 of the law lists some exemptions to the notification requirement imposed by Section 8. They are:

- the acquisition of firms in which the purchaser already holds over 50% of the shares;
- the acquisition of bonds, debentures, shares with no voting rights or certificates of indebtedness;
- the acquisition of a domestic firm by a foreign firm that does not own any shares or assets of another domestic firm;
- acquisitions of liquidated companies;
- acquisitions of operations or assets in Argentina whose value do not exceed AR$ 20 000 000 [USD 6 700 000], unless there have been more than one such acquisition in the preceding 12 months and their total value exceeds that amount, or the value of the total of such acquisitions in the preceding 36 months exceeds AR$ 60 000 000 [USD 20 000 000]. The transactions subject to the 12 month and 36 month accumulations must have occurred in the same market.
The last exemption, which effectively creates a “size of the transaction” threshold of AR$ 20 million, was added by decree in 2001. This was an important addition. Without it, every acquisition, however small, by a large company triggered the AR$ 200 million size of the parties test. The result was a large number of notifications, well over 100 per year in 1999 and 2000. This crippled the CNDC’s ability to prosecute conduct cases, because it had to deal with so many mergers. The effect of the 2001 amendment was dramatic. The number of notifications dropped from 97 in 2001 to 27 in 2002. (The decline was not due solely to the amendment, however. Argentina’s economic crisis occurred at the same time, which affected merger activity in the country, and there was a simultaneous downturn in merger activity worldwide.) The number of notifications has risen in every year since, however, totalling 65 in 2005. It seems that again the Commission’s enforcement of the conduct provisions of the law is being constrained by its merger review obligations. It may be that the AR$ 20 million threshold, established in 2001, is now too low, having been eroded by inflation.

The CNDC has created a process by which merging parties can seek advance consultations as to whether they must notify. The private sector considers this process to be a useful one, and that it is effectively administered by the Commission. One complaint heard from the private sector is that applications for a consultation can no longer be made on a hypothetical basis; the actual transaction must be disclosed. Some parties do not wish to do so, for both business and strategic reasons. There have been approximately 220 consultation procedures since 1999.

Section 8 requires that the notification must be made within one week from the earliest of: “the conclusion of the [merger] agreement, the publication of the acquisition or exchange offer or the acquisition of a controlling share.” The “trigger date” that marks the beginning of the one week period has been further defined by decree to mean: the date of the conclusion of a definitive merger agreement, as defined by a separate law; in the case of the transfer of a going concern, the date of the perfection of the transfer as defined by a separate law; in the case of the acquisition of stock or property, the closing date as provided in the sales agreement; or in other cases on the date of perfection of the transaction as defined by law. Failure to notify as required is punishable by a fine of up to AR$ 1 000 000 [USD 333 000] per day for each day in which the party is in delay.

It is apparent from the language of Section 8 that depending on which of the trigger dates applies, the parties to a merger may have consummated before they notify. In any case, there is no explicit requirement in the law that the parties refrain from consummating after they notify. On the other hand, Section 8 provides that “the acts [interpreted as meaning the implementation of the transaction] shall be effective upon the parties or in
respect of third parties after the provisions of section 13 and 14 hereof have been fulfilled, as appropriate.” Sections 13 and 14 set out procedures for approval of the merger by the competition authority. Thus, technically a merger, even if consummated, has no legal effect until approved.

The business community has interpreted these somewhat inconsistent provisions in the law as creating a “close at your risk” regime. Some transactions are consummated in advance of approval. (As discussed below, approval usually takes a minimum of three to four months.) These are usually the “easy” ones – those about which there is little doubt that approval is forthcoming. Parties to a transaction that is competitively problematic may be advised not to consummate before approval, or if there are business reasons why formal consummation cannot be postponed (for example, because the merger is part of an international transaction subject to a tender offer abroad), they may close but delay implementation of the combination until after approval.

As discussed above in part 2.1.4, Section 35 of the competition law authorises the Commission to issue preliminary orders in the course of a case or investigation “… where serious detriment to competition … is likely to be caused ….” Heretofore this remedy has been applied only in conduct cases. It could have obvious uses in merger cases as well; the Commission could enhance its ability to achieve an effective remedy by issuing an order in a problematic case forbidding consummation pending its review, or if consummation has taken place, forbidding integration of the parties’ businesses (“hold separate”). The Commission discussed this possibility in 2002, in the airports merger described below, but it concluded that it did not have the legal authority to apply this measure in merger cases.

In any event, there have been few transactions that have been completely disapproved by the authorities. Most cases in which there are competitive problems are resolved by divestitures. It is not clear that this phenomenon is a result of there not being a formal premerger notification regime. CNDC officials do not feel that the current procedures place them at a disadvantage in obtaining an effective remedy in the relatively few transactions that are found to be anticompetitive.30

One case in which a consummated merger was prohibited involved the acquisition of an airline company controlling as much as 40% of airline services nationwide by the operator (under concession agreements) of many of the domestic and international airports in Argentina. The authorities disapproved the transaction on the basis of a vertical analysis: the airports operator had monopoly power at the airport level, which it could use in a variety of ways to disadvantage or exclude airlines competing with the acquired company. The transaction had already been consummated,
The issue facing the competition authority was whether the merger should be unwound, because pursuant to Section 8 it had no effect, or whether the airports operator would be required to divest the airline. The Secretariat required divestiture of shares, permitting the airport operator to hold only a minority interest in the airline, and a commitment that the airport operator would take no part in the management of the airline. Later the airport operator sold all of its interest in the airline.32

Finally, the competition authority can control mergers that are not subject to the notification requirements, but they must be processed as conduct violations. The agency can either impose conditions on such an anticompetitive merger or prohibit it absolutely.

2.2.2 Merger review procedures

Sections 13 and 14 of the competition law establish the procedures for merger review. These provisions have been augmented by a regulation issued in 2001.33 Section 13 of the law requires the “Tribunal” (which does not exist) to decide in 45 working days (nine calendar weeks) whether to approve or deny the transaction, or to approve it subject to conditions. Section 14 provides that if there is no such decision within the prescribed period the merger is considered “implicitly approved.” These provisions have been interpreted as applying the 45 day period to the decision by the Secretariat for Technical Coordination, upon recommendation by the CNDC.

The implementing regulation further develops the review procedures, creating three stages in the process. The initial notification must be provided on a form denoted as Form 1. That form requires information about: the parties to the transaction; the merger agreement; the products and services offered by the parties, and products that are substitutes for them; conditions of entry into the provision of these products or services; the geographic markets in Argentina served by the parties; whether any of the parties are the subjects of an investigation of possible anticompetitive conduct in Argentina or elsewhere; and whether the proposed merger is the subject of an investigation in another country. The regulation further provides that the approving authority, which is interpreted as the CNDC, must, within 15 days of notification, recommend approval, denial or approval with conditions, or in the alternative, issue Form F2.

Form F2 requires the submission of much more detailed information about the merger and the markets in which the parties compete. If the CNCD issues Form 2 it must, within 35 days of notification, either reach a decision on the merger as above or issue Form 3, which requires even more detailed information. While Forms 1 and 2 are standard forms, Form 3 is drafted by the Commission uniquely in each case. If Form 3 is issued, the Commission
and the Secretariat have 45 days (all of the periods are expressed in terms of working days) from the date of notification to reach a final decision. In 2005 there were final decisions in 46 mergers. Of these, Forms F2 were issued in nine; no Forms F3 were issued. 2005 was something of an aberration, however; in most years two or three forms F3 are issued.

The issuance of Forms 2 and 3 have the effect of suspending the running of the relevant periods until the information is supplied. Further, if the Commission decides that the information supplied with any of the forms is incomplete it can notify the parties of the deficiencies and the periods are suspended until the missing information is supplied. Finally, the regulation provides that the Commission can, in “exceptional circumstances,” issue a request for information not requested in any of the forms. The request has the effect of further suspending the relevant periods. This authority to issue exceptional requests for information is almost never exercised, however.

It should be noted that the 15 and 35 day periods created by the regulation are internal to the organisation; there is no implicit approval of a transaction if these deadlines are not observed, but the agency strives to do so. It is not uncommon, however, that the CNDC notifies the parties that their Form F1 is not complete, which has the effect of suspending the 15 day period until the missing information is supplied. There may be even more than one such notification in a case. Further, the practice is always to issue a formal decision on a merger through the Secretariat. No merger to date has been approved implicitly. Thus, in every case the CNDC prepares a written analysis of the transaction and a recommendation for the Secretariat. This process has the effect of lengthening the review period and it consumes important resources in the Commission. It is estimated that the average “easy” case in which there are no serious competitive issues takes 3-4 months to complete. More serious cases may take 6 months, and the most serious a year or more.

An obvious means for shortening the review period for easy cases and concurrently conserving resources is to create a procedure for summary approval, eliminating the need for detailed analysis and a formal report in every case. The same issue exists in conduct cases, as discussed above. There is scepticism about such a summary procedure, however, both within and without the CNDC. Argentina has an unfortunate history of corruption in government, and for this reason many consider it necessary that all decisions under the competition law be fully transparent. Argentine law requires that administrative decisions be reasoned and well grounded. This may require a formal, written decision in every case. Finally, as discussed further below, there is a risk of third party intervention in merger cases, and this risk could be heightened if there were no formal decision in a case.
2.2.3 Merger cases

The following table shows the merger activity within the CNDC in the period 2001-05.

<table>
<thead>
<tr>
<th>Year</th>
<th>Matters Opened</th>
<th>Approved</th>
<th>Approved with Conditions</th>
<th>Rejected</th>
<th>Total Final Decisions</th>
</tr>
</thead>
<tbody>
<tr>
<td>2001</td>
<td>97</td>
<td>98</td>
<td>3</td>
<td>1</td>
<td>102</td>
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<tr>
<td>2002</td>
<td>27</td>
<td>24</td>
<td>1</td>
<td>1</td>
<td>26</td>
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<tr>
<td>2003</td>
<td>44</td>
<td>33</td>
<td>4</td>
<td>1</td>
<td>38</td>
</tr>
<tr>
<td>2004</td>
<td>49</td>
<td>41</td>
<td>4</td>
<td>-</td>
<td>45</td>
</tr>
<tr>
<td>2005</td>
<td>65</td>
<td>44</td>
<td>2</td>
<td>-</td>
<td>46</td>
</tr>
</tbody>
</table>

The data show that on average 5 to 10% of all notified mergers are the subject of some remedial action, a level of activity that is consistent with that in many other countries.

In 2001 the CNDC published a set of merger guidelines. The guidelines employ accepted concepts in merger review, and are consistent with those issued by other countries. Relevant product and geographic markets are to be determined by considering demand substitutability. Market participants are identified by their ability to begin easily and quickly to supply the relevant product. The market shares of participants are calculated in a traditional manner, and market concentration is expressed by using the Herfindahl-Hirschmann index. Entry is an important consideration in the analysis, and traditional methodologies are used to evaluate conditions of entry. Imports are given their proper place in the analysis. A methodology for analysing claims of efficiency gains, which again is consistent with international practice, is set forth. There are short sections dealing with vertical and conglomerate mergers. In the former, increases in entry barriers are identified as the principal anticompetitive effect, and in the latter it is noted that most conglomerate mergers do not adversely affect competition, save for the possible elimination of potential competition.

The Commission has considered several significant mergers under the 1999 law. One was the airports case described above. Some of the others that were found to be anticompetitive are described below.
Box 3. Mergers

Telefonica/Bellsouth

In 2005 Telefonica S.A., a multinational telecommunications company based in Spain and operating throughout Latin America, acquired the Latin American operations of Bellsouth. In Argentina, Telefonica was a significant provider of fixed line and mobile telephony services, both local and long distance, and also provided data transmission and Internet access services. Bellsouth provided some fixed line service in Argentina and was a significant competitor in mobile telephony and related services.

All mergers, including those in regulated sectors, are subject to the competition law. In most cases the sector regulators also have authority over mergers in their sector, however, and they too can prohibit mergers for appropriate reasons. In this case, there was close cooperation between the CNDC and the National Communications Commission, the telecoms regulator. The two agencies agreed on the analysis of the transaction and on the remedies to be applied.

The Commission determined that the merger would have little effect in fixed line services because of Bellsouth’s relatively small position in that sector, and concerns in the data transmission and long distance markets were alleviated by the prospect of new entry. One concern that was identified, however, was the provision of fixed lines to public telephone service licensees. The remedy applied to this concern was a requirement that the merged entity provide this service on a nondiscriminatory basis.

The transaction did result in an increase in concentration in the mobile telephony market, but it was determined that the effect on competition would not be significant because: there remained significant competition from other strong players; the two merging parties were not close competitors in markets characterised by differentiation; and Argentine law limited mobile telephony operators to ownership of 50 Mhz radio spectrum. The merged entity would exceed that limit, and the merger was conditioned upon the sale of radio spectrum by the merged entity. The Commission also noted that the merger presented certain concerns related to Argentina’s system of “calling party pays” in mobile telephony. In calls from a fixed line telephone to a mobile telephone the mobile operator enjoyed certain monopoly power. A regulation that would control abuse of that power had been suspended, and the Commission required the parties to abstain from certain exclusionary practices until such time as the regulation became effective.

Grupo Bimbo/Fargo

This merger, approved with conditions in 2004, was the core of an international transaction in which Grupo Bimbo, one of the largest international baking operations in the world, acquired Fargo, another bakery products manufacturer. Fargo had been in receivership. The CNDC analysed the effects of the merger in Argentina in two markets: industrial black and white bread and the baker’s shop market. In the former, the resulting company would have a market share of 79% after the merger and in the latter, 62%. The CNDC found that there were significant entry barriers into these markets, which included...
the well established brands of the two firms, which would be costly to duplicate, and the large excess production capacity that would be held by the resulting firm. The Commission concluded that the merger would have significant anticompetitive effects, and while the parties contended that the transaction would produce efficiencies, the Commission decided, pursuant to the consumer welfare standard that applies to in the efficiency analysis under the law, that the savings would not be passed on to consumers.

A part of the acquisition had already been consummated abroad, however, and the Commission declined to require the transaction to be unwound. It did require the divestiture of one baking plant operated by the parties together with a brand name and a distribution system. Further, the Commission required that the parties could not complete that part of the transaction that had not been consummated nor could they integrate their operations in Argentina until the divestiture was accomplished.

Ambev/Quilmes

This brewing industry merger, approved with conditions in 2003, was one of the most controversial mergers in recent history in Argentina. The transaction involved the acquisition by Ambev, headquartered in Brazil and one of the largest brewers in the world, of Quilmes, the largest brewer in Argentina (Quilmes also had operations in Bolivia, Paraguay and Uruguay). Quilmes had a market share in Argentina of about 65% and Ambev’s was about 15%, resulting in a combined market share of about 80%. This increase in concentration was of obvious concern, and the CNDC also concluded that entry barriers in the relevant markets were high. Entry barriers included the significant brand loyalty in the industry, the need for an effective distribution system, which was difficult to create, and significant excess capacity held by the parties.

The parties claimed that the merger would produce significant efficiencies, some of which the CNDC found credible. The Commission found the merger to be anticompetitive, but did not disapprove it completely, permitting it to go forward with conditions. It required the divestiture of two brewing facilities and four brand names, and also required certain distribution commitments. The market share represented by the brands to be divested was approximately equal to the increase in concentration that would result from the proposed merger. The Commission also required that the divestiture be made to a new entrant, not to an existing competitor. The parties were given a period of one year to complete the divestiture.

There are some who feel that it would have been better to disapprove the merger entirely. In any case, because of an intervention by a third party, the divestiture had not occurred as of early 2006. Another Argentine brewer sought to acquire the assets to be divested but it was not permitted to, because of the requirement that they be sold to a new entrant. That party went to court to challenge the CNDC decision. Initially the court of first instance issued an order suspending the divestiture process until its decision was final. It then denied the third party’s petition, but the petitioner appealed. A court of appeals sustained the decision of the court of first instance, but again the third party appealed to the Supreme Court. The injunction against completing the divestiture remained in effect. In April 2006 the Supreme Court rejected the appeal, deciding the case in favour of the CNDC, and the one year divestiture period again began running.8
Postal Services

This decision, handed down in 2001, involved the proposed merger of the two largest companies providing postal services in Argentina, one of which was a former state owned enterprise. The parties competed nationwide in several postal services, including basic letter delivery, telegraphic services, monetary transfers, business services, small package delivery, high security delivery and international courier services. There were smaller competitors in some of these services, but the merging firms had the largest and most comprehensive networks. They were the first and second choices for most consumers for these services. The Commission concluded that the increases in concentration in these several markets were unacceptably high and that it was difficult to enter these markets, in part because of significant economies of scope. The Commission attempted to estimate the costs to consumers that could result from the merger, and concluded that they could range from AR$ 18 to 55 million per year. The Commission rejected the efficiency claims made by the parties, saying that the estimates were not quantified and were too imprecise.

Postal services in Argentina were partially regulated, but the only services for which prices were set were letters, telegrams and small monetary transfers. Section 16 of the competition law provides that when a merger occurs in a regulated industry the sectoral regulator must provide a report to the competition authority on the competitive effects of the transaction. In this case the National Communications Commission provided such a report noting the anticompetitive effects of the proposed transaction.

The proposed merger was disapproved.

There is a procedural issue that has adversely affected at least two of the Commission’s merger cases and that has the potential to disrupt the process in the future. It has to do with the ability of third parties to challenge the Commission’s decision in court. The intervention by a third party in the Ambev/Quilmes beer case described above prevented for a period of years the accomplishment of the divestiture that the Commission ordered. A similar result has occurred in a merger of two supermarket chains. In that case a third party competitor intervened in a federal court located in Mendoza province, seeking to halt the CNDC’s review of the transaction, citing two grounds: first, that the CNDC lacked a quorum when the investigation was begun, and second, that the CNDC could not legally act on a merger under the 1999 law because the law purported to create another competition agency, the Competition Tribunal, which, nevertheless, has never been constituted. The lower court agreed with the intervenor on the quorum issue, but held that the CNDC was empowered to act on cases until the Tribunal was created. In May 2006 a court of appeals upheld the lower court on the quorum issue, directing the Commission to begin the case again (there has been a quorum at the Commission since July 2004). It also agreed with the lower court that the CNDC could act under the 1999 law, but said that it should have all of the powers given to the Tribunal by that law, notably the power to render decisions independently of the Secretariat. The case is now on appeal in the Supreme Court.
3. Institutional Issues

3.1 The enforcement toolkit

The competition law gives the competition authority the powers that it needs to enforce the law. Section 24 provides the agency with standard investigative powers, including powers to conduct market surveys; to hold hearings and take testimony; to examine books and documents; and to conduct dawn raids upon authorisation by a court. It also authorises the agency to engage in competition advocacy; to draft its internal rules; to prosecute actions in court; to participate with other relevant offices in the government in the negotiation of international agreements relating to competition policy; and to enter into consent agreements in cases.

Article VII, sections 46-51 create sanctions for violations of the law. They include powers to issue orders terminating unlawful practices and, if necessary, requiring actions to eliminate the effects thereof; to impose fines on both artificial and natural persons for conduct violations (described in part 2.1.1 above); in the case of abuse of dominance to request a court to dissolve or restructure the dominant firm; to fine persons up to AR$ 1 million [USD 333 000] per day for failure to observe one of its orders or to provide timely merger notification; and to fine persons up to AR$ 500 [USD 167] per day for obstruction of an investigation.

3.2 Financial and personal resources

The following table shows the budget, in pesos and U.S. dollars, and the person years expended in the CNDC for the period 2001-05.

<table>
<thead>
<tr>
<th>Year</th>
<th>Budget AR$</th>
<th>Budget USD</th>
<th>Person years</th>
</tr>
</thead>
<tbody>
<tr>
<td>2001</td>
<td>2 617 000</td>
<td>2 617 000</td>
<td>48</td>
</tr>
<tr>
<td>2002</td>
<td>2 497 202</td>
<td>713 572</td>
<td>41</td>
</tr>
<tr>
<td>2003</td>
<td>2 295 724</td>
<td>704 677</td>
<td>42</td>
</tr>
<tr>
<td>2004</td>
<td>2 161 697</td>
<td>745 412</td>
<td>48</td>
</tr>
<tr>
<td>2005</td>
<td>2 141 023</td>
<td>738 525</td>
<td>53</td>
</tr>
</tbody>
</table>

The sharp decline in the U.S. dollar amount in 2002 was the result of the elimination of convertibility and the fall in the value of the peso. The dollar increases in the years thereafter reflect a strengthening of the peso. The peso
data are more relevant, however, as most of the budget is used to purchase services provided locally. The peso data are revealing. Between 2001 and 2005 there was an absolute decline of 18%. A possible offsetting factor, which cannot be quantified, is that from time to time some expenses of the Commission are absorbed from the Secretariat’s budget. But further, there was cumulative inflation since 2001 of about 70%, even while the budget was declining in absolute terms. In real terms the decline can only be described as punishing.

It is clear that the Commission suffers from a lack of financial resources, the impact of which falls upon its personnel. As of early 2006 the five members of the Commission included three economists and two lawyers. On the professional staff there were 22 economists and 11 lawyers. There were eight administrative personnel and three part time non-professional assistants, giving a total of 49 employees. There is a further division of the staff, however, between those who serve on a contract status and those who are permanent employees. From year to year there is about an equal number of each. The contracts are usually for short terms, as short as three months, although they can be and usually are renewed. The salaries of the contract personnel are generally higher than those of the employees, but otherwise the contractors have no benefits. In any case, salaries are effectively frozen. The result is a high staff turnover, especially among contract personnel. It is not uncommon for employees to leave the Commission even for other jobs in government, where salaries are higher. In the past few years many highly qualified people have left the Commission for better paying jobs elsewhere, and it has proved difficult to replace them.

The situation for commissioners is much the same. Commissioner salaries have been frozen since 1992. The result is that fewer qualified people are interested in accepting an appointment to the Commission.

The low salaries and high turnover have obvious negative effects on the work of the Commission. At any given time most of the staff is inexperienced. The result is a lack of institutional memory, which affects efficiency, if not the substance of the Commission’s work. Despite this, the CNDC generally receives high marks from those in the private sector who deal with it. The staff is recognised as a hardworking group of professionals, who act professionally. Their output is considered good. For example, the amount of time that a typical merger review takes is not considered overly long by Argentine standards. More often than not, the Commission’s decision on a merger is not the last to occur in the course of necessary government approvals of such transactions. In terms of substance, the quality of the Commission’s decisions, especially in mergers, is also respected. It cannot be doubted, however, that the Commission is severely constrained by its budget.
3.3 Independence: the CNDC and the Tribunal

As noted above, there are five members of the CNDC, a president and four commissioners. The four commissioners are appointed by the national president for terms of four years. Two must be lawyers and two economists. Commissioners must be at least 30 years old and have had at least four years of relevant profession experience. They are relatively secure in their positions, and can be removed only for misconduct, the commission of a crime or similar acts. The president of the Commission is not appointed for a specified term. He or she serves at the pleasure of the national president. Typically the election of a new national president or the appointment of a new Minister of Economy results in the appointment of a new Commission president. A majority of three of the five commissioners must agree on a decision. The Commission’s decision, however, has no legal effect of its own, and must be approved by the Secretariat for Technical Coordination.

For several years after the enactment of the 1980 competition law that created the CNDC the Commission operated as a part of a government ministry and exercised little independence. That changed in the mid-1990s with the appointment of a series of more activist, qualified Commission presidents. In the last half of the 1990s the Commission was active, generally well staffed and rendered several important decisions. The political and financial crises beginning in 2001 brought further change, however. Rapid turnover in national presidents and in economy ministers in 2001-02 resulted in a series of short term Commission presidents. Stability returned in the second half of 2002 with the appointment of a Commission president who served until January 2006.

The current organisational structure virtually guarantees that the CNDC will be subject to some political influence. The perception exists, however, that there is more influence of that kind exerted on the Commission currently than there was in the late 1990s. Of course, throughout the period all of the Commission’s decisions had to be approved and implemented by the Secretariat in the Ministry of Production, or in later years, the Ministry of Economy and Production. In practice, the Secretariat almost never overrules the Commission, but in important merger cases there may be informal discussions between the two bodies in advance of the Commission’s decision, through which a consensus is reached.

Perhaps equally important, the Ministry and the Secretariat can have an active role in decisions to begin an investigation. This practice has become more common in recent years, as the government’s battle against inflation has intensified. If the ministry observes what it considers to be unwarranted price increases in a sector the Secretariat may order the Commission to undertake an investigation and report its findings. This practice has been
going on for some time, but recently it has become more formal. In 2004-05 the Commission was ordered to undertake investigations of markets in liquid petroleum gas (LPG), steel rebar used in construction, granulated urea, worker’s compensation insurance, plastic and plastic containers and most recently, the wholesale beef market. These investigations consume some of the Commission’s scarce resources. It is also true that sometimes they generate cases. The YPF case described above resulted from such an industry-wide inquiry.

Finally, the CNDC is dependant upon the ministry for its budget, and it has relatively little discretion as to how to spend the budget that it has. Most decisions of this type must be approved by the ministry.

The 1999 law provided for the creation of the National Tribunal for the Defence of Competition. The Tribunal would be within the Ministry of Economy but it would have independent decision making and enforcement powers. The Tribunal would be “self financing,” and have a separate budget. The law permits the Tribunal to “fix the fees to be paid by interested parties for the proceedings brought before the said Tribunal.” The Tribunal is to have seven members, who will be appointed for a term of six years. At least two members must be lawyers and two economists, each having more than five years of experience in their field. Commissioners will be selected by a competitive jury process; the jury will be composed of top officials from government ministries, from both national legislative chambers, the president of the National Court of Appeals for Commercial Matters and the presidents of the National Academies of Law and Economic Sciences.

In 2001 two important decrees affecting the new law were promulgated. One, noted above, created a new size of the transaction threshold for merger notifications. A second was more comprehensive, creating, among other things, new procedures for conduct and merger investigations. One of its most important provisions gave the Secretariat a role in the Tribunal’s conduct cases. The Secretariat would no longer be the approving authority, but the decree afforded it the status of a party in the Tribunal’s cases; it could take the necessary steps to begin a case; it had evidence gathering powers; and it could appeal to the courts from a decision of the Tribunal.

But as discussed above, the Tribunal has never been constituted. The political and economic crises at the turn of the century closely followed the enactment of the 1999 law. There was a succession of governments during this period, and creating an independent competition tribunal was overshadowed by the more pressing priorities of managing the massive public debt default and the end of convertibility, righting the economy and again dealing with inflation. The status quo continued into 2005, when there was an effort to revive the Tribunal process. A proposed amendment to the
competition law which would have led to the creation of the Tribunal was introduced in the Parliament, but it also would have permitted the executive to override a merger decision of the Tribunal in matters affecting the national interest. In late 2005 the amendment was almost enacted, but there was a failure to reach agreement in the Parliament on the issue of whether there could be appeal to the courts of such an executive decision. Soon thereafter the Minister of Economy resigned, and the initiative lost impetus. There seems to be a general feeling that the creation of a fully independent Tribunal, as provided in the current law, is unlikely for political reasons.

3.4 A competition culture and price agreements

Like in many countries in which competition law enforcement is relatively new, a competition culture has been slow to develop in Argentina, but there are signs that it is occurring. There is a small but growing competition/antitrust legal community. Most large law firms have an antitrust practice, which was spurred by the creation of merger control in the 1999 law. Influential members of this private sector group include former officials of the CNDC. One of them began an on-line discussion group called ForoCompetencia, whose members come from throughout Latin America and beyond. The site is a place for lively discussion of competition policy issues affecting the region. Locally in Buenos Aires, a group of interested competition policy experts from both private and public sectors meets informally from time to time to discuss current developments in the field. These experts publish articles and commentary on competition policy in local journals.

The CNDC contributes to the competition culture by maintaining a web site containing information about the agency and its decisions. The site includes information about the agency, relevant laws and regulations, annual reports and selected decisions of the agency. All decisions of the Commission are available for public inspection at the CNDC’s offices. In September 2005 the CNDC sponsored a conference on competition policy in Buenos Aires, featuring speakers from Argentina and abroad. The academic community recognises the discipline of competition policy. Courses on the topic are taught in law and business schools, but it has not yet become a subject that students choose to specialise in.

For the most part, however, the public at large does not participate in this modest competition culture. More likely than not, its perception of the competition law and of the competition authorities is as weapons against inflation. Moreover, as described in part 1.1 above, the government recently introduced a new tool in its battle against inflation: agreements with private sector participants limiting their ability to raise prices. The CNDC has no
role in the agreements, but the Secretariat for Technical Coordination is assigned the task of monitoring relevant costs. The terms of the agreements permit the parties to pass on their increases in costs.

These agreements of course apply only to price increases and not to price decreases, and so they do not completely supplant market forces. Whatever their value against inflation, however, they are not consistent with a market economy or with competition law enforcement. They could contribute to informal agreements not to lower prices, and inevitably they would complicate the efforts of the competition authority to enforce the anti-cartel provisions of the law.

Finally, in a few sectors not characterised by natural monopoly there is formal price regulation. One is in liquid petroleum gas. While natural gas is plentiful in Argentina, many residents do not have access to the distribution network. For them an important source of energy is LPG, which is refined from petroleum and natural gas. Because this fuel is so important, its price is regulated pursuant to law 26 020, enacted in 2005, which granted regulatory oversight for LPG to the National Secretary of Energy. The Secretary has the power to delegate to the natural gas regulator, Enargas, the technical tasks associated with this regulation. A second is civil air transportation, discussed further below in part 4.5. Rates for passenger air travel must be set within (fairly wide) bands, established by a government ministry.

3.5 Appeals of competition cases

Section 52 of the competition law provides that decisions of the CNDC imposing fines, issuing remedial orders, denying a merger and dismissing a complaint, as well as interlocutory orders, can be appealed to courts in the federal system. Other appeals authorised by the Argentine Criminal Procedural Code are also possible. The standard for the second type of appeal is that a decision of the CNDC must have resulted in an irreparable situation, in Spanish, “gravamen irreparable.” The lodging of an appeal has the effect of suspending the payment of any fines that the Commission has assessed, but it does not suspend other sanctions or orders imposed by the Commission. There is an expedited process for appeals from an interlocutory order.

Under the constitution all federal appeals courts have jurisdiction to hear competition cases. Sometimes appeals are heard by courts located in the provinces, outside Buenos Aires (the controversial supermarkets merger case, described above, originated in a federal court in Mendoza province). It
turns out, however, that most competition cases are appealed to the Federal Civil and Commercial Court of Appeals in Buenos Aires. This is a quasi-specialised court, whose jurisdiction is indicated by its title. To date this court has heard approximately 100 competition appeals of both types described above. Less complex cases are usually resolved within two or three months; more complex cases take longer, however.⁴⁹ The judges on the Civil and Commercial Court do not consider themselves specialists in competition cases, as their portfolio is much broader. Most of the cases that they hear come from courts of first instance; competition cases, on the other hand, originate in the CNDC. The judges on the court profess respect for the CNDC, and they are interested in broadening their exposure to competition law and policy.

Decisions of the courts of appeals can be appealed to the national Supreme Court. The jurisdictional requirements for Supreme Court appeals are strict. Only a handful of competition cases have been appealed to this highest tribunal. Two of those were the YPF dominance case and the Ambev/Quilmes merger case described above. The CNDC’s record in court generally has been good. Relatively few cases have been overturned on the merits. More frequently, however, courts, especially regional courts, have reduced the fines that the Commission has imposed.

Argentina does not employ a common law legal system. Judicial decisions do not have the same binding precedential effect that they do in common law countries, but a decision by a higher court, especially the Supreme Court, may have some practical effect on other cases. Recently the courts have considered two potentially important issues in merger cases: the ability of third parties to intervene in CNDC cases (Ambev/Quilmes), and the ability of the CNDC to decide cases under the 1999 law without the Tribunal having been constituted (supermarkets). It is the CNDC’s position that a decision in one case does not apply to others. It applies this view to the supermarkets case, and it continues to decide cases in its usual fashion.

### 3.6 Exemptions and exclusions, and acts of provincial governments

There are no explicit exemptions or exclusions from the competition law for business conduct of any type. Section 3 of the law provides:

All natural or artificial, public or private, profit or non-profit persons, performing economic activities in whole or part of the national territory and those performing economic activities outside the country, to the extent their acts, activities or agreements affect the national market, are subject to the provisions of this law.
Section 59 of the law is even more explicit about jurisdictional exclusivity:

Any jurisdictional powers concerning the subject matter and purpose of this law conferred on other governmental agencies are hereby revoked.

There are no exemptions or special rules that apply to small and medium sized businesses.

Of course, some sectors, especially those in which natural monopolies exist, are subject to regulation in various forms, and there are inevitably accommodations between the competition law and regulation in these instances, but these sectors are also subject to the competition law. The competition/regulatory interface is discussed below. But further, it is apparent that other private actions sanctioned or required by government can also escape the coverage of the competition law. The most obvious example of this is the recent round of price agreements, which absent government participation would clearly violate the competition law.

As noted above, Argentina is a federal republic. Its 23 provincial governments have a high degree of autonomy in some aspects of government. Article 121 of the national constitution, adopted in 1994, provides that “provinces conserve all the power not delegated by this Constitution to the Federal Government.” There are no provincial competition laws, however. Article 42 of the constitution provides that there shall be federal legislation guaranteeing the right to free markets, leaving no room for provincial competition laws to coexist with it. Provincial and local governments are also subject to the competition law to the extent that they engage in commercial activities. Apparently these governments do not usually participate in commercial activity, however, and there have been no cases under the current law against provincial entities.

The provinces still have regulatory authority in some sectors, however. They exert regulatory authority over local transportation, water and other natural resources, among others. They also had regulatory authority over the professions, and the result was little competition in these fields; horizontal arrangements among professionals were either imposed or condoned by provincial governments. Beginning in the early 1990s, however, the national government began entering into agreements with provincial governments, called “Federal Agreements,” in which the provinces agreed to relinquish regulation of the professions. Those professions affected included architects, engineers, surveyors, notaries, veterinarians, sociologists, lawyers, accountants, biochemists, geologists, stock brokers, stock markets and auctioneers (health care workers apparently were never part of this regulatory scheme). Where these agreements apply, the professions are subject to the competition law. Not all of the provinces entered into these agreements, however. By the end of the 1990s 15 of the 23 had done so.
3.7 **International aspects of enforcement**

Section 3 of the competition law, quoted above, applies the traditional “effects test” to conduct that occurs abroad: conduct that affects Argentine markets is subject to the law. In most other respects, foreign entities are not treated differently under the competition law from domestic ones. Competition analysis under the law fully takes into account the impact of imports. Argentine law does recognise that certain economic activities are of special importance to the country’s national interests. A statute provides:

> [T]he policies of the National State will preserve especially:
> a) anthropological, historical, artistic and cultural patrimony;
> b) companies dedicated to science, technology and research that are fundamental for domestic development;
> c) activities and industries of special importance for national defence;
> d) the electromagnetic spectrum and the media.

The same law limits foreign ownership of media companies to 30% of voting shares, with the exception that the percentage can be reciprocally higher as to entities from countries that permit greater degrees of foreign ownership in media companies.  

In 2003 Argentina and Brazil concluded a co-operation agreement, which provides for the usual means of co-operation in competition law enforcement matters, including notifications, information sharing subject to confidentiality requirements, positive and negative comity and consultations. This is the only bilateral co-operation agreement to which Argentina currently is a party. There has been little formal co-operation between the Argentine and Brazilian agencies under the agreement, but the two sometimes co-operate informally on specific matters, by means of email or telephone communications.

Argentina is a member of Mercosur, a common market comprising Argentina, Brazil, Paraguay and Uruguay. In 1996 the members signed an ambitious agreement on competition policy, popularly known as the Fortaleza Protocol. It would create a supranational body, the Committee for the Defense of Competition, which would have enforcement powers in matters referred to it by the national competition agencies of the member countries. In 2002 and 2003 the parties agreed to a complementary regulation to the Protocol and to a co-operation agreement, respectively. The Protocol is not in effect, however. It has been ratified only by Brazil and Paraguay, and there does not seem to be much impetus for ratifying it in Argentina and Uruguay.
The CNDC is active, to the extent that its resources permit, in several international forums on competition policy, including the OECD, the OECD/IDB Latin American Competition Forum, ICN, UNCTAD, ALCA and the Iberoamerican Competition Forum. A description of these activities can be found on the CNDC’s web site.

4. Competition Policy in Regulated Sectors\textsuperscript{53}

Until the early 1990s most of the assets in Argentina’s infrastructure industries were state owned. In 1989, however, an ambitious privatisation programme was set in motion. The assets in the several sectors were reorganised into viable business units and then sold. By 1994 most of the privatisation was accomplished. Some of the buyers, especially in electricity and telecommunications, were large foreign entities. Sector regulators were created. The regulatory schemes for electricity and natural gas were established by law, while the others were created by decree. Some of those are described further below.

In the years immediately following privatisation there was little interaction between the sector regulators and the CNDC, and the CNDC seldom intervened in those sectors under the competition law that existed then. That changed with the enactment of the 1999 law. As noted above, that law explicitly made all sectors subject to it. Section 16 is a special provision that applies to mergers in regulated sectors. In the event that such a merger is proposed, the CNDC … shall require from said government agency a report and considered opinion on the economic concentration proposal concerning its impact on competition in the respective market or on its compliance with the relevant regulatory framework.

The Commission then proceeds to review the merger under the competition law. In most regulated sectors the regulator also has authority to deny a proposed merger on grounds other than competition. While cooperation between the CNCD and sectoral regulators seems to be working well in the case of mergers,\textsuperscript{54} there has been less interaction among the agencies in conduct cases. The regulated sector in which the Commission has been most active in conduct cases in recent years is telecommunications, and much of this activity has been in cable television, as noted above.

As with almost every aspect of the Argentine economy, the 2001-02 financial crisis had a significant effect on the infrastructure sectors. The privatisation contracts and concession agreements with private investors in these sectors had been negotiated in dollar terms during the convertibility period. In January 2002 convertibility was ended by Public Emergency and Exchange Regime Reform Law no. 25,561 and the value of the peso fell to
as low as 3.9 to the dollar. The same law provided that all “public service” contracts would henceforth be expressed in pesos (“pesification”) at the rate of 1 to 1 to the dollar. The law also authorised the national Executive to renegotiate public service contracts, taking into account such factors as the competitiveness of the economy, quality of service, the interests of users and of the providers and the security of the systems.

The result was to freeze the tariffs under these contracts at pre-2002 levels. They remain there for residential and individual customers; some increases in tariffs for business and industrial users have been granted. In 2003 a decree established a new agency that would assume the contract renegotiation responsibility, the Unit for the Renegotiation and Analysis of Utility Contracts (UNIREN). Some agreements have been renegotiated, but many remain unresolved. Many of the international investors initiated cases in international dispute resolution forums, notably the International Center for the Settlement of Investment Disputes (ICSID). Some of these cases have been resolved as a result of the contract renegotiations, but others remain open. In some cases international investors, for example Électricité de France and Endesa (Spain) in the electricity sector, have been replaced by Argentine companies. One result of these extraordinary measures limiting increases in tariffs has been to discourage investment in these sectors, in which investment is now badly needed.

Below are brief descriptions of the structure and regulatory regimes in selected infrastructure sectors.

### 4.1 Electricity

Electricity generation in Argentina is almost equally divided between hydroelectric and thermal (natural gas), with a small nuclear component. Argentina followed Chile as one of the first countries to privatise this sector. The 1992 Electricity Act privatised the three principal state-owned electric utilities, which had been vertically integrated, into three distinct sectors, generation, transmission and distribution. Generation is competitive, with about 70 generators currently operating. Transmission and distribution are regulated private monopolies (in a few provinces the distributors are still state-owned). The Act created an independent sector regulator, the Ente Nacional Regulador de la Electricidad (ENRE) and a wholesale market, administered by an independent operator. Vertical integration in the industry is strictly limited. The three transmission companies may not purchase or sell power. Generators and distributors may not own majority interests in transmission companies. There are also limits on horizontal integration in generation and distribution.
4.2 Natural gas

Argentina has significant natural gas reserves. Like electricity, this sector was privatised in 1992 by statute. The former state-owned transportation and distribution monopoly was split into two high-pressure transmission companies, one operating in the north of the country and one in the south, and eight distribution companies. A ninth distributor has since been added. The price of gas at the wellhead was deregulated and a new regulator, Ente Nacional Regulador del Gas (Enargas) was created and given authority over transmission and distribution tariffs. As in electricity, these rates were regulated by means of price caps until the government intervention in 2002, described above.

The former state-owned oil and gas production company, YPF, was privatised and its exclusive rights to exploration and production were eliminated. YPF was also required to sell about a third of its oil and gas reserves. It currently controls about 50% of natural gas production. There are many smaller producers.

4.3 Telecommunications

In 1990 the state-owned telecommunications monopoly, Entel, was reorganised into two companies, Argentine Telecom, providing local land line service in the northern half of the country and Telefonica de Argentina serving the south, and privatised. A third company, Telintar, a joint venture of Telecom and Telefonica, was created to provide long distance service. A sector regulator, the Comisión Nacional de Comunicaciones (CNC) was also created by decree. It was originally intended that this duopoly would operate exclusively for five years, which was later extended to eight, and in 1998 a two-year transition period was introduced.

In 2000 all telecom sectors were liberalised. Local loop tariffs continue to be regulated, though prices will be freed when there is “effective competition” in a service area, which is defined as when the incumbent has a revenues of less than 80% of the total. In 1994 a single operator was designated to provide mobile telephony services, but in 1996 that market was liberalised. As of 2004 there were four firms competing in mobile telephony, and several were providing long distance and data transmission services. More recently there has been some consolidation in mobile telephony and data transmission (see the description of the Telefonica/Bell South merger above).
4.4 **Banking**

The banking sector suffered terribly in the 2001-02 crisis. A run on deposits in late 2001 caused the government to impose a series of measures restricting withdrawals and foreign transfers, collectively called the “corralito,” which effectively shut down the system. After the end of convertibility the government established a provisional “official” rate for the peso at 1.4 to the dollar. Bank loans, however, were assigned a lower rate: 1 to 1. This had the effect of rendering many banks technically insolvent, since their assets (loans) were valued at a lower rate than their liabilities (deposits). Many foreign banks, which until the crisis had been among the largest banks in the country, exited the market.

Like the rest of the economy, the banking sector made a rather quick recovery after 2002. Today there are about 70 banks operating in the country. The two largest account for about 35% of total deposits and the eight largest about 74%. The sector is only partially privatised. There are 11 government-owned banks, most of them owned by provincial or municipal governments. The two largest banks, the Banco de la Nacion Argentina and the Banco de la Provincia de Buenos Aires are, respectively, federal and provincially-owned banks. Foreign banks have returned to Argentina. There are currently about 16 operating in the country, but they are not among the largest.

The CNDC has had few cases or investigations in the banking sector; it has reviewed some mergers in other parts of the financial sector. No cases in recent years in the financial sector have resulted in the imposition of sanctions. There is little interaction between the Commission and Central Bank (a situation not unique to Argentina), which exercises close supervision over the industry on “providential” issues.

4.5 **Airlines and airports**

The former state owned airline, Aerolineas Argentinas, was privatised in 1989 and in 1992 civil aviation was deregulated, though in practice competition was not introduced until 1994 with the authorisation for two new airlines to begin business. Aerolineas Argentinas continued as the dominant domestic airline into the 2001-02 crisis, when it nearly went bankrupt. It survived the crisis, however, and today it is again Argentina’s dominant domestic carrier. Its principal domestic rival is LAN Argentina, a subsidiary of LAN Chile. There are a few other, smaller carriers serving domestic routes. Aerolineas Argentinas and several international carriers serve international routes from Buenos Aires.

Domestic airline prices were re-regulated in 2002, however. Currently the Secretary of Transportation in the Ministry of Economy and Production
establishes pricing bands, in which the maximum prices are about 190% of the minimums, within which the carriers must establish their prices. Certain other discounts from the minimums are possible.

The National Airports System Regulatory Organism (ORSNA) was created in 1997 as the airports regulatory authority. There is a national system of 54 airports and aerodromes in Argentina. Thirty-three are operated under concession, the remainder directly by ORSNA. ORSNA supervises the concessionaires, and is otherwise responsible, in conjunction with the Argentine Air Force, for the operation, maintenance and safety of the airports.

4.6 Ports

Argentina’s port system was also restructured in the early 1990s. The ports were transferred to the provinces, which could either operate or concession them. The Port of Buenos Aires is by far the largest in Argentina, accounting for more than 90% of container traffic in the country. Buenos Aires was divided into two ports, Dock Sud, which was transferred to the province of Buenos Aires, and Puerto Nuevo, which remained a federal facility. There were six terminals at Puerto Nuevo, concessions for which were offered for bid. Originally a concessionaire could operate only one terminal at Puerto Nuevo, but that limit has been eliminated. Still, this reorganisation had the salutary effect of introducing competition between ports, and in the case of Buenos Aires, within a port.

The CNDC has considered two mergers in this sector. In 2001 it reviewed a vertical merger in which Maersk Sea Land, a large international shipping company, proposed to purchase the concession for one of the terminals at Puerto Nuevo. The possible anticompetitive effect was one of foreclosure; Maersk might have been able to exclude its shipping competitors from access to the important port at Buenos Aires. The Commission concluded that it would not have sufficient market share to do that, however. Its terminal had only 8% of the total capacity at Puerto Nuevo, and it would also face competition from Dock Sud, also in Buenos Aires.

In 2003 the CNDC encountered a more difficult, horizontal transaction, in which the operator of terminals 1 and 2 at Puerto Nuevo proposed to acquire the operator of terminal 3. The HHIs in the relevant service markets (container handling and operational capacity) were 2,572 and 2,128, respectively, and the merger would increase them by 490 and 312. The Commission determined that the merger would not have significant anticompetitive effects, however, for the following reasons: terminal 3 was not as attractive a facility as some of its competitors, including terminals 1, 2 and 5, Dock Sud and another port located nearby; some of the remaining
competitors had a substantial amount of excess capacity which could be used to discipline an attempted unilateral price increase by the merged firm; shippers expressed no concern about the merger; and there continued to be some price regulation pursuant to the emergency measures that were implemented after the 2001-02 crisis. Further, there were plausible claims of efficiencies that would result from the merger.

5. Competition Advocacy

Article 24 of the competition law authorises the competition authority to conduct competition advocacy. It can: “promote the study and investigation of competition;” “give [its] opinion on competition … in respect to laws, regulations … and administrative acts;” and “issue general or sectoral recommendations about competition modalities in markets.” The CNDC’s limited resources and its merger review responsibilities, especially in recent years, prevent it from engaging in competition advocacy in regulated sectors in an ongoing fashion, however. Of course, when it conducts one of its industry-wide studies its report and recommendations are effectively a form of competition advocacy. In addition it has from time to time provided useful input into decisions by regulators or other government bodies. Two of these involved the auto fuels market, described in the box below.

6. Conclusions and Recommendations

Competition policy in Argentina has an excellent foundation: the 1999 competition law. The law articulates the right standards in the three substantive areas of competition law enforcement – restrictive agreements, abuse of dominance and mergers; it creates an independent, professional enforcement authority and provides it with the legal and administrative tools that it needs for the job. Competition policy has benefited from another fundamental advantage over the years: a dedicated, competent staff of professionals in the CNDC. But competition policy has not achieved its proper place in the Argentine economy. There are many reasons for this, not the least of which has been the country’s unsettled economic and political experience in the past several decades.

The following recommendations address several of the issues highlighted in the sections above. It is recognised that some of them, including the most important, cannot be fully implemented by the competition agency alone. These require concurrence and action by other parts of government, both executive and legislative. Thus, there is a political component to the strengthening of competition policy in Argentina.
YPF was privatised in 1991. At that time it controlled a dominant share of crude oil refining capacity, 63%. Shell and Esso together controlled 32% and smaller firms the remainder. By 2000 the market was somewhat less concentrated, with four firms controlling about 85% of capacity. YPF (by now, Repsol YPF) was still the largest, with about 50%. Shell, Esso and an independent firm (later acquired by Petrobras, the large Brazilian oil company) were the other significant players. By 2000, however, it was apparent that retail petrol prices in Argentina were not reacting to world market forces to the extent that one would have expected in a competitive market. There had been investigations of possible cartel activity among the Argentine producers, but they did not produce sufficient evidence of cartelisation.

In 2000 the CNDC undertook a comprehensive study of the market. It focused on the vertical relationships between the refiners and retailers. Although most petrol retailers were independently owned and operated, they were parties to supply contracts of long duration – more than 11 years in most cases – which effectively isolated them from their supplier. Given the obvious importance of a retail network in this industry, this integration constituted a barrier to entry. The CNDC’s recommendation to the Secretary of Energy, provided through the Secretariat for the Defence of Consumer Affairs and Competition, was to limit the duration of new supply contracts to five years. Because the reaction of the producers to this limitation would have been to vertically integrate into ownership of retail outlets, the Commission also recommended that producers be limited to owning 40% of their retail network. These recommendations were implemented through a presidential decree.58

Compressed Natural Gas

A more recent recommendation by the CNDC in the auto fuels sector, provided in 2004, involved the sale of compressed natural gas (CNG) for use in automobiles. The use of natural gas for this purpose is common in Argentina, given the country’s significant gas production. While the price of gas for residential purposes remains subject to regulation, in 2004 the price of gas for transportation use was deregulated by decree. A decree also required CNG retailers to contract directly with gas producers for their supply.

In a report to Enargas, the gas regulator, the CNDC (through the Secretariat) noted that two gas producers, YPF and Petrobras, also operated a significant number of retail outlets for CNG. Together these two firms controlled about 40% of natural gas production in the country and an equal percentage of retail sales by volume of CNG. The report noted the possibility for these vertically integrated firms to engage in various anticompetitive practices, including discrimination in prices or service against non-integrated retailers, refusal to supply independent retailers and imposition of minimum resale prices, limiting intra-brand competition. The CNDC’s report did not contain any specific recommendations, given that the decrees effectively created a new market structure for automotive CNG, but it pointed out the importance of closely monitoring the situation with a view toward preventing possible anticompetitive effects from vertical integration.59
6.1  Create the National Tribunal for the Defence of Competition

- If it is necessary to amend the law to give the executive some power to overrule a decision of the Tribunal in merger cases, this power should be limited in scope to matters of “overriding public interest,” or words to that effect.

It is anomalous that nearly seven years after the enactment of the competition law the agency that it provided for has not yet been established. Doing so would address two fundamental problems that the CNDC faces: insufficient budget and insufficient independence. Section 17 of the law provides that the Tribunal would be a “self financing agency.” Section 25 provides that the Tribunal shall annually submit a draft budget “to the National Executive,” and that it can impose “fees to be paid by the interested parties for the proceedings brought before said Tribunal.” Presumably this includes merger notification fees, a practice employed in many countries. Of course, to the extent that fees do not cover its expenses the Tribunal would still depend on the National Executive and ultimately the Parliament for its funding. Still, it would have its own, separate budget and the authority to decide how to spend it.

Creating the Tribunal would substantially enhance the independence of the competition agency. Its members would be appointed on merit, for fixed terms, by a quasi-independent jury. It would have the power to issue enforceable decisions, which would be subject to review only by the courts. It is said by knowledgeable people, however, that it is politically impossible to vest the agency with the degree of independence that the law currently provides. That was the reason for the proposed amendment in 2005, described above, which would have restored some oversight to the government in merger cases. The competition laws of other countries do provide for such powers in the executive, but the best practice in that regard is to severely limit them to matters of “overriding public interest,” or words to that effect. Ideally, this veto power is rarely used.60

6.2  Increase the budget of the competition agency

- Give the agency, whether the Tribunal or the CNDC, more authority over how to spend its budget

The severe budget problems that the CNDC faces are described in part 3.2 above. Whether the agency is the CNDC or the Competition Tribunal it will need more money to attract and keep qualified professionals at both the staff and commissioner levels. At a minimum it would seem that the agency’s budget should be restored in real terms to 2001 levels. Further, the current system of employing up to half of the CNDC’s personnel on a short
term contract basis also contributes to the high turnover in the agency. A larger budget presumably would permit the agency to convert some or all of these positions to permanent employee status.

It is noted above that the CNDC has little authority to make decisions about how to spend its budget. Of course some oversight it necessary, but it appears that currently the CNDC has too little discretion in this regard, which may be hampering its enforcement work.

6.3 **Strengthen anti-cartel enforcement**

- Make the fight against cartels the top priority within the agency.
- In successful cases against harmful, knowingly unlawful cartels, increase the fines that are assessed, and begin to fine natural persons as well.
- Increase the statutory maximum fines for conduct violations.
- Establish a leniency programme.
- Consider the judicious use of proactive investigations, especially in public procurement.

In the past several years the OECD has urged competition agencies everywhere to give anti-cartel enforcement their top priority. This seems especially important in Argentina, where there is anecdotal evidence of cartel activity. Fighting cartels is a multi-pronged effort. It requires the allocation of sufficient resources to the task; the assessment of ever larger fines against both organisations and individuals, which creates both a deterrent to future cartel activity and an incentive to co-operate with agency prosecutions; and concurrently, the creation of a leniency programme, which offers the elimination of sanctions for the first cartel participant to offer such co-operation. In this regard, it seems that the maximum fines for unlawful conduct under the competition law are now too low, even though the current maximum has yet to be imposed in a case. Raising the maximum, of course, requires legislative action. One way of ensuring that fines are not further eroded by inflation is to index them to inflation.

Proactive, industry-wide investigations sometimes generate cartel cases – that was true in the oxygen case – but they can also consume important resources over a long period of time, while ultimately resulting in no prosecutions. They should be undertaken with caution. One sector that is quite likely to be productive, however – it has been so in many countries – is public procurement. The agency should consider beginning *ex officio* investigations into possible bid rigging and price fixing in government purchasing and contracting.
Prosecuting more successful cases like the cement and oxygen cases would bring significant benefits to the competition agency, probably more than any other enforcement action the agency could take. It would enhance the agency’s reputation both within government and with the public at large. And it would contribute to the development of a competition culture in the country by helping the public to understand how it benefits from aggressive, competent competition law enforcement.

6.4 Increase efficiency in conduct investigations

- Consider ways of summarily dealing with private complaints that clearly do not describe possible violations of the competition law.

- In other cases in which sanctions are ultimately not imposed, consider ways of shortening the time and resources required to arrive at a decision of the Commission and a recommendation to the Secretariat.

The discussion in part 2.1.4 above points up a persistent backlog in conduct investigations. Much of this may be due to the ability of private persons to initiate and participate in investigations by the competition agency, as provided in the competition law. The laws of many countries provide in some way for such private complaints, and there are political reasons why it is useful to have it in Argentina. Many of these complaints are inevitably not credible, however, or they do not describe a possible violation of the law. The Commission can decide that a complaint is not relevant or that it is insufficient in other respects and dismiss it. Over a three year period, 44% of all decisions by the Commission in conduct cases were of this type. But in many more cases there was no decision at all; the backlog grew every year. The Commission must find a way to deal more efficiently with the many complaints that it receives, most of which inevitably are without merit.

The applicable procedures in the majority of cases in which the Commission decides to investigate further can also be cumbersome. Again, the great majority of these cases will result in a finding that the law has not been violated. It should be possible for the Commission to conduct an informal inquiry at the beginning of an investigation, and when it becomes clear that there is no violation, to terminate it. Here, of course, there are conflicting needs for transparency and fairness. This is a balance that the Commission must achieve, but it may be that currently there is too much inflexibility in the relevant procedures.62
6.5 Increase efficiency in merger review

- Consider raising the notification thresholds.
- Work to shorten the time required to approve “easy” mergers from the current 3-4 month average.
- Continue to aggressively oppose the right of third parties to appeal from merger decisions of the competition agency.

The decree in 2001 creating a “size of transaction” threshold had a distinctly beneficial effect on the Commission’s caseload. Until that time the Commission was having to review too many inconsequential mergers, which soaked up too many of the Commission’s resources. In recent years the number of notified mergers has again increased, however. It is beyond the scope of this report to determine if the current thresholds are again too low, but that may be the case. As noted above, there has been significant inflation since 2001, which had the practical effect of lowering the thresholds. The Commission should review the effect of today’s thresholds, and if it determines that they are too low, recommend that they be increased by law or decree.

As noted above in part 3.2, the private sector in Argentina is generally not critical of the CNDC for the amount of time that it takes to review mergers. But it is a fact that the Commission takes longer than agencies in many other countries to review and approve “easy” mergers – those that early on can be determined not to present any significant competitive issue. The OECD Competition Committee has conducted a study of merger review periods in OECD countries, and it has determined than in the majority of them non problematic mergers are approved in 30 to 45 calendar days, and sometimes less.63 The International Competition Network, in its Recommended Practices for Merger Notification Procedures, recommends that merger review be conducted in two phases, and that the duration of the first phase, in which non problematic mergers are approved, should be no longer than six calendar weeks.64 Regardless of how the private sector views the Commission’s efficiency in reviewing mergers, shortening the time that it takes to review easy ones would have the salutary effect of freeing up some of the Commission’s scarce resources for more important work, including anti-cartel enforcement.

With this goal in mind, the Commission should review all of its merger review procedures. If merging parties are completing Form 1, the initial notification form, in good faith it should not be necessary for the Commission to require as often as it does that the information be supplemented, which has the effect of suspending the internal 15 day deadline for phase I. Further, there may be ways of streamlining the manner in which recommended approvals are presented to the Commission, and then to the Secretariat.65
The ability of private parties to appeal from merger decisions of the Commission is also an important issue. Such appeals are disruptive, as the experience in the beer and supermarkets cases shows, and they consume the Commission’s time and resources. While the competition law authorises the complainant in a conduct case to appeal from a dismissal by the Commission, it does not specifically provide such a right in merger cases. The Commission has been right to oppose such appeals in the courts, and it should continue doing so.

6.6 Review the current merger notification regime which permits the parties to consummate their merger before the competition authority completes its review

- If it is decided not to change to a strict premerger notification procedure, which requires the parties to wait during the agency review, consider creating procedures that would permit the competition agency, in appropriate cases, to apply for an order prohibiting consummation pending the review, or in the alternative, to order the parties in a consummated merger to “hold separate” their operations to permit a meaningful divestiture if it is required.

The fact that the merging parties can consummate their transaction in Argentina before the competition agency completes its review can materially alter the ability of the agency to achieve an effective remedy for an anticompetitive transaction. In some cases the anticompetitive effects of a merger can be relieved through a divestiture of assets, but in others, only the complete prevention of the transaction is sufficient, and if the merger has been consummated this is not possible. Neither the Argentine competition officials nor the private sector seem to think that the current inability of the agency to prevent consummation in advance of the agency’s decision is a significant problem. Sometimes the parties voluntarily postpone consummation if they think the merger might be denied. In one case where the Commission ultimately disapproved a merger that had been consummated there was disagreement about whether the transaction should be unwound, but ultimately there was a successful divestiture.

Still, there have been very few cases in which a merger was ultimately disapproved. In a few others, where a partial divestiture was ordered there was disagreement over whether the remedy was adequate. All else being equal, it would be preferable for the competition agency to have the ability to prevent consummation before it makes its decision. One way to do so, of course, is to impose a strict premerger notification regime: the parties cannot consummate for a specified period after notification. Premerger notification has costs of its own, however, and in the current climate in Argentina it seems doubtful that the Argentine business community would support such a change. At a
minimum the competition agency would have to dramatically shorten the time it takes to review mergers in a premerger notification regime.67

A second way of preventing consummation in specific cases is to provide the competition agency with the power to seek an order to that effect, if there are sufficient concerns about the transaction’s competitive effects. The Commission has powers to order preliminary remedies in conduct cases, but apparently not in merger cases. Because time is often of the essence in mergers, and because the entry of a preliminary order preventing consummation could have the practical effect of preventing the merger permanently, the prevailing view across countries is that the agency should be required to meet a fairly strong burden of showing that the merger could be anticompetitive. One way of ensuring this is to require the competition agency to apply to a court for such an order. An alternative to such a “preliminary injunction,” or perhaps a complement to it, is the power to order that the parties “hold separate” their operations after consummation until the agency makes its decision, for the purpose of making a divestiture or dissolution more feasible.68

6.7 Until the Competition Tribunal is created, free the CNDC from as much political influence as possible

Since the CNDC became more active in 1996 it has enjoyed periods that were relatively free of political interference. It seems that the current period is one in which it is subject to more of it, if only because it has been enlisted in the government’s battle against inflation. By keeping prices at competitive levels, effective competition law enforcement can be a force against inflation, but other, macroeconomic factors are almost certainly more important in this regard. In any case, if the Commission is to be an ally against inflation it must be left free to enforce the competition law. To the extent that its scarce resources have been diverted for other causes its law enforcement responsibilities will languish. The 1999 law articulates a clear policy in favour of independence of the competition authority. Until that law is fully implemented it seems that its spirit should be observed by preserving the CNDC’s independence as much as possible.

6.8 Continue and broaden the efforts toward building a competition culture in Argentina

The CNDC has implemented several useful programmes toward developing a competition culture in Argentina, described in part 3.5 above. It should continue these and initiate others, to the extent its resources permit. These could include regular, periodic conferences or seminars open to the public on competition policy, such as an annual “competition day” featuring speakers
from the domestic and international competition communities. Participants could come from both the private and public sectors, including especially members of Parliament. Developing good relations with the press is vital in this effort. Every important decision by the Commission should be accompanied by a press release, and in the most important, a press conference. The Commission could publish brochures or pamphlets describing for the general public its functions, the importance to consumers of an effective competition policy and how to contact the Commission to provide information. The CNDC web site could be expanded to include more of the same information of interest to the general public, and more of the Commission’s decisions. But while all of these measures are useful and important, effective law enforcement, including bringing cases of demonstrable benefit to consumers, is the most effective means of all in developing a national competition culture.

6.9 Develop an effective, professional relationship with the judges who hear appeals in competition cases

The competition agency is fortunate that many of the appeals in its cases are made to a quasi-specialised court in Buenos Aires, though of course appeals can also be made to federal courts in other parts of the country. In some ways competition cases are unique among civil cases, and the agency can contribute to judges’ understanding of the special issues that these cases present by sponsoring seminars for judges on these topics, and also by including judges in public events that the agency sponsors. All such events must observe the relevant legal ethics, of course.

6.10 Expand the competition agency’s role in regulated sectors

- Consider opportunities for conduct cases in these sectors, and, consistent with its limited budget, for more competition advocacy,
- Develop co-operative working relationships with sector regulators.

The competition law provides the competition agency with more jurisdiction in regulated sectors than exists in many countries. There are no specific exemptions; the competition agency must approve all mergers in these sectors, with the input of the regulator. Interagency co-operation seems to be working in mergers, but there is relatively little interaction in conduct matters. It would seem that the regulated sectors could be fruitful sources for important dominance cases, and possibly also for cartel cases. Further, while the agency’s ability to engage in competition advocacy is limited by its budget, it could do more in this field. Expanding its role in regulated sectors, however, requires developing working relationships with the regulators, who have critical industry expertise.
Notes

1. Background sources for this brief description of Argentina’s economy and history include: IADB (2006), Economic Situation and Prospects – Argentina; Blustein, Paul, And the Money Kept Rolling In (And Out): Wall Street, the IMF and the Bankrupting of Argentina, (PublicAffairs 2005); United States Department of State, Bureau of Western Hemisphere Affairs, Background Note: Argentina (2005).

2. The law has a constitutional foundation. Article 42 of Argentina’s constitution, which was adopted in 1994, affirms the right to “a defense of competition against all forms of distorsion of the markets . . . .”

3. It is said that an important impetus for the new law was the acquisition in 1999 by tender offer of the former state-owned and then dominant oil company, YPF, by the Spanish company, Repsol.


7. The CNDC – and most competition agencies – readily act against conduct or mergers that harm competition in producer inputs, without the need for showing ultimate harm to consumers.

8. In early 2006 a proposed amendment to the competition law was introduced in Parliament that would change the legal standard to “damage to the economic interest of competing companies or consumers.” The proposal, in which the CNDC was not involved, provoked a great deal of criticism within the competition community in Argentina and elsewhere in Latin America. It is not known whether the proposal has any significant chance of becoming law.

9. For a more detailed description of some of these cases, see the CNDC’s 2002 report to the OECD Competition Committee, available on the OECD web site at www.oecd.org/competition.

11. One of the other two cartel cases in which there were sanctions -- the liquid petroleum gas case in Bariloche – also took five years. The sand case in Parana took two.

12. Article VII, Section 46.

13. It seems that the sand case in Parana was a naïve cartel.


15. Impsat used primarily its own satellite network, and so there was not an issue of access in the case.

16. For a more complete description of some of these cable TV cases, see the CNCD’s 2002 report to the OECD Competition Committee, supra n. 9.


19. YPF S.A., decided 19 March 2000, affirmed by the Supreme Court, see n. 6, supra.

20. In 1999 it was acquired by the Spanish firm Repsol. The conduct that was the subject of this case occurred before the acquisition, however.

21. Supra, n. 6.


23. There have been a few complaints of exploitative pricing, mostly in the cable TV sector, which the CNDC has rejected.

24. Section 42. It seems that the language of this section would permit broader intervention, however. This problem has surfaced in merger cases, as described in the merger section below.

25. Mergers were subject to the conduct provisions of the previous law, but few were actually reviewed in that way by the Commission.

27. The 1999 law had a second threshold: total worldwide turnover of the parties exceeding 2,500 000 000 pesos [USD 833 000 000]. This threshold was eliminated by decree in 2001.

28. Decree No. 396/2001, April 5, 2001. Argentina law permits the President to amend statues by a “decree of urgency and necessity.” The decree must ultimately be approved by the Parliament, but it is enforceable immediately.


30. Argentina seems to have avoided a problem that developed in neighbouring Brazil, which has a similar notification regime. In that country, because of the risk that a transaction would be consummated before a final decision on its lawfulness could be made, the competition authority aggressively interpreted the “trigger date” provision of the competition law to ensure that notifications were provided as early in the process as possible. The result was that the agency brought many cases seeking fines for failure to provide timely notification, which occupied too many of the agency’s scarce resources. (That problem has abated in recent years. See, OECD, *Competition Law and Policy in Brazil: A Peer Review*, 2005, available on the OECD web site at www.oecd.org/competition. ) It seems that the CNDC has not had a similar experience. In the 2001-05 period it instituted only five such cases, resulting in fines totalling USD 214 000.


35. Decision no. 417, 22 December 2004; Bellsouth Corporation and Telefónica Móviles S.A..


38. The Supreme Court’s decision did not give the basis for the ruling.

39. Decision no. 226, 9 March 2001; Correo Argentino S.A. (CASA) and Sociedad Anónima Organizacióncoordinadora Argentina (OCA).


41. Section 58 of the 1999 law offers support for the position that the CNDC can act on cases until the Tribunal is constituted. It provides (as translated):

   Law 22,262 [the previous competition law] is hereby repealed. However, proceedings pending as of the effective date of the present law shall continue to be conducted in accordance with the provisions of the former law before the corresponding enforcement authority, which will continue to remain in effect until the National Tribunal for the Defence of Competition is organised and becomes operative. It shall likewise hear all cases brought as from the coming into effect of the present law. Once the Tribunal is organized, such cases shall be referred to the latter for trial.

   The law does not explicitly deal with whether the CNDC would be fully independent or continue to have advisory powers only, however.

42. Article IV, Sections 17-23.

43. Section 25. As noted above, the CNDC does not impose merger notification fees or other fees of that type.

44. Decree 296/2001, supra, n. 28.

45. Decree 89/2001, supra, n. 29.

46. It can be accessed at http://groups.yahoo.com/group/ForoCompetencia. There are more than 400 members of the group, which also maintains a website at http://www.forocompetencia.com.

47. At www.mecon.gov.ar/cndc/home.

48. The agenda and papers created for the conference are available on the CNDC’s web site.
49. One of the most notable examples was the Ambev/Quilmes case, described above. The divestitures ordered by the Commission could not be accomplished for three years, despite the fact that the merger had been consummated, while the case (ultimately resolved in the Commission’s favour) was in litigation.

50. Provinces have even issued their own currency; the practice was prevalent in the 2001 crisis, when provinces issued “quasi currency” in the form of bonds to pay public sector obligations.

51. Section 3.

52. Articles 1 and 2, Law no. 25,750. These limits on foreign ownership of media companies do not apply retroactively from the date of the enactment of the law.


54. The Telefonica/Bellsouth merger, described above, was one in which there was close co-operation between the CNDC and the telecoms regulator.

55. See generally, IADB (2001), Bondorevsky, Diego, Petrecolla, Diego, The Structure of Natural Gas Markets in Argentina and Antitrust Issues in Regional Energy Integration.

56. Decision no. 225, 7 March 2001, Maersk Argentina Holdings, Terminal 4 S.A., y Terminal Emcym S.A.


59. In another report the CNDC recommended to the Minister of the Economy certain changes in the way that the city of San Carlos de Bariloche administer the subsidies that it provided its citizens for the purchase of liquid petroleum gas.

60. The German competition law has such a provision. It has been used by the German authorities only a handful of times in the past several years, however. See OECD, The Role of Competition Policy in Regulatory Reform: Regulatory Reform in Germany, 2004.
61. The OECD has published a Recommendation of the Council and three comprehensive reports on anti-cartel enforcement. All of them are available on the OECD web site, supra, n. 9.

62. This process could be complicated by the fact that a private complainant has the right to appeal to the courts from a decision by the competition agency to dismiss a complaint (Section 52(d)). In fact, there have been very few appeals of this type, so the direct burden on the Commission from this source has been minimal. Still, an indirect effect could be to cause the Commission to be more cautious in reviewing these many complaints than it might otherwise be, causing delays and consuming resources. If this is a problem, or becomes one, it seems that the only course for the agency is to pursue in the courts (or by legislative amendment) a standard that confers deference to the agency’s decision to dismiss a complaint, and that does not require unnecessary justification by the agency for its decisions in such cases.

63. See OECD, Merger Control Laws and Procedures in Latin America and the Caribbean, paras. 50-51, an issues paper presented to the 2005 Latin American Competition Forum, available on the OECD web site, supra, n. 9.


65. Here again, creating the Tribunal would automatically bring about improvements; it would eliminate the last step in the current process – approval by the Secretariat.

66. Brazil has confronted the same problem. The solution that the competition authority decided upon there was to recommend a change in the law to premerger notification. The law has not yet been amended, however. In the meantime the authority has streamlined its review process through internal changes. See the Brazil peer review, supra, n. 30

67. For a discussion of different notification regimes and their advantages and disadvantages, see the issues paper cited in n. 63, supra. In this regard, there is an error in para. 24 of the paper, in which it is stated that in Argentina the law requires that consummation be suspended upon formal notification. This is not the case.

68. Preventing parties from consummating their merger before the competition agency’s review is completed has a secondary benefit, in addition to preserving the agency’s option to forbid the transaction completely: it creates an incentive for the parties to expedite the review, resulting in closer co-operation with the agency.

69. Argentina has more Internet users per capita than any other South American country.
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OECD (2005b), *Merger Control Laws and Procedures in Latin America and the Caribbean*.


OECD (2003), *Hard Core Cartels: Recent Progress and Challenges Ahead*.
OECD (2000a), *Hard Core Cartels*.
United States Department of State, Bureau of Western Hemisphere Affairs, *Background Note: Argentina* (2005).

**Internet Resources**

Boletín Latinoamericano de Competencia:
http://ec.europa.eu/comm/competition/international/others

CNDC: www.mecon.gov.ar/cndc/home.htm

ForoCompetencia: http://www.forocompetencia.com

Global Competition Review: www.globalcompetitionreview.com

International Competition Network:
www.internationalcompetitionnetwork.org

OECD: www.oecd.org/competition
COMPETITION LAW AND POLICY 
IN BRAZIL

A Peer Review

-- 2005 --
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Summary

This report assesses the development and application during the past five years of competition law and policy in Brazil. It follows an earlier OECD analysis, prepared in 2000, which reviewed the activities of the Brazilian Competition Policy System (BCPS) since enactment of Brazil’s current competition law in 1994. The BCPS consists of three bodies: (1) CADE, the Administrative Council for Economic Defence, an autonomous agency which has dispositive adjudicative authority in BCPS cases; (2) SDE, the Economic Law Office in the Ministry of Justice, which has the principal investigative role; and (3) SEAE, the Secretariat for Economic Monitoring in the Ministry of Finance, which also has investigative authority but is primarily responsible for providing economic analysis in BCPS proceedings.

The previous Report concluded that while much had been achieved in the effort to develop a fully functioning market economy in Brazil, much remained to be done. The Report recommended that the BCPS agencies reduce the effort devoted to the review of competitively innocuous mergers and focus more attention and additional resources on other areas, including cartels, anticompetitive conduct by newly-privatised firms in network industries, and competitive restraints imposed by state and local governments. Statutory amendments to provide enhanced enforcement tools were suggested, including authority for the BCPS to conduct examinations at businesses premises and to establish a leniency program. Certain statutory changes in merger notification filing requirements were also recommended and the agencies were urged to simplify the method by which the “trigger date” for merger notifications is determined. The 2000 Report also identified three important institutional features of the BCPS that warranted attention. These were (1) the involvement of three separate agencies in competition enforcement, resulting in duplication of effort and other inefficiencies; (2) the short, two-year term for CADE commissioners, resulting in rapid turnover and possible impairment of the agency’s autonomy; and (3) the absence of a permanent, professional staff at CADE, resulting in a lack of institutional knowledge.

Despite serious handicaps, the BCPS has made substantial headway during the past five years in implementing sound competition policy in Brazil. Especially since 2003, it has effectively addressed the most critical problems within its power to control. Most of the recommendations in the 2000 Report to which it could respond have been accomplished, including particularly the recommendations relating to increased efficiency in merger reviews and
reallocation of resources to cartel enforcement. Many other improvements have been made in areas not addressed by the 2000 Report, such as the elimination of case backlogs, the establishment of a certification system for antitrust compliance programs, the introduction of procedural mechanisms for preventing the integration of merging parties during agency review proceedings and for enjoining anti-competitive conduct in non-merger cases, and enhancement of the agencies’ capacity to undertake sophisticated economic analysis. CADE has developed better techniques for protecting competition policy interests in judicial review proceedings. The BCPS has won several competition advocacy victories against anti-competitive regulatory programs and proposals, and has vigorously expanded its interaction with foreign antitrust authorities. All three agencies have participated in the important effort to increase the understanding of competition law among public prosecutors and members of the judiciary, and have engaged actively in promoting the development of a competition culture in Brazil.

The BCPS did not, on the other hand, pursue several of the recommendations in the 2000 Report. Thus, CADE devoted little attention to addressing state and local anti-competitive restraints, both law enforcement and competition advocacy activity in some sectors was barely visible, and CADE was unwilling to place sole reliance on the “first binding document” as the trigger event for merger notification. Other areas in which improvements could be made relate to the transparency of CADE’s decisions and guidelines, and its approach to private antitrust litigation. Nonetheless, the areas in which the BCPS deserves commendation substantially exceed, both in number and importance, those in which its performance was in some way deficient.

On the legislative front, the competition law was amended in late 2000, vesting the agencies with authority to conduct on-site inspections and to establish a leniency program. The BCPS has employed those powers vigorously in the past two years. No statutory enactments, however, have been adopted to deal with institutional issues, to create a permanent staff for CADE, or to adjust the merger notification requirements. Recently, the BCPS agencies joined in developing a unified proposal for statutory revisions that will remodel the institutional structure and make many other significant changes to the competition law.

Particular strengths of the BCPS include a strong institutional dedication to high standards of integrity, autonomy, sound policy, and fair procedure; an excellent leadership cadre; and a supportive business community. Weaknesses include a counter-productive institutional structure and a staff that is neither sufficient in size nor compensated adequately to retain qualified employees over the long term. The consequences include poor institutional memory, inefficiency, and delay. There are also statutory provisions relating to merger notification and the leniency program that interfere with efficient and effective law enforcement. The unfamiliarity of the courts with competition law is another source of difficulty.
This Report makes recommendations designed to address the full array of competition law and policy issues facing the BCPS. Some of the proposals recommend action by branches of the government other than the BCPS, while some involves changes that CADE can implement.

In the first category, the report recommends that Brazil:

Consolidate the investigative, prosecutorial, and adjudicative functions of the BCPS into one autonomous agency.

Protect the autonomy of the re-constituted CADE by extending the terms of the commissioners, the Director General, and other senior officers to at least four years (and more preferably five), and by making commissioners’ terms non-coincident.

In making appointments, accord due consideration to the importance of technical expertise in economics and competition law.

Fix the Plenary’s quorum at four rather than five whenever the number of commissioners available to vote on a case is reduced to four by vacancies or recusals.

Adopt legislation creating CADE career positions and provide adequate resources to hire and retain a sufficient number of qualified professional staff.

Consider the economic feasibility of establishing CADE regional offices.

Revise the proposed bill to eliminate allocation of fine proceeds to CADE and SEAE.

Modify the merger notification and review process to

-- Adopt an explicit standard for reviewing the competitive implications of merger transactions.

-- Establish a pre-merger notification system.

-- Eliminate the present market share notification threshold and adopt thresholds based on the domestic turnover of both the larger and the smaller parties to the transaction.

-- Eliminate notification of non-merger transactions.

-- Provide for expedited review and clearance of transactions that do not raise competitive concerns.

-- Establish a final deadline by which CADE must determine whether to block a merger.

-- Establish formal settlement procedures for merger cases.
Modify the leniency program to
-- eliminate exposure of leniency participants to prosecution under
criminal laws other than the Economic Crimes Law.-- reduce the
exposure of leniency participants to civil damages awards.
-- adopt regulations assuring that incriminating evidence provided by
leniency program applicants will not be used against them if they are
found ineligible for participation.

Consider designating specialised judges and appellate panels to resolve
competition law issues.

Limit the Economic Crimes Law to cartel violations.

Consider limiting civil suits for antitrust damages to parties and conduct
that have been subject to a specific finding of illegality by CADE.

Adopt the provisions in the omnibus sector agency bill establishing
standard procedures for enforcing the competition law.

Adopt the provisions in the omnibus sector agency bill establishing
standard procedures for the participation of SEAE in agency proceedings to
promulgate norms and regulations.

Adopt the pending bill providing for enforcement of the competition law in
the banking sector.

In the second category of proposals, the Report recommends that CADE:

Address anti-competitive restraints by state and local governments.

Serve as a competition advocate with respect to federal legislation and
regulatory programs.

Update the 2001 Horizontal Merger Guidelines.

Assure that case decisions enable the public to assess consistency,
predictability, and fairness in applications of the competition law.

Permit settlement of conduct cases by consent even where the defendant
admits unlawful behaviour.

Treat private suits seeking antitrust damages as opportunities for
competition advocacy and develop more information about the competitive
impact of such litigation.

Continue existing programs to
-- focus law enforcement efforts on cartel cases
-- develop law enforcement cooperation agreements with sector
  regulatory agencies and prosecute anti-competitive conduct by firms
  in regulated sectors
1. Competition Policy in Brazil: Foundations and Context

This report assesses the development and application of competition law and policy in Brazil since 2000. It follows an earlier OECD analysis entitled “Competition Policy and Regulatory Reform in Brazil: A Progress Report,” (hereafter “2000 Report”). The assessment begins with a brief description of the background of competition policy in Brazil and the context in which it presently operates.

Brazil’s economic policies after World War II relied on pervasive government intervention in market operations. The state controlled prices in many sectors, and most of the country’s largest industrial, transportation, and financial enterprises were either state owned firms or publicly sanctioned private monopolies. A competition law (No. 4137) enacted in 1962 created the Administrative Council for Economic Defence (Conselho Administrativo de Defesa Econômica or “CADE”), but the Council had marginal economic impact because its authority extended only to private firms. In 1988, coincident with a series of significant economic changes in Brazil, a new constitution established competition as a key feature of the “economic order.” A privatisation program was launched, barriers to international trade were reduced, and CADE became more active.

The modern era of competition policy in Brazil began in 1994. In response to a period of hyperinflation, the “Real Plan” was implemented in that year. Its principal features were the introduction of tight fiscal and credit policies and a new currency (the real) pegged to the U.S. dollar. As a part of the 1994 reforms, a new competition law (No. 8884) was enacted with the expectation that it could be employed to deal with inflated prices. The new law also introduced merger control and made important institutional changes. CADE was re-configured as an independent agency,
and certain aspects of enforcement authority were vested in two other agencies: the Secretariat of Economic Law in the Ministry of Justice (Secretaria de Direito Econômico do Ministério da Justiça or “SDE”) and the Secretariat for Economic Monitoring in the Ministry of Finance (Secretaria de Acompanhamento Econômico or “SEAE”). Collectively, the three agencies comprise the Brazilian Competition Policy System (Sistema Brasileiro de Defesa da Concorrência or “BCPS”). Over the next few years, the pace of privatisation increased; the government agency responsible for general administration of prices was abolished; and new, independent regulatory agencies for telecommunications, petroleum and natural gas, and electricity were created.

The 2000 Report (p. 184) noted that, as of 2000, privatisation was essentially complete in the telecommunications, civil aviation, and bus transportation sectors, but only partially so with respect to electricity, oil and gas, railroads, ports, and banking. From 2000 to 2002, further privatisation projects were undertaken at both the federal and state levels. Significant actions in that period include the public sale of shares of Petrobrás (the federal hydrocarbon company) for USD 4 billion; the sale of 60 per cent of the state bank of São Paulo to Santander Bank for USD 3.7 billion; and the sale of the Cia. Vale do Rio Doce (CVRD, the federal iron ore mining company), for USD 1.9 billion. Other privatisations involved the state banks of Paraná, Goiás, Paraíba, and Amazonas; the state electrical energy distribution companies of Pernambuco, Maranhão, and Paraíba; and the state water and sewerage company of Manaus.

No further privatisations in Brazil have occurred since 2002. As of 2004, the federal government listed 128 government-owned enterprises still under government ownership, including maintenance of a controlling interest in Petrobrás. Other sectors in which government enterprises operate include electricity generation (including nuclear power), airline terminal and seaport services, banking, health services, and sewage systems. State ownership of some firms reflects a policy decision that government control is appropriate to accomplish strategic objectives or to offset market failures, or because the firms involved provide public services. Plans for future privatisation focus on granting concessions to operate freight railways and toll highways.

Since 1994, two significant legislative amendments affecting the competition law have been enacted. In January 1999, a merger filing fee was instituted, the proceeds of which were allocated to CADE (Law No. 9781). In December 2000, subsequent to the 2000 Report, Law No. 10149 added important investigatory powers, clarified procedures for service of process on foreign entities, established a leniency program, increased the
merger filing fee, and provided for an equal division of that fee among all three of the competition agencies.

At present, three pieces of proposed legislation designed to re-model the competition law system in Brazil are pending. The first is a wide-ranging revision of Law 8884 that would combine SDE with CADE; add new institutional elements to CADE’s structure; redefine SEAE’s role in the competition regime; institute a pre-merger notification system; alter the present triggering requirements for reporting mergers; and make other changes in the substantive and remedial provisions of the law, including the limits applicable to fines imposed for unlawful conduct. The second proposal is an omnibus bill intended to revise and standardise the procedural requirements applicable to sector regulatory agencies, including various provisions affecting the relation between the sector regulators and the competition regime. The third bill would resolve a conflict between the competition agencies and the bank regulatory authorities with respect to jurisdiction over mergers in the banking sector. These three legislative proposals are discussed in more detail at the relevant points in this report.

2. Substantive Issues: Content and Application of the Competition Law

The Brazilian Constitution of 1988 establishes an explicit foundation for competition policy. Article 173, paragraph 4 provides that “[t]he law shall repress the abuse of economic power that aims at the dominance of markets, the elimination of competition, and the arbitrary increase of profits.” More generally, Article 170 contemplates that the “economic order” of Brazil shall be “founded on the appreciation of the value of human work and on free enterprise,” and shall operate with “due regard” for certain principles, including “free competition,” “the social role of property,” “consumer protection,” and “private property.” In line with those provisions, Article 1 of Law 8884 states that the statute’s objective is to “set out antitrust measures in keeping with such constitutional principles as free enterprise and open competition, the social role of property, consumer protection, and restraint of abuses of economic power.”

The substantive provisions of Brazil’s competition law appear in Articles 20, 21, and 54. Unlike the laws of many countries, which separately proscribe anticompetitive agreements and abusive conduct by single firms, Articles 20 and 21 deal with all types of anticompetitive conduct, other than mergers, while mergers, acquisitions, and similar transactions are addressed in Article 54. This discussion follows the statutory pattern by dividing the analysis of the law’s prohibitions into two parts, conduct and mergers.
2.1 Conduct

Article 20 contains general language providing that “any act in any way intended or otherwise able to produce the effects listed below, even if any such effects are not achieved, shall be deemed a violation of the economic order.” The specified effects are (1) to limit, restrain or in any way injure open competition or free enterprise; (2) to control a relevant market of a certain product or service; (3) to increase profits on a discretionary basis; and (4) to abuse one’s market control. The article specifies that the “market control” violation described in item (2) does not include control achieved by means of “competitive efficiency.” A concluding sentence provides that market control is “presumed” when a company or group of companies possesses a 20 per cent share, and vests CADE with authority to change the 20 per cent presumption with respect to specific sectors of the economy.

Article 21 contains a lengthy but non-exclusive list of acts that are considered unlawful if they produce the effects enumerated in Article 20. The listed practices include various kinds of horizontal and vertical agreements and unilateral abuses of market power. With respect to horizontal agreements, the list covers collusion among competitors, including agreements to fix prices or terms of sale, divide markets, rig bids, and limit research and development. The listed vertical agreements include resale price restraints and other restrictions affecting sales to third parties (including limits on sales volumes and profit margins), as well as price discrimination and tying. As to unilateral conduct, the list specifies various actions to exclude or disadvantage new entrants or existing rivals, including refusals to deal and limitations on access to inputs or distribution channels. Other unilateral practices cited in Article 21 are actions to impose unreasonable contractual terms or conditions, “bar the use of industrial or intellectual property,” “unreasonably sell products below cost,” discontinue production or other business activities without good cause, “affect third-party prices by deceitful means,” hoard or destroy raw materials and intermediate or finished goods (including agricultural products), “require or grant exclusivity in mass media advertisements,” impair the operation of manufacturing or distribution equipment, impose “abusive prices,” or “unreasonably increase the price of a product or service.”

The 2000 Report noted two peculiarities about the list of anticompetitive activities in Article 21. First, the formulation was characterised as “somewhat unorthodox” (p. 197) because it does not expressly distinguish between activities relevant to the law’s prohibition of restrictive agreements and those relevant to abuse of dominance. Second, and more significantly, the Report noted that some of the enumerated practices are either ambiguously worded or not traditionally considered to be anticompetitive.
(e.g., “to deny the sale of a certain product or service within the payment conditions usually applying to regular business practices and policies;” “to retain production or consumer goods, except for ensuring recovery of production costs;” or “to take possession . . . of industrial or intellectual property rights or technology”). The Report added that although such provisions created the potential for misapplication, CADE had issued clarifying enforcement guidelines for Articles 20 and 21 that appeared to “place competition analysis at CADE within the mainstream” of conventional antitrust analysis (pp. 197-98).

The enforcement guidelines for Articles 20 and 21 were issued in 1999 as attachments to CADE Resolution 20. That resolution establishes procedures applicable to the presentation of a proposed case to the Council by the assigned Reporting Commissioner, and requires that the commissioner “verify whether the proceeding [is] duly supported” in accordance with the guidelines. The Attachments to the resolution establish a standard analytic scheme for restrictive practices. Attachment I contains definitions for anticompetitive practices, which are classified into horizontal and vertical categories. Horizontal practices are defined as those constituting “an attempt to reduce or eliminate market competition, whether by establishing agreements between competitors in the same relevant market with regard to prices or other conditions or by adopting predatory pricing.” Four categories exemplifying such practices are given: (1) cartels, which involve agreements between competitors controlling a substantial part of the relevant market “regarding prices, production and distribution quotas and territorial division, in an attempt to increase prices and profits jointly to levels that are closer to monopolistic levels;” (2) other horizontal agreements, which involve “only part of the relevant market and/or temporary joint efforts aimed at achieving a higher level of efficiency, especially productive and technological efficiencies;” (3) illicit practices of professional associations, which involve “any practice that unreasonably limits competition between professionals, mainly price-fixing practices;” and (4) predatory pricing, which involves pricing “below the average variable cost” to eliminate competitors, in market conditions that would permit the costs of the predatory scheme to be recouped through subsequent price increases.

Vertically restrictive trade practices are defined in Attachment I as “restrictions imposed by manufacturers/providers of products and services in a certain market (‘market of origin’) on vertically related markets, downstream or upstream along the production chain (the ‘target market’).” Six examples are provided: (1) resale price maintenance, (2) customer and territorial restrictions imposed in a distribution chain, (3) exclusive dealing, (4) refusals to deal, (5) tying, and (6) price discrimination. The Attachment notes that vertical restrictions may cause anticompetitive effects in either the
market of origin or the target market, by excluding rivals or facilitating
downstream or upstream collusion.

According to Attachment I, a finding of illegality for either horizontal or
vertical restrictions entails establishing “the existence of market power in the
relevant market of origin, as well as an effect on a substantial share of the
market that is the target of such practices, ... .” Attachment II elaborates on
these themes by outlining the “basic criteria for the analysis of restrictive trade
practices,” and describing the specific steps to be followed. They include:

1. identifying the precise practice at issue and assuring that there is an
   adequate evidentiary basis to conclude that the practice was
   implemented;

2. determining the existence of a dominant position, which involves
   (a) defining the relevant market in both product and geographic
   dimensions, by considering actual or potential product or service
   substitution by buyers; (b) determining market shares and measures of
   concentration, using either or both of the additive market share (CRx)
   or the Herfindahl-Hirschman (HHI) indices; and (c) analysing barriers to
   entry; and

3. weighing the economic efficiencies likely to result from the practice
   against the actual or prospective competitive harm.

In making market power determinations, CADE always undertakes a
case-specific analysis, and has neither invoked the 20 per cent “market
control presumption” in Article 20 nor exercised the power to alter that
percentage for a specific market. As a practical matter, a market share
below 20 per cent is presumed to reflect the absence of market power. With
respect to cartels, although the guidelines do not establish a “per se rule,”
they imply that cartels will be strictly scrutinised by noting that non-cartel
agreements entail fewer anticompetitive effects and more pro-competitive
benefits and therefore require “a more judicious application” of the rule of
reason. In fact, in cartel cases, CADE assumes that anticompetitive effects
exist once the existence of market power is demonstrated.12

The competition law and CADE’s guidelines provide no special treatment
for small firms, although Article 170 of the Constitution specifies that one
principle guiding the economic order shall be “due regard” for the “preferential
treatment [of] small enterprises organised under Brazilian laws and having their
head-office and management in Brazil.” Because CADE does not apply *per se*
analysis, however, even horizontal agreements among small firms will rarely
entail the requisite market power to run afloat of the law.
The analytical practice of dividing conduct offences into five categories (per se and non-per se horizontal agreements, per se and non-per se vertical agreements, and unilateral conduct involving monopolisation or abuse of dominance) is not employed in Brazil. As noted, the per se/non-per se distinction does not arise because CADE requires market power for all offences. Further, vertical agreements are effectively eliminated as a class because CADE makes no distinction (like that in US antitrust law) between the ordinary degree of market power required to find vertical violations involving non-dominant firms, and the heightened degree of power required to find a monopolistic abuse. Thus, CADE states that it has decided no “vertical” cases as such since 2000, because all of the vertical practices it has addressed since then have been raised in abuse of dominance cases. The following discussion of enforcement activity involving conduct offences under Law 8884 is therefore divided into sections on horizontal agreements and abuse of dominance. The number and disposition of conduct cases concluded by CADE from 2000 to 2004 are shown below.

Table 4. CADE Decisions in Conduct Cases 2002-2004

<table>
<thead>
<tr>
<th>Year</th>
<th>Cases Decided</th>
<th>No violation</th>
<th>Total</th>
</tr>
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<tbody>
<tr>
<td></td>
<td></td>
<td>Horizontal</td>
<td>Abuse of Dominance</td>
</tr>
<tr>
<td>2000</td>
<td>39</td>
<td>26</td>
<td>2</td>
</tr>
<tr>
<td>2001</td>
<td>34</td>
<td>18</td>
<td>16</td>
</tr>
<tr>
<td>2002</td>
<td>34</td>
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<tr>
<td>2003</td>
<td>23</td>
<td>13</td>
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<tr>
<td>2004</td>
<td>42</td>
<td>24</td>
<td>16</td>
</tr>
<tr>
<td>Total</td>
<td>172</td>
<td>103</td>
<td>54</td>
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Source: BCPS, 2005

2.1.1 Horizontal agreements

The 2000 Report observed (pp. 192-93) that although CADE had to that point considered very few cases involving traditional “cartel” activity, all three agencies were focusing new emphasis on that subject. In 1999, CADE decided the first true cartel case brought under Law 8884. The Council found sufficient circumstantial evidence warranting a conclusion that the producers of flat rolled steel products had entered into a price-fixing agreement. The steel producers sought judicial review of CADE’s decision and of the associated fines, which CADE set at the statutory minimum of 1 per cent of the firms’ gross turnover for the previous year. Subsequent to the previous Report, the first instance court rendered a decision favourable to CADE. That decision was, however, further appealed by the steel producers and is presently pending.
In a series of cartel cases beginning in 2002, CADE upheld price-fixing charges against retail fuel dealer associations in Florianópolis, Goiânia, Belo Horizonte, and Recife, among others. In these cases, fines were often assessed against association officers and station owners individually, as well as against the association itself. The utilisation of price lists by medical associations also received attention, with cases decided against such practitioner groups as anaesthesiologists in Goiás, doctors in Piauí, and urologists in Ceará. In March 2005, CADE concluded a case against Rio de Janeiro’s four largest newspapers for simultaneously raising prices by 20 percent. On the day of the price increase, all four papers published identical editorial notes, which purported to justify the increases and referred to the paper’s trade association as the organising agent. CADE fined each paper 1 per cent of its annual revenues. A price-fixing case decided in 2004 involved distributors of liquid petroleum (LPG) gas in the city of São Sebastião, in the Federal District. CADE fined the participating distributors 15 per cent of their annual revenues and added a fine against the owner of each firm owner equal to 10 per cent of the company’s fine. Another 2004 case charged an airline cartel, as described in the box below.

**Box 1. Rio De Janeiro- São Paulo Airline Cartel**

In August 1999, several newspapers reported that five days after the presidents of Brazil’s four major airlines had met, ticket prices for service on the heavily-travelled Rio de Janeiro- São Paulo route increased simultaneously by 10 per cent. SEAE’s investigation concluded that the price move was not merely a case of conscious parallelism. In addition to the meeting of the companies’ executives, evidence revealed that price data were exchanged among the companies through postings on ATPCO, the computerised airline price data system maintained by the Airline Tariff Publishing Company. A company could configure a price change notice so that, for an initial three-day period, the change could be viewed only by other airline companies and not by consumers or travel agents. The posting company was thus able to abort the change if competitors failed to follow suit. This feature of the ATPCO system had earlier been attacked by the U.S. Department of Justice, but system modifications arising from that case had been implemented only in North America.

In September 2004, CADE determined that the four airlines had colluded to raise prices. Each carrier was fined 1 per cent of the revenue earned on the affected route during 1999 and was enjoined from fixing prices and from posting price adjustments in advance.
The BCPS has also challenged horizontal agreements other than price-fixing, including horizontal exclusivity clauses imposed by “Unimeds.” Unimeds, found in most Brazilian towns and cities, are co-operative associations of doctors that have traditionally barred their member physicians from contracting with other health plans. CADE’s long-standing enforcement policy is to attack such clauses where a Unimed’s local market share of physicians is high. CADE decisions against Unimeds since the previous Report have involved associations in the cities of São Paulo, Araguari, Uberlândia, and Macapá. In a 2002 case against a Unimed in the state of Rio Grande do Sul, CADE concluded that the fines imposed in previous cases had not been effective in deterring exclusivity clauses. CADE therefore imposed a fine of approximately USD $75 000, more than twice the previous level.\footnote{16}

In another action that involved a horizontal agreement, although arising in the context of a merger case, CADE in March 2005 ordered the termination of an arrangement under which TAM and Varig, Brazil’s two largest domestic airlines, shared seats on each other's planes. CADE had approved the arrangement in March 2003 as an initial step in what was expected to be a full merger of the two companies. The parties subsequently cancelled the merger and CADE concluded that continuation of the agreement was no longer justified.\footnote{17}

In late 2004, CADE considered an interesting case involving coordinated action by a trade association to obtain anti-competitive legislation. The association of fuel retailers in Brasilia successfully petitioned the municipal government for an ordinance forbidding the construction of filling stations in the parking lots of supermarkets and shopping centres. CADE found this conduct to be unlawful and fined the association and two chain retailer members an amount equal to 5 per cent of their revenues.\footnote{18} A separate count in the same case involved an agreement among association members whereby they ceased to sell certain specially-refined diesel oil. The motivation for the agreement was a regulation by the National Fuel Department requiring that refined diesel be sold at the same price as regular diesel whenever regular diesel was unavailable at a filling station. The retailers agreed to stop sales outright to avoid selling refined diesel at the regular diesel price. CADE found that this conduct was likewise unlawful and assessed a fine against the association.

\subsection{2.1.2 Abuse of Dominance}

Most BCPS dominance cases involve some form of exclusionary conduct to foreclose or impede horizontal competitors. CADE’s most recent abuse of dominance decision, however, focused on restrictions affecting intra-brand competition. That case, involving Microsoft, is described in the following box.
Box 2. Microsoft

In August 2004, CADE held that Microsoft unlawfully restricted the distribution of Microsoft brand software and associated computing services. Microsoft had established a system of “Large Account Resellers” (“LARs”) for sales to substantial corporate customers. LARs were restricted to a specified geographic area, but a given area could be served by multiple LARs depending on how many distributors met Microsoft’s requirements for LAR status.

For the Federal District (Brasilia) geographic area, only one firm, TBA Informática (“TBA”), satisfied the LAR qualifications. Microsoft attested in letters to the federal government that TBA was the sole firm authorised to sell Microsoft software and associated services to all federal agencies (including those located outside Brasilia). As a consequence, the bidding procedures normally required for federal agency purchases were waived with respect to purchases from TBA.

In examining Microsoft’s arrangement with TBA, CADE concluded that the relevant product market was the sale or licensing of software and computing services to the federal government and that the relevant geographic market was national. In this market, Microsoft was found to have a dominant 90 per cent share. In CADE’s view, Microsoft’s action in creating TBA’s exclusive position was unlawful. By eliminating bidding procedures in sales to the government, the consumer welfare benefits of intra-brand competition were diminished without sufficient offsetting efficiencies in a market where inter-brand competition did not exist. Government procurement officials were denied the opportunity to choose among competing providers not only of Microsoft software but of associated computer services as well.

Microsoft argued that it could choose to integrate forward into distribution and sell directly to the federal government, and that therefore interposing TBA as an exclusive distributor did no economic harm. CADE’s response was that the system established by Microsoft for government sales involved distribution through an exclusive intermediary, not direct sales by Microsoft. CADE observed that when a monopoly producer sells through a single distributor, the final price is higher and total output lower than when a monopoly producer sells directly to the purchaser. CADE concluded that a decision to create an exclusive distributor obligated Microsoft to establish maximum resale prices or otherwise ameliorate the inefficient “double-monopoly” effect that would otherwise arise.

CADE was equally unconvinced by Microsoft’s proffered efficiency justifications. Microsoft asserted first that the territorial restriction stimulated resellers to invest in a detailed analysis and understanding of customer needs...
CADE rejected this justification, pointing out that although TBA was located in Brasilia, it was obligated to service federal agencies located in other geographic areas across the country. Microsoft’s second argument was that exclusivity prevented free-riding on the marketing efforts of other resellers. CADE replied that Microsoft itself shouldered the bulk of marketing efforts in Brazil and that TBA’s own efforts were directed to promoting TBA’s trademark, not Microsoft’s. Moreover, this claim was undercut by the fact that Microsoft had authorised multiple LARs to operate in other geographic areas. CADE concluded that Microsoft’s true objective in establishing TBA as the exclusive distributor in the Federal District was to evade government bidding procedures.

CADE’s negative view of Microsoft’s efficiency justifications was aggravated by Microsoft’s claim that the exclusive status accorded to TBA had not been deliberately intended, but had simply resulted from the application of neutral LAR qualification standards. CADE found instead that Microsoft had engineered the criteria to assure that only TBA could qualify. CADE asserted that the freedom of a producer to establish a distribution system and choose distributors did not include “the prerogative to do it in a discriminatory manner.”

CADE concluded that the conduct by Microsoft and TBA constituted a restraint on competition under Article 20 I, an abuse of dominance under Article 20 IV, and an agreement to secure an improper advantage in public procurement under Article 21 VIII. Microsoft was fined 10 per cent of its revenues from licensing Microsoft products to the Brazilian federal government, while TBA was fined 7 per cent of its billings to the government for Microsoft products and associated computing services.

Another dominance case with an intra-brand focus entailed charges that Matec, an affiliate of Ericsson, had unlawfully refused to sell component parts for the Ericsson MD 110 Telephone System. Independent companies offering telephone system maintenance contracts claimed that they would be unable to compete effectively in the MD 110 market without access to replacement parts. In a 2003 decision, CADE defined two relevant markets: maintenance services for the MD 110 telephone system, and system replacement parts. In the former market, Matec had more than a 90 per cent market share at the time of violation, and in the latter, Matec was a monopolist. CADE found that Matec had unlawfully foreclosed competition in the market for system maintenance services, because competing companies could not operate without access to replacement parts. The foreclosure reduced consumer welfare because the affected telephone system purchasers were “locked-in” to the MD 110 phone system by high switching costs. Competition at the point of sale for telephone systems was
not adequate to forestall a market failure in the case of the federal government, which was a prime MD 110 customer. Government procurement rules disabled the government from selecting any bid but the lowest, without regard for post-purchase servicing costs.

In contrast to Microsoft/TBA and Matec, a number of other CADE decisions have examined exclusionary practices aimed directly at horizontal competitors. One of these was another case involving Microsoft, decided earlier in 2004. In that case, CADE found that no abuse of dominance arose from Microsoft’s bundling of “Money” (financial management software) into the “Microsoft Office for Small Business” package. A seller of competing financial management software had complained that Microsoft’s tactic constituted an exclusionary tying arrangement. Microsoft responded that “Money” had been bundled with the larger “Office” package only on a temporary promotional basis and was ordinarily sold as a separate product. CADE concluded that no unlawful tying was involved and closed the case.

CADE also held in 2004 that the Iguatemi shopping centre in the city of São Paulo violated Article 20 by forbidding its tenants from locating in any other shopping centre in the city. Iguatemi had a 30.9 per cent share of shopping centre store rental revenues in the relevant geographic market in São Paulo and a 29 per cent share of revenue from shopping centre sales. CADE concluded that Iguatemi had sufficient market power to restrain competition among shopping centres by means of the exclusivity provision. A fine was imposed equal to 1 per cent of Iguatemi’s gross revenues. The case was followed in early 2005 by a similar exclusivity case against Shopping Centre Norte (“SCN”), also located in the city of São Paulo but in a different relevant geographic market. SCN, which had a 69.6 per cent share of store rental revenues and a 71.6 per cent share of store sales revenues in its market, prohibited tenants from operating another outlet within one thousand meters of the SCN site. CADE found this condition to be unduly restrictive and fined SCN 1 per cent of gross revenues.

In 2002, CADE addressed a contract between the White Martins Corporation (“WMC,” formerly Liquid Carbonic Corp.) and Ultrafértil, a petrochemical company. Ultrafértil’s manufacturing processes generated (as a by-product) the main input used by WMC for the production of carbon dioxide gas (CO₂). The contract gave WMC exclusive rights for ten years to all of the by-product generated by Ultrafértil. A potential entrant into CO₂ production complained that the contract was a device to preclude new entry. Observing that WMC had dominant power in CO₂ production and that no input source other than Ultrafértil was available, CADE agreed that the contract was anti-competitive. It supported this assessment by noting that WMC had been venting a significant portion of the input into the atmosphere. WMC was fined BRL 24 million (USD 9.4 million), an
amount equal to 5 per cent of its gross sales in the year preceding the complainant’s petition.

In a 2003 case, CADE considered a predatory pricing claim involving the sale by Merck Company and its Brazilian subsidiary of vacuum tubes for collecting human blood samples. CADE found no violation because Merck’s prices generally exceeded average variable cost and because Merck did not have sufficient market power to assure the recoupment of losses associated with the alleged predation.

CADE also decided some abuse of dominance cases that involved potentially anti-competitive exploitation of market power, rather than exclusion of competitors. Thus, in a different case against White Martins Corporation, CADE considered allegations that WMC had engaged in abusive vertical conduct by tying the transportation of liquid carbon dioxide gas to the sale of the product and also by charging discriminatory prices. The case was resolved in 2000 by a consent agreement under which WMC agreed to terminate the offending practices. CADE has considered no cases involving resale price maintenance.

As described in the 2000 Report (p. 197), a Congressional Inquiry Commission that examined the pharmaceutical industry in 2000 requested SDE to investigate allegations of abusively high drug prices. Under Article 30 of Law 8884, SDE must initiate an administrative proceeding at the request of the Senate or House of Representatives without first conducting a preliminary inquiry. Accordingly, SDE opened about 60 abusive pricing proceedings involving more than 1500 drugs. After the investigations had languished for several years, SDE organised a special task force in 2003 to deal with the project, with a particular focus on employing economic analysis to define relevant markets. SDE has recently sent 15 of these cases to CADE and anticipates that the remainder will be concluded by the end of 2005.

CADE’s position on abusive pricing reflects the view that antitrust enforcement should not focus on a firm’s allegedly high prices but rather on illegitimate accretions of market power that permit abusive price increases. In January, 2001, CADE considered abusive pricing charges against two natural gas distributors in the state of Rio de Janeiro. CADE concluded that the distributors had not acted unlawfully merely by raising prices because the increases raised fell within the range permitted by the state utility regulator.

2.2 Mergers

The provisions of Law 8884 applicable to mergers appear in Article 54, which opens with the following language:
Any acts that may limit or otherwise restrain open competition, or that result in the control of relevant markets for certain products or services, shall be submitted to CADE for review.

This notification requirement, on its face, applies to any “acts,” and thus covers not merely mergers but all agreements. In August 2001, SDE and SEAE jointly issued Horizontal Mergers Guidelines that confirm the applicability of Article 54 to any “transactions that may limit or otherwise harm free competition, or result in the domination of relevant goods and services markets, such as horizontal agreements among competitors.” Article 54 paragraph 4 requires that notification must be made no later than fifteen business days after the occurrence of the transaction, while paragraph 5 empowers CADE to penalise a failure to comply with the filing requirement by imposing a fine in an amount ranging from 60,000 to 6 million tax reference units (“UFIR”) (USD $24,900 to USD $2.49 million). In practice, most penalties imposed for failure to file an Article 54 notification relate to transactions that entail some structural realignment among the parties.

In 1999, a fee of BRL 15,000 (USD 5850) was imposed for notifications filed under Article 54. The fee was increased to BRL 45,000 (USD 17,550) beginning in 2001. While most notifications submitted under Article 54 relate to mergers and acquisitions, some are for agreements involving distribution, franchising, licensing, joint ventures, and consortia.

Article 54 paragraph 3 establishes special notification thresholds for acts that constitute mergers, stating that notification is mandatory for “any form of economic concentration” where the resulting entity “accounts for twenty per cent (20 per cent) of a relevant market” or where any of the transaction participants had total turnover in the previous year of BRL 400 million (USD 156 million). As discussed further below, a signal feature of Article 54 is that notifications, whether involving a merger or otherwise, need not be filed until after the act has occurred.

Article 54 does not contain any language providing the substantive standard to be employed in reviewing submitted acts. Paragraph 1 of the article, however, provides that a transaction submitted for review may be approved if it meets all four of the following conditions: (1) It is intended to “increase productivity; improve product or service quality; or cause an increased efficiency,” or “foster technological or economical development.” (2) It generates benefits that are equitably allocated between the merging parties and consumers. (3) It does not eliminate “a substantial portion of the relevant market for a product or service.” (4) Its provisions are no more restrictive than necessary to obtain the beneficial effects. The Horizontal Merger Guidelines state (paragraph 2) that “the rule of reason [is] the
fundamental principle in the control of mergers,” attributing this proposition to the statement of objectives set out in Article 1 of Law 8884. This language, along with that of Article 54 itself, could be interpreted to place the burden on the merging parties of showing that their transaction is economically beneficial. In practice, however, CADE has not imposed such a requirement, intervening only when it concludes that, on balance, there would be a significant lessening of competition. Thus, paragraph 1 of Article 54 is considered to establish an efficiencies defence, to be applied only in the case of mergers that are otherwise deemed anticompetitive. The proposed legislation to revise the competition law establishes a substantive standard for evaluating mergers, prohibiting transactions that “eliminate competition in a substantial part of the relevant market, that can create or strengthen a dominant position, or that can dominate a relevant market.”

Paragraph 2 of Article 54 contains a special provision that permits mergers to be approved that satisfy only three of the four attributes enumerated in Paragraph 1, provided that the transaction is “in the public interest or otherwise required to the benefit of the Brazilian economy, [and] provided no damages are caused to end-consumers.” Such a provision is found in some form in the merger control laws of several countries, permitting the approval of otherwise anticompetitive mergers on the grounds of overriding national interest. To date, however, no merger in Brazil has been approved under this provision. The proposed legislation retains this language, along with the four conditions that appear in paragraph 1 of the existing law.

The August 2001 Horizontal Merger Guidelines, issued jointly by SEAE and SDE, describe a five-step analytical process employing concepts found in similar guidelines published by other countries. The elements of the process include (1) defining the relevant product and geographic markets; (2) determining whether the market share of the merged entity is sufficiently large to permit the exercise of market power; (3) assessing the probability that market power will be exercised post-merger; (4) examining the efficiencies generated by the transaction; and (5) evaluating the net effect of the transaction on economic welfare.

The methodology for defining the relevant product and geographic markets, contained in step 1 of the Guidelines, focuses on determining the smallest market in which a hypothetical monopolist could impose a small but significant and non-transitory price increase. In step 2, the Guidelines consider two contexts (unilateral action by a single firm and coordinated action by multiple firms) in which certain levels of market concentration will be deemed to raise a significant prospect of post-merger market power. Where the focus is power exercised by a single firm, the threshold for concern is a merged entity with a market share of at least 20 per cent. Where the focus is coordinated action by multiple firms, the threshold is a four-firm
concentration ratio of at least 75 per cent coupled with a merged entity market share of at least 10 per cent. If either set of thresholds is met, analysis proceeds to step 3, which entails an assessment of the probability that post-merger market power will actually be exercised. Such exercise will be considered improbable if (a) imports are an effective remedy against the exercise of market power, (b) new entry is “probable, timely, and sufficient,” or (c) rivalry in the market is such that existing firms would have both the capacity and the motivation to resist attempts by the merged entity to exercise market power. If step 3 demonstrates the prospect of anti-competitive effects from a transaction, the analysis proceeds to the step 4 for consideration of efficiencies that the merger may generate, and ultimately to step 5 for evaluation of the net economic effect of the transaction. A transaction will be rejected if, after accounting for efficiencies, it will produce a net decrease in economic surplus. If surplus will increase because anticompetitive effects are outweighed by efficiencies, further analysis is required. Under Article 54 paragraph 1 of the statute, an efficiencies defence will be accepted only if the economic benefits of the transaction are equitably allocated between the merging parties and consumers or end users.27

Although CADE has not formally adopted the Merger Guidelines in the form of a Council Resolution, it treats them as non-binding guidance in assessing merger cases and their provisions are usually (but not always) discussed in CADE’s formal merger decisions. An oddity of the Merger Guidelines is that the portion discussing the assessment of market power refers only to the four-firm concentration ratio and not to the Herfindahl-Hirschman (HHI) index. In contrast, the Guidelines in CADE Resolution 20, issued two years earlier for use in assessing conduct violations under Articles 20 and 21, refer to both methods of measuring market concentration. The agencies state that, in fact, they calculate the HHI whenever possible in evaluating mergers, although they note that Brazilian markets may be deemed unconcentrated at HHI levels that would trigger concern in the United States. Another feature of the Guidelines is the absence of any reference to mergers involving failing firms, although CADE analysed and rejected a failing firm defence in the Mahle-Metal Leve case, a 1996 proceeding that involved the acquisition of an auto parts manufacturer. In that decision, CADE construed the defence in accordance with the formulation developed in the United States, an approach it has subsequently maintained. CADE has rejected the defence in several other cases since Metal Leve, usually on the grounds of inadequate efforts to identify less anti-competitive purchasers.

Transactions notified to CADE under Article 54 may be resolved in three possible ways: unconditioned approval, approval with conditions, or denial. If a transaction is rejected outright, Article 54 paragraph 9
CADE has disapproved only one asset acquisition merger entirely, in the recent Nestlé-Garoto case described below.

When transactions are approved conditionally, the conditions imposed fall into one of two categories, depending on the statutory provision invoked. Conditions requiring one-time acts (such as the divestiture of assets or the deletion of a non-compete clause from the acquisition contract) are imposed as an exercise of CADE’s intrinsic authority to review transactions under Article 54. Conditions that mandate continuing but time-limited acts (such as the temporary obligation of an acquiring company to license a trademark or maintain a relocation program for terminated employees) are imposed under Article 58. That Article empowers CADE to require that one or more parties to a transaction comply with temporary conduct restrictions or requirements, termed “performance commitments” by the statute.”

In the past five years, CADE has reviewed the merits of 2802 transactions under Article 54, rejecting three and conditionally approving 88 others. Seven of the conditional approval cases involved performance commitments. The acquisition by Varig Airlines of a computerised airline reservation service resulted in a 2003 performance commitment requiring Varig, for a period of three years, to treat all airlines equally in operating the reservation system. Similarly, a 2004 performance commitment required CTBC Telecom, a land-line telephone company that had acquired a dial-up internet service provider, to treat all other ISP’s equally for three years. Another 2004 performance commitment arose from the transfer by Pepsico to AmBev subsidiary Companhia Brasileira de Bebidas of assets and licenses for the production and distribution of the isotonic drink “Gatorade.” CADE required divestiture by AmBev of the trademark for its existing isotonic drink “Marathon.” To help assure that Marathon could survive in the market, AmBev was required to offer the trademark acquirer an option to purchase the Marathon production assets, and an option to utilise AmBev’s distribution network for Marathon over a six month period.

For purposes of analysis, it is useful to examine approval conditions for their impact on the disposition of assets held by the parties. The conditions and commitments imposed by CADE may therefore be classified according to whether they were (1) “structural” (defined as conditions requiring the divestiture of assets) or (2) “ancillary” (defined as all other conditions). Ancillary conditions include most performance commitments, as well as such provisions as those requiring the modification or elimination of non-compete clauses in merger agreements.
The following table summarises CADE’s merger review activity from 2000 to 2004, showing the proportion of cases in which “structural” or “ancillary” conditions were imposed.

### Table 5. CADE Determinations in Merger Cases 2000-2005

<table>
<thead>
<tr>
<th>Year</th>
<th>Transactions Reviewed</th>
<th>Approved without conditions</th>
<th>Approved with conditions</th>
<th>Disapproved</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td>Percent of transactions reviewed</td>
<td>Percent of transactions reviewed</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Structural</td>
<td>Ancillary</td>
</tr>
<tr>
<td>2004</td>
<td>618</td>
<td>574</td>
<td>2</td>
<td>0.32</td>
</tr>
<tr>
<td>2003</td>
<td>491</td>
<td>484</td>
<td>1</td>
<td>0.20</td>
</tr>
<tr>
<td>2002</td>
<td>485</td>
<td>474</td>
<td>0</td>
<td>0.0</td>
</tr>
<tr>
<td>2001</td>
<td>571</td>
<td>559</td>
<td>0</td>
<td>0.0</td>
</tr>
<tr>
<td>2000</td>
<td>507</td>
<td>490</td>
<td>1</td>
<td>0.20</td>
</tr>
<tr>
<td>Total</td>
<td>2672</td>
<td>2581</td>
<td>4</td>
<td>0.15</td>
</tr>
</tbody>
</table>

Source: BCPS, 2005

1. This figure is net of filings that were not reviewed by CADE because the transaction did not meet the notification filing thresholds or because the parties withdrew the notification.

Although CADE has imposed conditions on about 3.4 per cent of transactions, structural requirements directing the disposition or utilisation of assets were imposed in only four instances (well under a tenth of all conditional cases). The 2000 structural case cited in the table was the AmBev beer merger case, in which CADE required the divestiture of one beer brand and five breweries. The 2003 structural case was the acquisition of the supermarket chain G. Barbosa by the Ahold Group (owner of Bompreço, the largest supermarket chain in Brazil’s Northeast region). CADE ordered that Ahold divest 16 of the 32 G. Barbosa stores. One of the 2004 cases was another supermarket merger, involving the divestiture of one store, and the second was the Pepsico Gatorade case, described above, in which AmBev was required to divest its isotonic drink trademark.

An example of an ancillary condition case is Novo Nordisk’s acquisition of Biobrás. Nordisk was a major exporter of insulin to Brazil. Biobrás, a Brazilian pharmaceuticals company, was the sole domestic insulin manufacturer. Nordisk proposed to structure the transaction by spinning off the Biobrás insulin production assets to Biomm, a newly-created company. CADE approved the transaction, but barred a contract provision specifying that Biomm could not export insulin to Brazil from its foreign production facilities for three years. The high number of ancillary condition cases reported for 2004 is explained by about 25 acquisitions of local elevator
service firms undertaken by a single company in different geographic markets. In each case, the acquisition agreement prohibited the seller from engaging in maintenance services for a period of years, and CADE imposed conditions requiring the non-compete clauses to be restricted either to the elevator market (rather than including escalators) or to be limited geographically.

Most transactions (96.6 per cent) have been approved without conditions. In 2001, CADE considered an international merger that involved the Brazilian subsidiaries of two farm machinery companies, New Holland (a Dutch affiliate of Fiat) and Case Corporation (an American firm). Although some of the Brazilian machinery sub-markets were relatively concentrated, CADE approved the transaction without conditions. In the Council’s view, any attempt by the post-merger firm to increase prices would be effectively constrained by the presence of other Brazilian manufacturers who operated multi-purpose plants capable of producing the affected products. CADE noted that the European and US antitrust agencies, in assessing the same merger, had required divestiture of several manufacturing plants in their respective geographic jurisdictions. The Brazilian situation was distinguished on the grounds that market demand was much greater in the overseas markets, with the consequence that foreign plants could be (and were) constructed as highly efficient single-product operations. In contrast, all of the Brazilian plants are multi-product operations.

Complete rejections of notified transactions are rare. CADE blocked two joint ventures in 2000 that involved different features of a single operation. A group of firms that manufactured fuel alcohol from sugar cane formed a joint agency to sell all output from the members. CADE concluded that the anticompetitive aspects of the proposals outweighed any efficiency benefits. In February 2004, CADE took the first decision in its history to disapprove an asset acquisition merger in toto, rejecting Nestlé Brasil’s acquisition of Chocolates Garoto.

Recently, in April 2005, CADE cleared the acquisition of the tractor manufacturer Valtra by the US tractor firm AGCO. The case is significant because it was the first occasion on which CADE considered econometric simulations that had been conducted by SDE and SEAE, rather than by the merging parties. The simulations were designed to examine market definition issues and addressed cross-elasticities across various sub-markets defined by the horsepower range of tractor engines. In some sub-markets, the post-merger market share was 85 per cent or more. CADE nevertheless approved the transaction because impending new entry would create sufficient capacity to forestall price increases in any of the markets.31
Box 3. Nestlé-Garoto

Nestlé Brasil, the Brazilian subsidiary of the Swiss Group Nestlé, produces food and beverage products, including chocolate, as well as drug and hygiene items. Chocolates Garoto, a Brazilian firm in the foods sector, is a major producer of chocolates and sweets. In the general chocolate products market, Garoto was the third largest firm, while Nestlé and Kraft Foods (Lacta) alternated in the leadership position. The merger significantly increased horizontal concentration in the general chocolates market, as shown in the following table.

<table>
<thead>
<tr>
<th>Company</th>
<th>1998</th>
<th>1999</th>
<th>2000</th>
<th>2001</th>
</tr>
</thead>
<tbody>
<tr>
<td>Nestlé (a)</td>
<td>35.26</td>
<td>34.60</td>
<td>30.95</td>
<td>33.94</td>
</tr>
<tr>
<td>Garoto (b)</td>
<td>22.13</td>
<td>24.69</td>
<td>28.55</td>
<td>24.47</td>
</tr>
<tr>
<td>(a+b)</td>
<td><strong>57.39</strong></td>
<td><strong>59.29</strong></td>
<td><strong>59.50</strong></td>
<td><strong>58.41</strong></td>
</tr>
<tr>
<td>Lacta</td>
<td>33.73</td>
<td>32.83</td>
<td>33.59</td>
<td>33.15</td>
</tr>
<tr>
<td>Ferrero</td>
<td>5.45</td>
<td>4.61</td>
<td>3.91</td>
<td>3.18</td>
</tr>
<tr>
<td>Arcor</td>
<td>3.20</td>
<td>3.07</td>
<td>2.61</td>
<td>3.40</td>
</tr>
<tr>
<td>Others</td>
<td>0.23</td>
<td>0.20</td>
<td>0.39</td>
<td>1.86</td>
</tr>
<tr>
<td>Total</td>
<td>100.0</td>
<td>100.0</td>
<td>100.0</td>
<td>100.0</td>
</tr>
</tbody>
</table>

Source: BCPS, 2005

A threshold issue was whether general chocolates constituted the correct market for analysis. There were other candidates, including boxed chocolates, tablets, snacks, candy bars, and chocolate Easter Eggs, although concentration was generally high in those markets as well. The merging parties and Kraft filed duelling market definition studies, employing price elasticity models to estimate consumer reactions to relative prices among different chocolate formats and chocolate brands. The merging firms also presented econometric estimations based on Nielsen data to better illuminate the degree of competitive rivalry.

For the first time in a Brazilian merger case, the parties submitted simulation studies, which Kraft countered by conducting simulation studies of its own. The studies, designed to predict post-merger effects on prices and quantities, also purported to estimate the reduction in marginal costs needed to offset the merged firm’s increased market power. The dramatically different results reached by the contending studies obliged CADE to consider a host of methodology issues associated with simulation models, including identification of the relevant demand function, assessment of the statistical uncertainty associated with demand elasticity estimates, and examination of the potential defects in the Bertrand-Nash differentiated products model that the simulations employed.

Other issues besides the relevant market were also hotly contested, including barriers to entry and the prospects for expansion of such rival brands as Mars and Hershey. As another first in a Brazilian merger case, the applicants presented a detailed study of merger efficiencies prepared by an independent auditing company.
On February 4, 2004, a majority of the Council voted to block the operation, determining that Nestlé should sell Chocolates Garoto to a competitor with less than a 20 per cent share of the relevant market. In CADE’s view, the econometric studies demonstrated a high cross-elasticity of demand among the various market segments for chocolates and among the different brands, leading to the conclusion that the relevant market was chocolates of all forms (excluding homemade items) in the Brazilian national market. CADE also noted that imports were not a significant factor in the market and that there were barriers to new entry because of difficulties in securing wholesale distribution. CADE concluded that the transaction should be rejected because (1) neither the expected reduction in variable costs nor the degree of surviving market rivalry was sufficient to forestall price increases, and (2) no structural remedies were available to reduce the negative effects of higher concentration.

The parties filed motions with CADE seeking reconsideration and clarification, which CADE denied on February 3, 2005. The companies again appealed to CADE, proposing partial divestitures, which CADE rejected on April 27, 2005. Judicial review is now pending.

The decision generated considerable political controversy. Congressional representatives from one Brazilian state vigorously advocated approval of the transaction in light of Nestlé’s proposal to expand a Garoto production facility located in that state. In July 2004, the term of one CADE commissioner who had joined in the decision came to an end. The commissioner was nominated for a second term by the President and approved by the Senate Economic Affairs committee for consideration by the full Senate. The Senate, however, delayed action, reportedly because of displeasure by some senators with the Nestlé decision. The commissioner ultimately withdrew his nomination.

Under CADE’s Resolution 15 (1998), respondents in a merger case may seek reconsideration of the Council’s decision by showing that the decision was based on factual errors or that new facts material to the decision have arisen. From 2000 to 2004, CADE considered 13 reconsideration applications, granting six in whole or in part, denying five on the merits, and rejecting two as unfounded. In the Nestlé - Garoto merger case, the Council rejected an application to reduce the market share attributed to Nestlé, concluding that the requested change would not have a material effect on the Council’s decision to disapprove the acquisition. The statute provides that CADE may revoke a transaction approval “in the event of default on obligations assumed [by the parties], or if the intended benefits have not been attained” (Art. 55). Revocation is also authorized, whether or not conditions or performance commitments are imposed, if the approval was based on false or misleading information submitted by the applicants. No revocation cases under Article 55 have arisen.
As noted previously, Article 54 paragraph 3 requires notification for mergers that either produce an entity with twenty per cent of a relevant market, or involve a participant with total annual turnover of BRL 400 million (USD 156 million). Until recently, the BRL 400 million turnover threshold was applied to worldwide turnover. This interpretation of the requirement was widely criticised by practitioners and the business community in Brazil. The 2000 Report examined this issue and concluded that the worldwide turnover interpretation likely resulted in over-reporting of competitively insignificant mergers. The Report suggested (p. 213) that the threshold be limited to turnover in Brazil (observing, however, that adopting such a change would make it “necessary to inquire whether BRL 400,000,000 would be too high”). The 2000 Report also recommended (1) that a minimum revenue threshold be established for the smaller party to the merger, on the grounds that the existing scheme required notification of every acquisition undertaken by very large companies, no matter how tiny the acquired firm and how trivial the competitive implications; (2) that consideration be given to eliminating the market share test, on the grounds that it introduced a subjective element into what should be an unambiguous notification scheme; and (3) that consideration also be given to eliminating application of the notification requirement to non-merger acts, on the grounds that broad notification systems do not typically generate benefits worth the costs imposed worth the costs imposed (pp. 213-14).

In an important decision rendered in January 2005, CADE determined that annual turnover would henceforth be measured with reference to Brazilian rather than worldwide sales. According to the BCPS, of 161 merger filings examined in the aftermath of the new interpretation, 68 (42 per cent) could be dismissed because they met neither the turnover nor the market share test. The question posed by the 2000 Report (whether adopting a Brazilian turnover interpretation should lead to a reduction in the BRL 400 million threshold) is now a matter of keen interest to the BCPS, not least because of the implications for filing fee receipts. The proposed legislation to remodel the competition law resolves this issue, as well as the question of a threshold for the smaller party, by providing that notification is required if (1) at least one of the transaction participants has total turnover in Brazil of BRL 150 million and (2) at least one other transaction participant had total turnover in Brazil of BRL 30 million. The proposed legislation also addresses the other issues raised by the 2000 Report by eliminating the market share test and expressly restricting the notification requirement to “mergers,” defined as transactions wherein (1) two companies merge, (2) one company acquires control of the stock or assets of another, or (3) a joint venture is undertaken that entails formation of an independent economic entity.
As also noted previously, an important feature of the merger notification scheme in Brazil is that notification, while mandatory, need not be filed in advance of consummation. Article 54 paragraph 4 requires only that notification must be made “no later than fifteen business days after the occurrence” of the transaction. CADE Resolution 15, the implementing regulation for merger control issued in 1998, specifies the “trigger date” that commences the 15 day period. Under the Resolution, the period begins to run when (1) “the first binding document [is] signed” by the parties or (2) when there occurs “a modification in the competition relations between the requesting parties or between at least one of them and a third agent” (Art. 2).

The fact that the parties are free to consummate their merger before or after filing a notification poses an obvious problem for CADE in dealing with transactions that are found to be anticompetitive. Because the adverse effects of such a transaction may begin to accumulate immediately, and because unwinding a consummated merger is so notoriously difficult, CADE has a strong incentive to construe and enforce the notification deadline so as to require filing as early in the process as possible. The 2000 Report observed (p. 207) that CADE had been vigorous in assessing fines against merging parties for failing to submit their notifications on time, adding that CADE’s interpretation of the “trigger date” was controversial because of ambiguities in determining when, a “modification in the competition relations” between the parties occurs. Although the 2000 Report suggested (p. 212) that CADE considers dropping that element of the “trigger date” formulation and rely solely on the “first binding document” standard, CADE has maintained the policy articulated in Resolution 15.

In the past five years, as CADE has continued to take an aggressive approach to untimely filings, compliance has increased and the incidence of untimely notifications filed has steadily diminished. The following table shows the experience with late filings from 2000 to 2004.

| Table 6. Untimely Article 54 Notifications 2000 - 2004 |
|-----------------|---------|---------|---------|---------|---------|
| Transactions reviewed | 2000    | 2001    | 2002    | 2003    | 2004    |
| Untimely filings (number) | 107     | 57      | 39      | 16      | 18      |
| Untimely filings (% of total reviewed) | 20.5    | 9.8     | 7.5     | 3.0     | 2.7     |
| Fines imposed (BRL million) | 16.3    | 9.9     | 7.9     | 2.2     | 3.0     |

Source: BCPS, 2005

The difficulties associated with undoing consummated mergers have led CADE to pursue other means for preventing the complete integration of business entities pending review. Although no provision in Law 8884 addresses this issue, Article 83 applies Brazil’s Code of Civil Procedure and certain related procedural statutes to BCPS proceedings and CADE may therefore impose an injunction according to the standards applicable to temporary relief under Brazilian law. The 2000 Report (p. 206) described two merger cases in the late 1990s (AmBev and WorldCom/Sprint) in which CADE issued injunctive orders under civil law procedures to bar the combination or closing of production facilities, prohibit the exchange of commercially sensitive information, and require that stock shares be held in separate accounts.

To formalise the mechanisms by which the consummation of merger transactions can be suspended pending review on the merits, CADE issued Resolution 28 in August 2002. Under Article 2 of the Resolution, a “precautionary order” may be granted under civil law principles either by the Council, or by the Reporting Commissioner with subsequent ratification by the Council (Art. 7). The order can be issued either ex officio or in response to a petition by SEAE, SDE, the CADE Attorney General, or “any third party interested in the concentration act under review.” The Resolution establishes a procedure whereby the merging parties are given five day’s notice of an impending preventive order and provided with an opportunity to present opposing arguments to CADE (Art. 4). Such orders, if granted, are subject to review in the courts. Resolution 28 also creates (in Article 8) a second mechanism, termed an “Agreement to Preserve Reversibility of Transaction” (“Acordo de Preservação de Reversibilidade da Operação” or APRO). As its name suggests, an APRO reflects a consensual agreement between CADE and the merging parties designed to accomplish the same result as a precautionary order.

From 2002 to 2004, CADE issued one precautionary order (in 2004) and adopted nine APROs (4 in 2002, 1 in 2003, and 4 in 2004). The precautionary order arose during review of the News Corporation’s acquisition of the satellite TV assets of Hughes Electronics, and barred both parties to the transaction from establishing any new contracts providing for exclusive distribution in Brazil of television programming. Of the nine APROs, three arose (like Hughes Electronics) in the telecommunications sector and three others related to supermarket chain mergers. The remaining three involved cases previously described: (1) the transfer of assets by PepsiCo for the production of “Gatorade,” (2) the acquisition of Garoto Chocolates by Nestlé, and (3) the acquisition of a Brazilian insulin manufacturer by Novo Nordisk. Typically, preventive orders and APROs impose restrictions or conditions on the acquiring company’s freedom to
integrate activities; close stores or plants; dismiss workers; terminate brands or product lines; alter marketing, investment, or research plans; or liquidate assets. Both preventive orders and APROs include provisions that specify daily fines for failure to comply with the restrictions imposed.

The 2000 Report did not directly recommend that Brazil move to a pre-merger notification system. Since then, a consensus view has developed in Brazil that the present post-merger system is unwieldy and inefficient for both the competition agencies and the business community. The proposed legislation establishes a pre-merger notification system by providing that the parties to a merger must preserve “the conditions of competition” between themselves and may not execute a notified transaction until it is evaluated by CADE.

The procedures established under the present law for reviewing notified transactions appear in Article 54. The notification is filed with SDE, which supplies copies immediately to SEAE and CADE (paragraph 4). Unlike conduct cases processed under Article 38, SEAE does not have the option to determine whether it will opine on merger transactions. Rather, Article 54 requires that SEAE provide to SDE, within 30 days, a technical report on the transaction. SDE, in turn, must provide a recommendation to CADE within 30 days of receipt of the SEAE report. At that point, the case files are transferred to CADE, which must evaluate the recommendation and render a decision within 60 days (paragraph 6). CADE is not in any way bound by the recommendations of SEAE or SDE and is responsible for impartial adjudication of contested cases. If SEAE or SDE fail to meet their respective deadlines, no legal consequences result. If CADE does not issue a decision within its 60 day period, however, the merger is deemed to be approved (paragraph 7). Assuming deadline compliance by all three agencies, the maximum statutory period for merger review under Article 54 is 120 days. Each of the three agencies, however, also has the power to issue one or more requests for additional information, and in such circumstances the running of the statutory periods is suspended from the time of the request until the information is supplied (paragraph 8). Although neither Article 54 nor CADE regulations establish any formal mechanism for settlement of merger cases by consent, conditional merger approvals may arise from negotiations between the parties and the BCPS.

CADE Resolution 15, the implementing merger regulation, was adopted in 1998 as part of an effort to streamline the merger review process within CADE. The Resolution introduced a “two stage” process involving an initial notification form (attached as Exhibit I to the Resolution) that was a simplified and shortened version of the form previously used. A second form (Exhibit II), requiring substantially more information, and was designed for issuance to the merging parties if the Reporting Commissioner
determined that supplementary investigation was required. As practice has developed, the second form is never used. If a merger is sufficiently complex to warrant a “second request” for information, SDE or SEAE will prepare questions addressed specially to the transaction under review. Likewise, if CADE decides that a merger presented by SDE and SEAE requires yet more information, the supplemental inquiry will be conducted by the Reporting Commissioner and will focus on the particular issues identified for examination.

The 2000 Report, observing that the review of simple mergers presenting no apparent competition issues could take the BCPS six months or more to complete, urged the agencies “to find ways of simplifying and speeding the review of the 90 to 95 per cent of all mergers that are competitively benign” (p. 211). Beginning in 2002, on an informal basis, SDE and SEAE developed a streamlined procedure for simple cases under which SEAE would prepare a short form report within 15 days of receiving the notification and SDE would likewise prepare a short form report within 15 days of receiving the SEAE report. In February 2003, the two agencies formalised the procedure by issuing Joint Ordinance No. 1, which establishes a “Fast Track Procedure” applicable to transactions involving (1) the purchase of franchisees by their franchisors, (2) cooperative joint ventures created to enter a new market, (3) corporate restructuring within a single business group that entails no change in control, (4) acquisition of a Brazilian firm by a foreign firm that has no (or insignificant) business interests in Brazil, (4) acquisition of a foreign firm that no (or insignificant) business interests in Brazil by a Brazilian firm, (6) replacement of an economic agent where the acquiring firm did not previously participate substantially in the target market or in vertically–related markets, and (7) acquisition of a firm with a market share small enough to be unquestionably irrelevant with respect to competition.39 In January 2004, SEAE and SDE instituted a “Joint Procedure for Merger Review” that has further expedited merger analysis. Under this procedure, both Secretariats begin reviewing a notification immediately upon its receipt and send a joint recommendation to CADE, thus avoiding the delay inherent in referring a case to SEAE and awaiting its analysis before SDE commences work. SEAE and SDE report that about 60 per cent of merger filings qualify for “Fast Track” treatment and that they ordinarily process such cases for transmittal to CADE in about thirty days. Implementation of the system has reduced the two agencies’ average total merger review time in half, from nearly six months to 86 days. After adjusting for delays caused by requests for additional information, both agencies meet the statutory deadline for completion of their work.40
CADE has also developed some procedures to help expedite cases. Mergers processed under the “Fast Track” procedure precede all others on CADE’s decision docket, and CADE has also continued the practice of adopting as its own the report issued by SDE and SEAE, rather than preparing a separate decision. Nonetheless, the average time for merger review by CADE (based on the number of days that elapse between receipt of the file by CADE and CADE’s decision date) has not changed greatly in the past several years, except for an increase in 2004.

Table 7. Average Time for CADE Merger Analysis

<table>
<thead>
<tr>
<th></th>
<th>2001</th>
<th>2002</th>
<th>2003</th>
<th>2004</th>
<th>2005</th>
</tr>
</thead>
<tbody>
<tr>
<td>Transactions reviewed</td>
<td>584</td>
<td>518</td>
<td>526</td>
<td>651</td>
<td>202</td>
</tr>
<tr>
<td>Average time for review (days)</td>
<td>85</td>
<td>80</td>
<td>83</td>
<td>125</td>
<td>75</td>
</tr>
</tbody>
</table>

Source: BCPS, 2005

CADE advises that the spike in 2004 arose because SDE cleared a backlog of mergers from previous years, including some complex cases that CADE’s resources were taxed to handle. CADE also resolves merger cases within the statutory 60 day deadline established for its work (after adjusting for delays caused by requests for additional information). Were CADE to miss that deadline, the merger would be approved by default under Article 54 paragraph 7.

2.3 Unfair competition and consumer protection

“Unfair competition” that injures individual competing firms is not addressed in Law 8884, but in another statute that provides a basis for both criminal prosecution and private civil suits. The Industrial Property Law (No. 9279/96) defines the crime of “unfair competition” to include commercial disparagement, false branding, fraudulent diversion of trade, advertising designed to cause brand confusion, violation of trademark rights, commercial bribery, illegitimate appropriation or disclosure of trade secrets, and false patent claims (Art. 195). The statutory penalty is imprisonment for three to twelve months or imposition of a fine. Public prosecutors may bring criminal charges under the statute only in response to complaints filed by private parties (Art. 199). Victims of unfair competition may also invoke the law as the basis for seeking damages and injunctive relief in a civil suit.
Box 4. Merger Review Procedures: Proposed Amendments

As described above, the proposed legislation amending Law 8884 makes numerous changes to the present merger review system by establishing a pre-merger filing deadline, altering the filing thresholds, eliminating the market share test, providing a substantive standard for evaluating mergers, and expressly restricting the notification requirement to mergers. It also entails substantial modifications to the merger review procedures. When a notification filing is deemed complete, the Directorate General (“DG”) must, within five days, publish a summary notice of the proposed transaction and provide a copy of the filing to SEAE. SEAE has the option, but not (as now) the obligation, to opine on the contemplated merger. A request by SEAE for further information no longer suspends the deadline for agency action. Within 20 days after notice publication, the DG must either request further information or approve the transaction. In the latter case, the Plenary may, within 15 days, choose to review the approval decision, but is not required to do so. This feature of the proposal is intended to operate as an “early termination” mechanism.

If further information is requested, then within sixty days after its receipt, the DG must formulate a recommendation on disposition of the case. Again, an approval by the DG is subject only to discretionary review by the Plenary. If the DG recommends either disapproval or approval with conditions, the matter is immediately assigned to a Reporting Commissioner and the applicants have 30 days to file a defence. Upon receipt of the defence, the Reporting Commissioner must decide within 20 days whether to docket the case for decision or request that the parties produce further information. Once any such information is submitted, the DG and the petitioner are given 10 days to submit written briefs. Within 20 days after the deadline for filing briefs, the Reporting Commissioner must schedule the case for judgment by the Plenary. No deadline is imposed by which the Plenary must resolve the case. In proceedings before the Plenary, the burden of proof is on the DG to demonstrate that the transaction is anti-competitive.

A new provision permits an appeal against a Directorate General decision to approve a merger. Such appeals may be filed (within 20 days after the approval determination is published) by interested third parties, by SEAE, and by sector regulatory agencies. The appeal is lodged first with the DG, who has five days either to reverse his decision or forward the appeal to the Plenary. If forwarded, the Reporting Commissioner makes a determination (subject to review by the Plenary) whether to “admit” the appeal. If admitted, the appellant then takes the role that the Directorate General would otherwise play. The DG, however, retains complete authority to participate as a party to defend its position. If an appeal by a private party is admitted but ultimately rejected, the Plenary must impose a fine on the party ranging from BRL 5000 to BRL 5 million (USD 1950 to
US$ 1.95 million). The amount assessed is to be determined by considering the economic condition of the appellant, its performance in the proceedings, its good faith, and the effect of the delay on the transaction.

The bill also provides a formal mechanism for resolving merger cases by settlement. The Directorate General (with the mandatory participation of the Reporting Commissioner) is empowered to negotiate a settlement agreement for a notified merger at any time before the matter is lodged with the Plenary as a contested transaction. Once negotiated, the agreement must be published for at least ten days of public comment, after which the DG may choose to re-negotiate the proposal before transmitting it to the Plenary for final disposition.

Under the bill, filing fees collected for merger notifications are allocated two-thirds to CADE and one-third to SEAE. The fine previously imposed under Article 54 paragraph 5 for failure to comply with the post-consummation notification filing deadline is made applicable to the consummation of a reportable transaction prior to its approval. A new provision permits fines ranging from BRL 60,000 to BRL 6 million (US$ 23,400 to US$ 2.34 million) for the submission of false information that leads to an erroneous transaction approval.

Brazil’s Consumer Defence Code (Law 8078), adopted in 1990, regulates such marketing practices as deceptive advertising, false warranties, door to door sales, telemarketing, and abusive price increases, as well as consumer contracts generally. The law establishes the “National Consumer Defence System,” which is composed of (1) the Consumer Protection and Defence Department (“DPDC”) in SDE, (2) state and local consumer protection agencies, (called “Procons”) and (3) non-governmental consumer organisations (NGCOs). DPDC is responsible for overall coordination of the system and also handles various specific duties. It employs 29 administrative and professional staff allocated among the Director’s office and three General Divisions (Legal Affairs, Consumer Policy, and Marketing Supervision). The Department also administers a Call Centre that responds to telephone inquiries from consumers, provides requested information, and refers complaints to local Procons.

The “Procons,” located in all 26 Brazilian states, in the Federal District (Brasilia), and in 670 municipalities, provide guidance to consumers; analyse their inquiries, complaints, and suggestions; and engage in consumer class action litigation. They also assist consumers and suppliers to resolve disputes by agreement. The NGCOs include three national and more than forty state and regional organisations in Brazil. They are very active in consumer class action litigation, and also publish consumer magazines,
undertake consumer education functions, and conduct other activities (such as comparative product testing).

The Consumer Defence Code provides that consumer complaints seeking damages may be filed in court by an individual consumer, or by a group of individuals asserting a common claim. In the case of class injury, suits may be also filed by Procons or prosecutors’ offices, and NGCOs may likewise commence legal actions in their own name on behalf of a victim class. Besides authorising suits for damages, the law provides for criminal and civil enforcement proceedings. Criminal actions, which may lead to fines and imprisonment, can be filed by government prosecutors in both federal and local courts. Federal and local civil enforcement suits, which may lead to injunctive orders and monetary consumer redress awards, can be filed by prosecuting attorneys, NGOs, and (depending on the court involved) by either DPDC or the Procons.

DPDC also has a consumer education function, which it implements by maintaining a web site, conducting training for NGCO personnel, issuing consumer brochures, and developing educational materials for school curricula. Because DPDC is the sister agency to SDE’s antitrust department, there are opportunities for synergy between the competition promotion and consumer education functions, as described in the competition advocacy discussion in this report. The two departments also exchange case referrals and consult on competition advocacy issues that have a consumer protection component.

3. Institutional Issues: Enforcement Structures and Practices

3.1 Competition policy institutions

3.1.1 CADE

Law 8884 establishes CADE as “an independent federal agency,” associated with the Ministry of Justice for budgetary purposes (Art. 3). CADE’s role in competition law enforcement is to adjudicate alleged violation of the law and impose appropriate remedies and fines. The Council consists of a President and six Council members (or commissioners) appointed by the President of the Republic and approved by the national Senate for terms of two years (Art. 4). Appointees must be citizens more than thirty years of age and “reputed for their legal or economic knowledge.” They may be reappointed for one additional term, and may be removed from office only for certain criminal offences or other malfeasance as specified by law (Art. 5). Members of CADE, while in office, may not undertake outside employment (except of an academic nature) or engage in
political activities. Of the six current CADE Commissioners, two (including the President) are economics professors, and a third is an economist who formerly served as deputy secretary of SEAE. The remaining three are lawyers, including a professor of competition law, a federal government banking law attorney, and a state government criminal law attorney. The view in Brazil’s antitrust community is that nominations to CADE seats have sometimes reflected political considerations rather than a focus on technocratic expertise. Some practitioners urge that commissioners from the legal profession either have experience specifically in competition law or have an educational background in economics.

### Box 5. Three Legal Institutions Affecting Competition Law Enforcement: The Public Prosecutor, The Attorney General, and The Ministry of Justice

The Federal Public Prosecutor’s Office is created by the Brazilian Constitution (Art. 128) as a wholly independent branch of the government. One important function, as its name suggests, is to prosecute violations of criminal law. Beyond that, however, the Office is charged with responsibility for protecting the general public interest, including particularly “diffuse” interests that do not have a naturally strong political constituency. The economic order and the environment are two examples of such diffuse interests. The Prosecutor’s Office is also intended to check excesses by other parts of the government. Thus, it has a special role in prosecuting corrupt actions by government officials and is vested with specific authority to challenge the constitutionality of actions taken by Congress or government agencies.

The Public Prosecutor may be contrasted with the Federal Attorney General’s Office and the Ministry of Justice, the latter two of which are regular ministries in the Executive Branch. The role of the Attorney General’s Office is to represent the government as such, and thus it provides legal advice to federal agencies and represents those agencies in court. If SDE or SEAE are parties in a court action, they will be represented by lawyers from the Attorney General’s Office. Some autonomous agencies, including CADE, have their own Attorney General.44

The Ministry of Justice serves as the government’s arm for administrative matters relating to law enforcement. Secretariats within the Ministry, such as SDE, are responsible for various elements of the Ministry’s mission but do not engage directly in court litigation (which is the province of the Attorney General).
Law 8884 also provides for the involvement in CADE’s activities of two independent officers. The first is the CADE Attorney General, appointed by the Minister of Justice and commissioned by the President of the Republic after Senate approval. The Attorney General serves under the same conditions as apply to Commissioners with respect to term of office, qualifications, re-appointment, and removal (Art. 11), and thus is not subject to removal by the Board. The Attorney General’s statutory duties are to provide legal advice to CADE, render opinions on cases pending before CADE for judgment, defend the agency in court, arrange for judicial execution of its decisions, and (with CADE’s preliminary approval) enter into settlements of cases pending in court (Art. 10).

The second officer is a representative of the Federal Prosecutor General. Article 12 provides that the Prosecutor General shall appoint a member of the Public Prosecutor’s Office “to handle” cases submitted to CADE for review. The Article adds that CADE may request the Prosecutor General to enforce CADE decisions in court and take other judicial action in furtherance of the Prosecutor’s statutory duty to protect the economic order. A description of the Public Prosecutor’s role and relation to other Brazilian legal agencies appears below.

The Portuguese verb “oficiar” used in Article 12 (and translated here as “to handle”) is ambiguous and leaves unclear the precise role of the designated prosecutor in CADE proceedings. Presumably, the prosecutor is intended to serve as a watchdog against malfeasance in CADE’s operations. At present, the Prosecutor General has two representatives serving at CADE, who prepare written opinions on matters presented to the CADE Plenary for decision. If the representatives conclude that an action contemplated by CADE is legally defective, they can both present argument to the Council and challenge the action in federal court. Given the prosecutor’s responsibility for protecting society’s diffuse interest in the economic order, the most likely occasion for a suit would be where the prosecutor concluded that CADE had improperly declined to condemn a violation.

CADE’s experience with the Public Prosecutor has been chequered. Representatives of the Prosecutor are ordinarily designated to serve at CADE for two year terms. During some periods, the post has simply been left unfilled. In contrast, the incumbent Prosecutor in 2003-04 adopted a quite aggressive posture, bringing several court suits against CADE for alleged procedural errors. More recently, CADE and the Public Prosecutor’s Office have opened consultations to establish a common interpretation for the statutory language describing the prosecutor’s function at CADE.
Box 6. Institutional Issues: Proposed Amendments

All participants in Brazil’s antitrust community, including the BCPS agencies, academicians, and practitioners, agree that the present tri-partite institutional structure for competition law enforcement is inefficient. The 2000 Report made the same point (p. 214), although it declined to recommend specific institutional rearrangements. The 2000 Report urged closer integration of investigative and adjudicative functions and increased efforts to eliminate duplicative effort among the agencies (p. 214).

Beyond the problem of structural inefficiency, the 2000 Report also noted two institutional features of the BCPS that operate to compromise CADE’s autonomy. First, because law enforcement cases may be initiated only by SDE, CADE lacks capacity to control the direction of competition law enforcement (p. 215). Second, the two-year terms of CADE commissioners, and the fact that the terms were not staggered, means that the entire membership of the Council can be replaced in a short period of time when (as in fact has happened) terms of office expire in rapid succession. This not only threatens CADE’s independence from political control, but results in a loss of institutional continuity (p. 215). The Report recommended longer, staggered terms of five to seven years to address these issues (p. 215).

The proposed amendments to Law 8884 include provisions dealing with the duration and sequence of terms for commissioners and with institutional integration. Besides converting the CADE “council” to an “administrative tribunal,” the bill extends the terms of its members from two years to four and staggers the terms to avoid simultaneous vacancies.48 The appointment process for commissioners is modified slightly, so that the President of the Republic’s nominee for CADE President will be recommended jointly by the Ministers of Finance and Justice, and the nominees for the individual Board member positions will be recommended alternately by those two Ministers. Senate approval of the nominations is still required.

The most dramatic institutional changes in the law affect SDE and SEAE. SDE’s Department of Economic Protection and Defence (DPDE) is abolished and its investigative and preliminary enforcement responsibilities are transferred to a new CADE Directorate General, comprised of a Director General (DG) and five directors. The Director General, appointed by the President of the Republic upon the joint recommendation of the Ministers of Finance and Justice and approved by the Senate, serves for a two year term, with the opportunity for one additional re-appointment. The DG is subject to the same conditions as apply to Commissioners with respect to removal from office, and thus cannot be removed at will by the Plenary. The five directors are appointed by the President of the Republic upon nomination of the Director General and serve at the DG’s discretion.
A Department of Economic Studies is also created within CADE, headed by a Chief Economist appointed by the President of the Republic upon recommendation of the Finance Minister and approved by the Senate. The Chief Economist serves under the same conditions as apply to Commissioners with respect to term of office, re-appointment, and removal. The Department is responsible for undertaking economic studies and technical reports to assist CADE’s case analysis, as requested by the Reporting Commissioner or the Director General.

The role and authority of CADE’s Attorney General in providing legal counsel and representation in judicial proceedings remain largely unaltered. The Attorney General, however, is no longer required to opine on each case presented to the Plenary for decision. Rather, the Reporting Commissioner for a case has discretion whether to request an Attorney General opinion.

SEAE’s function is significantly changed to focus primarily on competition advocacy, market studies, and matters related to regulated sectors of the economy. In the law enforcement context, SEAE now longer possesses its own compulsory investigative tools. It is still informed when administrative proceedings are commenced and still receives copies of all merger notifications, but is not obliged to provide a technical opinion in every merger case. Rather, SEAE provides an opinion on conduct or merger cases only at its own option or when requested by either the Directorate General or the Reporting Commissioner in a particular matter. A new provision specifies that SDE is responsible for evaluating complaints it receives from private parties and referring those it finds meritorious to the DG for initiation of an administrative inquiry. SEAE may also recommend that CADE issue a cease and desist order during an administrative proceeding whenever SEAE concludes that the defendant’s conduct may cause irreparable damage to a market or render the proceeding ineffectual.

Outside the law enforcement arena, SEAE is responsible for promoting competition before other government agencies and before civil society in general, consulting with regulatory agencies and opining on proposed regulations, conducting market studies, and analysing and proposing revisions to laws and regulations that affect competition. To accomplish its various missions, SEAE may request the voluntary production of information from individuals and public or private entities. SEAE is also empowered to access case files maintained by CADE and other public bodies and law enforcement agencies, and may request CADE’s Director General to conduct examinations and inspections and seek judicial authority for search and seizure procedures on SEAE’s behalf.
As noted above, a separate clause in Article 12 provides that CADE may request the Federal Prosecutor to seek judicial enforcement of CADE decisions. Traditionally, attorneys from the CADE Attorney General’s office have represented CADE in judicial enforcement actions filed in Brasilia. Recently, the Prosecutor’s representatives at CADE have been providing cooperative assistance in such proceedings. When enforcement actions are filed outside Brasilia, CADE ordinarily relies on the Federal Attorney’s Office in the relevant state, but it has also received some assistance in those cases from federal and state prosecutors.

CADE is created as an “independent” agency by Article 3, and Article 50 provides that CADE decisions are not subject to any review by the Executive Branch of the government. The antitrust community considers CADE to be genuinely autonomous, although many practitioners express concern about the provision in Article 4 under which Commissioners may be re-appointed to a second two-year term. This is thought to create an incentive for sitting Commissioners to adjust their decisions for political reasons in order to win re-appointment. Whether or not this is true, the re-appointment option undeniably presents an opportunity for political manoeuvre by the Senate, as the aftermath of the Nestlé-Garoto merger demonstrates. The proposed legislation to amend Law 8884 extends the term of CADE Commissioners to four years, without the possibility of immediate re-appointment.

3.1.2 SDE

Under Law 8884, investigative functions and some preliminary enforcement functions are performed by SDE (Art. 14). SDE is headed by a Secretary appointed by the Minister of Justice and is divided into two Departments, one with responsibility for the competition law (the Department of Economic Protection and Defence, or DPDE), the other responsible for the consumer protection law (the Department of Consumer Protection and Defence, or DPDC). Each of the Departments is headed by a Director who is appointed by the Secretary. Although SDE is not created as an independent agency, Law 8884 provides that the Secretary’s decisions “cannot be appealed to higher ranks” in the Justice Ministry (Art. 41). Traditionally, the Ministry has not interfered in SDE’s activities.

3.1.3 SEAE

SEAE, headed by a Secretary appointed by the Minister of Finance, has three principal responsibilities: (1) performing certain investigative and advisory functions under the competition law, (2) providing economic analysis for economic regulatory programs (including analysis of prices),
and (3) monitoring market conditions in Brazil. Under Law 8884, SDE must inform SEAE whenever SDE commences an administrative proceeding in a conduct case, and SEAE may then elect to provide an opinion to SDE on the matter (Art. 38). In merger cases, Article 54 requires SEAE to provide a technical analysis report to SDE on all transactions for which a notification is filed (Art. 54). The 2000 amendments to Law 8884 vested SEAE with authority to employ all of the investigative powers available to SDE (Art. 35-A §1). SEAE does not, however, have any adjudicatory or enforcement functions under the competition law.

3.2 Competition law enforcement

Law 8884 vests SDE with primary responsibility for monitoring markets and identifying possible violations (Art. 14). The SDE Secretary may initiate a “preliminary investigation” either ex officio or upon a complaint or request of an interested party (including CADE and SEAE), where the available evidence does not warrant immediate commencement of more formal “administrative proceeding” (Art. 30). Within 60 days thereafter (a period which may be extended by requests for information), the Secretary must decide whether to close the preliminary investigation or initiate an administrative proceeding (Art. 31). A determination to close the investigation requires approval by CADE. The “administrative proceeding,” which is essentially a process for developing a formal evidentiary record, must be instituted within eight days of closing the preliminary investigation or of receipt of a sufficiently well founded complaint (Art. 32). SEAE is notified when such a proceeding is initiated and may then elect to provide an opinion to SDE on the matter (Art. 38). The defendant party is formally advised of the nature of the alleged violation and is summoned to submit a defence within fifteen days (Art. 33). After submission of the defence, a forty-five day period commences, during which the defendant may submit additional information and also request a hearing before SDE of up to three witnesses (Art. 37). Within five days after close of the discovery phase, the defendant presents its final arguments, and the SDE Secretary thereafter issues a written report containing findings and a recommendation that the Plenary either dismiss the case or find a violation of law (Art. 39). The case file, including any recommendation prepared by SEAE, is then forwarded to CADE for action.

All of SDE’s information gathering powers may be invoked during both preliminary investigations and formal administrative proceedings (Art. 35 §1). Prior to the December 2000 amendments, those powers entailed only the authority to compel the production of documents (with due regard for protection of confidential information) and the oral testimony of witnesses (Art. 35). The 2000 Report recommended that the investigational powers
and techniques available to the BCPS agencies be enhanced to enable more effective pursuit of cartels (p. 207). Suggested improvements included vesting the agencies with authority to search business premises without notice and to offer cartel participants amnesty from sanctions and penalties in exchange for cooperation. The 2000 amendments realised these recommendations, authorising the agencies to issue search warrants with 24 hours advance notice (Art. 35 §2), empowering SDE and SEAE to request that the Federal Attorney obtain a judicial warrant to execute unannounced search warrants (“dawn raids”) (Art. 35-A), and extending to SEAE all of the investigative powers available to SDE (Art. 35-A, §1). Further, Article 35-B authorises SDE to enter into leniency agreements under which individuals and corporations, in return for their cooperation in prosecuting a case, are excused from some or all of the penalties for unlawful conduct under Law 8884. The leniency provision is supplemented by new Article 35-C, which provides that successful fulfilment of a leniency agreement will also protect cooperating parties from criminal prosecution under Brazil’s economic crimes law (Law 8137/90).

BCPS efforts to exploit the statutory powers created by the 2000 amendments did not get underway until 2003. Beginning in that year, SDE restructured itself to focus increased attention on anti-cartel enforcement, and created a department of quantitative and econometric techniques to undertake analyses in conduct investigations (and in merger cases as well). SDE also established an “intelligence centre” for cartel investigations in conjunction with the Federal Police and the Public Prosecutor’s Office, to advance cooperative efforts in joint criminal and civil investigations of cartels. This initiative was assisted in part by the passage of legislation in May 2002 (Law 10446) under which the Federal Police were authorised to assist in cartel investigations that entail interstate or international aspects. From 2003 to late 2004, SEAE also substantially increased its activities with respect to cartels, conducting investigations in such markets as civil aviation, cement, LPG, gasoline, and others, with a particular focus on employing economic analysis to identify cartel behaviour. In significant part, the re-deployment of resources by SEAE and SDE to cartel investigations was made possible by their intensive efforts to simplify and expedite the merger review process. The two agencies have also sought to increase their efficiency by allocating particular matters between themselves to avoid duplicative conduct investigations.
Box 7. Dawn Raid on Crushed Rock

The first antitrust “dawn raid” in the history of Brazil was conducted by SDE in July 2003 at the offices of the State of São Paulo Flintstone Industries Association (Sindipedras). Investigators sought evidence of collusion in the market for crushed rock, an essential raw material in the civil construction industry. The 21 companies involved in the Association accounted for 70 per cent of the crushed rock produced in São Paulo, and had allegedly been operating a cartel for the previous two years.

An analysis of the materials seized in the raid led SDE to initiate an administrative proceeding to investigate price fixing, market segmentation, production restriction, and bid rigging. In November 2004, SDE completed its investigation and recommended that CADE find unlawful collusion by Sindipedras and 18 of the 21 member companies. SDE based its recommendation on evidence that the companies (a) maintained pricing data and daily sales figures in a central computer file at Sindipedras; (b) met on the association’s premises to set cartel policies; (c) levied fines for failure to comply with group decisions; (d) divided customers and allocated sales quotas (including sales arising from bids tendered in public competitions); and (e) required a surcharge on sales made to customers assigned to other companies. CADE issued its decision in July 2005, agreeing with SDE’s analysis and fining the defendant companies in amounts ranging from 15 to 20 per cent of their 2001 gross revenues, depending on the degree of their involvement in the cartels’ administration.

SDE also provided the evidence it had seized to the criminal enforcement authorities, which led to joint interviews of witnesses by SDE and the police and ultimately to criminal indictments that are now pending before the criminal court.

SDE has conducted more than 15 dawn raids since July 2003. This activity has not only greatly increased the profile of competition law enforcement, but also generated evidence that criminal prosecutors have used to support judicial applications for wiretapping authority.

Since 2003, SDE has also been developing the leniency program authorised by Article 35-B. Under that Article, a leniency agreement may be executed if all of the following conditions are met: (1) the company or individual is the first to report with respect to the anti-competitive practice under investigation, (2) the company or individual ceases all involvement in the anti-competitive practice as of the date on which the agreement is proposed, (3) SDE does not already possess sufficient evidence to convict the company or the individual at the time the agreement is proposed, and
(4) the company or individual confesses to having participated in the unlawful practice and effectively cooperates with the government’s investigations (Art. 35-B, §2). Leniency is not available to the companies or individuals that instigated the illegal conduct (Art. 35-B, §1).

The degree of leniency accorded to a cooperating party depends on whether SDE was previously aware of the illegal conduct at issue. If SDE was unaware, the party is entitled to freedom from any penalty in the ensuing CADE proceeding. If SDE was previously aware, CADE is authorised to reduce the applicable penalty by one to two-thirds, depending on the effectiveness of the cooperation and the “good faith” of the party in complying with the leniency agreement (Art. 35-B, §4). In the latter instance, the penalty imposed cannot in any event be more severe than the mildest penalty imposed on any of the other participants in the illegal conduct (Art. 35-B, §5). A leniency agreement shelters the directors and managers of the cooperating firm if those individuals sign the agreement and fulfil the requisite obligations (Art. 35-B, §6).58

Thus far, SDE has reached leniency agreements with two firms and has three other agreements under negotiation. One of the cases involves the Brazilian subsidiary of a company that has entered leniency agreements with antitrust authorities in the United States and the EU respecting the same cartel. SDE has, however, encountered a number of practical obstacles to implementation of the leniency system. Exchanging cooperation for reduced penalties is not a practice that has often been employed in Brazil, in either civil or criminal enforcement, and counsel for affected parties are wary about exposing their clients without strong guarantees that the full benefits of leniency will actually be accorded. There are three sources of uncertainty. First, in any case in which SDE was previously aware of the unlawful conduct, the reduction in penalty will be determined not by SDE but by CADE, and will turn on CADE’s assessment of the party’s cooperation and good faith. Second, cartel participants are subject to civil actions for damages brought by the victims of the cartel, and the statutory leniency provision says nothing about protection from private suits. The third area of concern entails issues associated with protection from criminal prosecution, a topic with respect to which four sub-issues can be identified.

First, Article 35-C provides that successful fulfilment of a leniency agreement will shelter the cooperating party from criminal prosecution under Brazil’s economic crimes law (Law 8137/90), but does not address other criminal laws (such as those against racketeering and conspiracy) under which cartel participants could conceivably be attacked. Second, under Article 35-B, leniency agreements are entered into by SDE “on behalf of the Brazilian Federal Government,” a phrase which leaves unclear the effect on state prosecutors. Although the Brazilian Constitution vests the
federal government with exclusive power to enact criminal laws, state prosecutors are empowered to enforce such laws except in cases that entail a federal dimension. The jurisdiction of state prosecutors in cartel cases under the economic crimes law is still in dispute. Third, some federal prosecutors may consider SDE’s leniency agreements to be improper intrusions into their prosecutorial domain. Fourth, some private practitioners have doubts that the SDE program is even constitutional, on the grounds that only a judge is empowered to extinguish criminal liability. SDE has responded to the concerns of prosecutors by establishing liaison agreements with local prosecuting attorneys, and by including as signatories to particular leniency agreements the prosecutors who have undertaken to commence criminal actions against the other members of the cartel.

A separate implementation issue has arisen in cases where a party approaches SDE for a leniency agreement but is found to be ineligible (perhaps because it is not the first party in the matter to offer cooperation). In such circumstances, the statute expressly provides that the party’s proffer shall be kept confidential by SDE and will not be treated as an admission that the party engaged in the conduct at issue or that the conduct is unlawful (Art. 35-B, §10). Nonetheless, practitioners point out that SDE personnel will review the party’s submission, and they express concern about SDE’s treatment of the information. In response, SDE has offered commitments under which agency personnel who had seen an unsuccessful leniency proffer would be barred from participating in cases relating to the market sector at issue (thus creating a “Chinese wall” to insulate the information from any improper exploitation for law enforcement purposes).

As an innovative adjunct to the leniency program, SDE in January 2003 issued Ordinance 14, which provides guidelines for the establishment of corporate antitrust compliance programs. Companies meeting the guidelines may apply to SDE for a “Compliance Certificate,” which is valid for two years and commits SDE to recommending imposition of a reduced penalty if the certified firm is found liable for infringing Law 8884 during the two year period. Although no Compliance Certificates had been issued by the end of 2004, SDE reports that a significant number of companies have contacted SDE for information about conforming their compliance programs to the Ordinance.

Interim relief during the SDE proceedings is available under Law 8884. The SDE Secretary, either ex officio or upon the request of the CADE Attorney General, may issue a preventive order during an administrative proceeding if the Secretary finds sound reason to believe that the defendant’s conduct either “caused or may cause irreparable or substantial damages to the market” or “may render the final outcome of the proceedings ineffective” (Art. 52). The order is immediately effective, but may be
appealed to CADE and thereafter to the courts. Once a case is before CADE, Article 52 also permits the Reporting Commissioner to issue a preventive order, again subject to review by the Council.

SDE issues a preventive order at the outset of most important non-cartel conduct investigations. From 2002 to 2004, CADE decided appeals on the merits of 9 SDE preventive orders, upholding 6 in full and 3 in part. CADE has also issued several orders itself, typically in circumstances where SDE had previously denied an order request from a third party. Recent cases involving issuance by SDE of a preventive order include an investigation of the Bahia Medical Association with respect to an association fee schedule issued to member doctors. SDE’s order prohibited the association from attempting to enforce compliance with the schedule. Another 2004 order barred the Goiânia Unimed from disaffiliating three city hospitals that had announced plans to offer an alternative health plan in competition with the Unimed. The parties in both of these cases unsuccessfully appealed the SDE order to CADE. In a third 2004 case, SDE ordered an association of fire extinguisher manufacturers in Brasilia and its members companies to terminate an agreement whereby the association published an annual statement of “average variable and fixed costs of production,” and members determined their retail prices by imposing a 30 per cent mark-up on each cost item. The parties choose not to appeal the order.

Consent settlements in conduct cases may be arranged under Article 53 of the law, which provides that either SDE (subject to approval by CADE) or CADE itself may enter into an agreement with a defendant to resolve an administrative proceeding. Under such a settlement, the case is suspended if the defendant agrees to cease and desist from the conduct at issue and to provide periodic compliance reports. The agreement does not constitute an admission of liability or guilt by the defendant and entails no monetary penalty, but the case will be reopened and fines assessed if the settlement’s terms are subsequently violated. The agreement applies for a specified period of time, at the end of which the underlying administrative case is dismissed if the agreement has been honoured. The 2000 amendments provide that such settlements may not be accepted with respect to horizontal violations involving price fixing, bid-rigging, market division, and similar conduct (Art. 53 §5).

SDE regulations provide that an Article 53 settlement is not available if, at the time it is proposed, SDE already has sufficient evidence to convict the respondent of the violation under investigation (SDE Ordinance 849/2000, Art. 40). This policy is designed to prevent defendants from awaiting the conclusion of SDE’s investigation before seeking settlement. The SDE ordinance also requires that settlement agreements be posted for 15 days of public comment before acceptance by SDE and transmittal to CADE for review (Art. 41).
Since 2002, there have been only two Article 53 settlements undertaken by SDE. A 2003 agreement, arranged with the Airline Tariff Publishing Company (ATPCO), involved a case described previously in conjunction with the prosecution of the Rio de Janeiro - São Paulo airline cartel. ATPCO offered at the outset of SDE’s investigation to terminate the feature of its computerised airline tariff information system whereby an airline could post price changes for temporarily viewing only by other airlines. The second agreement, also in 2003, was with Helibrás, the exclusive distributor in Brazil for a certain brand of helicopter. SDE opened an investigation of Helibrás based on complaints that the company refused to make technical manuals and spare parts available to aircraft service companies that wished to enter into maintenance contracts with purchasers of the helicopter. SDE issued an Article 52 preventive order that required Helibrás to provide the necessary manuals and parts. After unsuccessfully seeking a court injunction against SDE’s order, Helibrás offered to enter an Article 53 agreement that entailed the same provisions as the order. SDE concluded that settlement was appropriate, because no investigation had been undertaken of several issues, including whether the manuals might be available from other sources and whether there were technical or safety reasons for refusing to sell spare parts. CADE approved the Helibrás agreement in 2004 and the ATPCO agreement in March 2005.

When CADE receives the SDE report recommending disposition of a matter, the case is assigned on a random basis to one of the six commissioners, who is designated as the Reporting Commissioner. The CADE Attorney General is required to provide an opinion on the case within 20 days (Art. 42). The Attorney General’s opinion generally focuses on the legal aspects of the matter, but it can extend to substantive issues as well. Under CADE Resolution 20, which establishes certain features of the Plenary’s deliberative procedures, the Reporting Commissioner must decide whether to institute a supplementary investigation within 60 days of receiving the case. If a supplementary inquiry is undertaken, CADE may employ the investigative powers of Article 35 to obtain the necessary information (Art. 43). As noted above, the Reporting Official, like the SDE Secretary during SDE’s administrative proceeding, may invoke Article 52 to issue a preventive cease and desist order during the CADE proceeding. Such an order, issued to prevent irreparable harm or otherwise to ensure that the proceeding will not be rendered moot, is effective immediately but may be appealed to the CADE Plenary and thereafter to the courts.

Upon completion of the 60 day period or the supplemental investigation, the Reporting Commissioner places the matter on CADE’s trial docket “to be judged as soon as possible.” The Reporting Commissioner must prepare a written report and a recommended resolution of the case and must provide
that report to the other commissioners and the parties not less than five days before the judgment session. The decision of the Council is rendered at a public meeting, during which the CADE Attorney General and the defendant (but not SDE or SEAE) are accorded an opportunity to speak (Art. 45). The minimum quorum is five members and a decision is taken by a majority of those participating (Art. 49). The President is one of the seven voting members and, in the event of a tie, may cast an additional vote (Art. 8 II). At the judgment session, any of the commissioners may request the opportunity to review the case file in detail, and may also propose that additional investigation be undertaken. Such additional investigation must be approved by the Plenary and, if approved, is undertaken by the Reporting Commissioner.

As is true in merger cases, CADE is not in bound by the recommendations of SEAE or SDE and is responsible for impartial adjudication of contested cases. A Council judgment finding a violation must be issued as a written decision, containing a detailed report of the defendant’s conduct, an analysis of the basis for determining illegality, a discussion of the remedial order imposed and the amount of the monetary penalty assessed, and a specification of the daily fine to be assessed if the unlawful conduct continues (Art. 46). Under Article 24, CADE has broad remedial authority to order any necessary alteration in the defendant’s structure or conduct, including asset divestiture, transfer of corporate control, and discontinuance of specified business activities. The order may also declare the defendant ineligible to bid on public contracts for up to five years, require the defendant to publish a newspaper notice summarising CADE’s decision, and mandate entry of the defendant’s name on Brazil’s list of consumer protection violators.

Practitioners raise no due process complaints about BCPS procedures. The agencies emphasise the transparency of the process – parties have full access to case records (subject to confidentiality restrictions) at both SDE and CADE (Art. 33 ¶ 4), and CADE decision meetings are held in public session. On the other hand, there are complaints that confidentiality restrictions, although well elaborated in agency regulations, are not implemented with sufficient care to avoid mistaken disclosures. There is also some anxiety about what investigative information is disclosed to foreign antitrust authorities. According to practitioners involved in the merger review process, agency staff members have sometimes conceded that an information request was made primarily for the purpose of suspending the statutory time limit. There is also a general conviction among merger practitioners that agency requests for additional information do not reflect due sensitivity to the costs imposed on the affected firms.
Box 8. Conduct Case Procedures: Proposed Amendments

A recurring criticism of CADE is that cases presented to it take too long to resolve. One approach to this problem is to reduce the number of secondary determinations that CADE has to make, so that more time may be devoted to substantive case determinations. The proposed legislation amending Law 8884 addresses this issue by eliminating Plenary review of Directorate General decisions to close investigations. The proposal also alters several other features of the procedures applicable in conduct (non-merger) cases, as described below.

The CADE Directorate General (DG), as the successor to DPDE, is made responsible for monitoring markets, identifying possible violations, and deciding whether to commence enforcement proceedings under the statute. Those proceedings include “preparatory procedures” (replacing what are termed “preliminary investigations” in the current law), administrative inquiries (which are formal investigations conducted by the DG), and administrative proceedings (processes for the development of a formal evidentiary record to be judged by the Plenary). If the Directorate General initiates a “preparatory procedure,” it must be concluded within 30 days, reduced from the sixty days allotted for preliminary investigations under the present law.

An “administrative inquiry” is a new investigative phase that has no counterpart under existing law. Conducted by the Directorate General, it must be completed within 180 days, but may be extended by the DG for cause.73 The Directorate General’s refusal to open an administrative inquiry can be appealed by a complainant only to the Directorate General, and the DG’s decision on such appeals (as well his determinations to close a matter at the end of an administrative inquiry) are final and not subject to automatic reviewed by the Plenary as they are under existing law.

The processes for an administrative proceeding are left essentially unaltered, except that the discovery period after the defendant presents its defence extends for 60 days (increased from the existing 45 day period). Once the case is before the Plenary, the only procedural change is that the Director General or the Reporting Commissioner may permit participation in the case by any third party who will be affected by the Plenary’s decision or who has standing to represent the interests of an affected class.

Consent settlements under Article 53 remain available, but new language has been added to provide expressly that a proposed settlement may be rejected where (1) there is already sufficient evidence available to secure a conviction, (2) adoption of the agreement would not serve the objectives of Law 8884, or (3) the parties cannot reach common terms.
As to the decisions rendered by CADE, the consensus view in the antitrust community is that the quality of analysis has steadily improved since 2000 and that decisions now may usually be rated as “good” or better. There is criticism that CADE decisions pay insufficient attention to developing a body of precedent. There is usually little discussion of earlier case decisions or of analytic guidelines (such as Resolution 20) that CADE has previously issued. This complaint is not, however, limited to CADE, as practitioners assert it against the Brazilian judicial system in general.

Delay in BCPS proceedings remains a problem. As discussed previously with respect to mergers, although substantial improvements have been made in recent years with respect to processing simple merger notifications, more complex cases can require several years to resolve. Conduct cases can also consume many years of effort. Even preliminary investigations by SDE under Article 30, which the statute requires to be completed in 30 days, take on average six month to complete. The following table shows the time line for five BCPS conduct cases. Two of them, involving newspapers and airlines, have been discussed previously in this report. The other three were mentioned in the previous Report as cases that were pending in 2000. All of the cases are price-fixing cartels, except the generic drugs case, which involved an agreement among pharmaceutical firms to boycott distributors who sold generic brand products.

Table 8. Timeline in Five BCPS Cases

<table>
<thead>
<tr>
<th>Case</th>
<th>Investigation commenced</th>
<th>BCPS Status</th>
</tr>
</thead>
<tbody>
<tr>
<td>Airlines</td>
<td>1999</td>
<td>CADE decision -- 2004</td>
</tr>
<tr>
<td>Newspapers</td>
<td>1999</td>
<td>CADE decision -- 2005</td>
</tr>
<tr>
<td>Lysine</td>
<td>1999</td>
<td>Investigation pending in SDE</td>
</tr>
<tr>
<td>Bulk vitamins</td>
<td>2000</td>
<td>Case transmitted to CADE -- June 2005</td>
</tr>
<tr>
<td>Generic drugs</td>
<td>2000</td>
<td>Case transmitted to CADE -- August 2003; supplemental investigation ordered by CADE -- February 2005</td>
</tr>
</tbody>
</table>

Source: BCPS, 2005

SDE, for its part, has recently taken steps to expedite the progress of major cartel cases. The crushed rock investigation, for example, was commenced in July 2003 and the case was sent to CADE in November 2004. It is also important to note that SDE issues Article 52 preventive orders at the outset of most important non-cartel conduct investigations, with the effect that the anticompetitive conduct is halted.

SDE, for its part, has recently taken steps to expedite the progress of major cartel cases. The crushed rock investigation, for example, was commenced in July 2003 and the case was sent to CADE in November 2004. It is also important to note that SDE issues Article 52 preventive orders at the outset of most important non-cartel conduct investigations, with the effect that the anticompetitive conduct is halted.
during the proceeding. This was the case, for example, with respect to the
generic drugs case, in which the preventive order prohibited the defendants
from continuing the boycott. Nonetheless, the long duration of BCPS
proceedings results in inefficiencies. The typically short tenure of BCPS
investigators and CADE commissioners means that the accumulated
knowledge about a given case must be mastered by successive groups.
There are many reasons for the delay that characterises BCPS procedures,
not the least of which are the tenure problem just mentioned and a chronic
deficiency in the number of staff available. Issues relating to staffing levels
and turnover are examined in a later portion of this report. In the case of
SDE, another source of delay arises from the necessity to coordinate
investigative raids with the police and to negotiate leniency agreements with
Public Prosecutors.

Once a case is before CADE, delays can result from the absence of a
quorum, caused by any combination of vacant seats and recusals by sitting
commissioners that reduces the number of voting participants to less
than the five required by law. Circumstances requiring recusal can arise not only
where a commissioner has previously worked in the private sector, but also
where a commissioner was previously employed by SDE or SEAE. Also,
under CADE’s internal procedures, commissioners other than the Reporting
Commissioner receive the assigned commissioner’s report of the case only
five days prior to the judgment session. 76  This system leads to requests for
additional time to examine complex cases in greater depth and, often
thereafter, to motions for supplemental investigation. The statutory
provision in Article 42 requiring that the CADE Attorney General render an
opinion to the Plenary respecting every pending case can also cause delay.77

Article 50 of law 8884 provides expressly that CADE decisions, once
issued, are not subject to review elsewhere in the Executive Branch, and that
such decisions “shall be promptly executed”. CADE decisions are, however,
fully subject to review by the Judicial Branch at the instance of the affected
parties, as discussed further below. The CADE Attorney General is
responsible for taking appropriate legal action to assure implementation of
the Plenary’s decision. CADE’s orders, as required by law, impose a fine
for the violation found, and also specify a daily fine to accumulate in the
event that the defendant does not comply with any conduct prohibitions or
requirements established by the decision.

For cases involving conduct in violation of Article 20 (that is, for
unlawful conduct not involving mergers), the statutory minimum fine is
1 per cent of gross pre-tax revenues for the previous year, provided that the
amount assessed may not be less than the gain realised from the violation
(Art. 23 I). The statute does not specify whether gross revenues are to be
determined by reference to worldwide revenues of the defendant or only to
revenues generated by sales in the Brazilian market affected by the violation. CADE has typically referred to worldwide sales, although its September 2004 decision in the Rio de Janeiro- São Paulo airline cartel case relied on Brazilian sales as the appropriate measure. The maximum fine for Article 20 violations is 30 per cent of gross pre-tax revenue for the previous year (Art. 23 I). Individual managers responsible for unlawful corporate conduct may be fined an amount ranging from 10 to 50 per cent of the corporate fine (Art. 23 II). Associations and other entities that do not engage in commercial activities, or for which gross revenue is not relevant, may be fined from 6 thousand to 6 million tax reference units (USD $2,460 to USD $2.46 million)(Art. 23 III). Fines for recurring violations are doubled (Art. 23, sole paragraph).

For failure to comply with a CADE remedial order, preventive measure, cease and desist commitment, or merger performance commitment, CADE may impose a daily fine ranging from 5 000 to 100 000 UFIR (USD 2 050 to 41 000) (Art. 25), accumulating for up to ninety days. As noted in the discussion of merger notification filings, Article 54 paragraph 5 empowers CADE to assess a fine ranging from 60 000 and 6 000 000 UFIR (USD 22 800 to USD 2.28 million) for failure to comply with the merger notification filing deadline. In May 2004, CADE issued Resolution 36, which establishes a detailed set of guidelines for determining the amount of the fine to be assessed for an untimely notification. Aside from such fines as may arise from untimely filing, no fine or other penalty is assessed for proposing a merger that CADE disapproves or approves conditionally, unless the defendant subsequently violates CADE’s remedial order.

A daily fine ranging from 5 000 to 100 000 UFIR (USD 2 050 to 41 000), accumulating for up to ninety days, may be imposed for failing to produce (or for tampering with) documents demanded in an investigation (Art. 26). Under the 2000 amendments, a person who does not appear for oral examination may be fined from BRL 500 to 10,700 (USD 195 to 4,175) (Art. 26 ¶5). These fines may be assessed by SDE, SEAE, or CADE, depending on which entity issues the investigative demand. Similarly, Article 26-A authorises imposition of a fine ranging from BRL 21,200 to 425,700 (USD 8,270 to 166,000) for impeding an examination conducted at a firm’s place of business under Article 35 §2.

Law 8884 provides that, in imposing fines, CADE must consider various factors, including the impact of the violation on the market and the amount of damage caused, the benefit to the violator, the violator’s good faith, and the violator’s economic resources (Art. 27). Article 84 requires that all fines collected be remitted to the Fund for the Defence of Diffused Rights (“Fundo Gestor de Defesa dos Direitos Difusos” or “CFDD”). The CFDD, is administered by a Council comprised of representatives from the
government and the public. It disburses funds to support educational or scientific projects relating to protection of “the environment, consumers, economic order, open competition, [and] the artistic, aesthetic, historical, tourism, and landscape heritage.”

### Box 9. Fines: Proposed Amendments

Under the proposed legislation, the minimum fine (now the greater of 1 per cent of gross revenues or the gain realised from the violation) is set at BRL 6000 (USD 2340). The maximum (now 30 per cent of gross revenue in the previous year) is set at BRL 200 million (USD 78 million). Individual managers who are responsible for a company’s unlawful conduct are subject at present to a fine ranging from 10 and 50 per cent of the company’s fine. The proposal subjects such managers to a fine with the same minimum and maximum levels as apply to corporations. Fines against individuals will now be more feasible, given the significant reduction in the corporate minimum fine.

The fines for violating CADE remedial orders, failing to produce documents or appear for oral examination, or impeding an investigation are left unchanged (except for their restatement in terms of reais rather than UFIR), but a new provision is added providing a fine of BRL 5000 to 5 million (USD 1950 to 1 950 000) for submitting false documents or testimony. The features of the proposal that alter fines associated with the merger review process are treated in the discussion of mergers.

One further significant change entails the disposition of fine revenues. Under the proposal, revenues from fine collections are no longer remitted solely to the Fund for the Defence of Diffused Rights, but are allocated 25 per cent each to CADE and SEAE, and 50 per cent to the Fund.

Most of the fines imposed by CADE fall into two categories – those assessed under Article 23 in conjunction with a conduct violation and those assessed under Article 54 in conjunction with an untimely merger notification. The record with respect to the assessment and collection of such fines appears in the tables below.

### Table 9. Article 23 Fines Assessed and Collected in Conduct Cases 2002-2004

<table>
<thead>
<tr>
<th>Year</th>
<th>Assessed (BRL million)</th>
<th>Collected (BRL)</th>
<th>Percentage Collected</th>
</tr>
</thead>
<tbody>
<tr>
<td>2002</td>
<td>2.8</td>
<td>12 770</td>
<td>0.45 %</td>
</tr>
<tr>
<td>2003</td>
<td>8.3</td>
<td>620 000</td>
<td>7.46 %</td>
</tr>
<tr>
<td>2004</td>
<td>5.6</td>
<td>0</td>
<td>0 %</td>
</tr>
</tbody>
</table>

Source: BCPS, 2005
Table 10. Article 54 Fines Assessed and Collected for Untimely Merger Filings 2002-2004

<table>
<thead>
<tr>
<th>Year</th>
<th>Assessed (BRL million)</th>
<th>Collected (BRL million)</th>
<th>Percentage Collected</th>
</tr>
</thead>
<tbody>
<tr>
<td>2000</td>
<td>16.3</td>
<td>8.7</td>
<td>53.4 %</td>
</tr>
<tr>
<td>2001</td>
<td>9.9</td>
<td>5.7</td>
<td>57.5 %</td>
</tr>
<tr>
<td>2002</td>
<td>7.9</td>
<td>4.8</td>
<td>60.5 %</td>
</tr>
<tr>
<td>2003</td>
<td>2.2</td>
<td>1.1</td>
<td>50.1 %</td>
</tr>
<tr>
<td>2004</td>
<td>3.0</td>
<td>1.4</td>
<td>48.8 %</td>
</tr>
</tbody>
</table>

Source: BCPS, 2005

The portion of untimely merger fines collected has consistently been higher than the portion of fines collected for conduct violations. This is because at least some parties charged with a merger filing fine pay voluntarily, whereas parties charged with a conduct fine rarely do. If payment is not made voluntarily, CADE’s Attorney General must commence a fine collection action in court. Defendants typically respond to such a collection suit by moving that payment of the fine be stayed during the proceeding. Law 8884 provides that execution of a fine shall not be stayed unless an amount equal to the fine or a bond assuring payment is deposited with the court (Art. 65). CADE invokes this provision routinely, and has successfully required that large bonds be posted by such defendants as Iguatemi Shopping Centre (BRL 1 million), Xerox do Brasil (BRL 2.4 million), and White Martins (BRL 38 million). In contrast, the first instance court in the steel cartel case declined to require fine deposits, a decision which CADE is contesting on appeal. Court orders for the execution of fines may be enforced by attachment and sale of assets and by other means, including the appointment of a receiver to operate a debtor corporation (Arts. 63, 69).

Few final decisions have been rendered thus far in court actions reviewing the imposition of fines by CADE in conduct cases. With respect to fines assessed for untimely merger filings, CADE has won 17 (55 per cent) of 31 first instance cases decided thus far, but has lost the two decisions that have been rendered by the second instance courts. The adverse decisions in these cases have generally arisen from judicial disagreement with CADE’s approach to defining the “trigger date” that commences the fifteen day period for notifying transactions.

CADE has also imposed some fines under Article 25 for failure to comply with final orders or settlement agreements in conduct cases or with Article 52 preventive measures. No such fines were assessed in 2002, but Article 25 fines totalling BRL 7.3 million were imposed in 2003 and BRL 1.5 million in 2004. In early 2005, British America Tobacco Company (BAT) was fined BRL 957,700 for violating a settlement agreement entered
in 2000. The agreement had resolved an abuse of dominance case in which 
BAT, which controlled more than 50 per cent of cigarette sales in Brazil, 
was charged with unlawfully imposing exclusive dealing and other 
merchandising requirements (such as exclusive product display) on retail 
establishments selling cigarettes. Most Article 25 fines are under judicial 
review and have not been collected.

The only other bases for imposing fines arise under Article 26 (for 
failure to produce documents or appear for oral examination in an 
investigation) and Article 26-A (for obstructing an examination conducted at 
a firm’s place of business under Article 35 §2). CADE assessed no fines 
under Article 26 in 2002 or 2004; BRL $332 000 was assessed in 2003. 
These fines are likewise in litigation and have not been collected. No 
occasion has arisen recently requiring either SDE or SEAE to assess any 
fines under Articles 26 or 26-A.81

Turning to conduct cases, most final orders entered by CADE in such 
proceedings require both payment of a fine and some further action by the 
defendant, such as terminating publication of an association fee schedule, 
selling replacement parts to service companies, or publishing a newspaper 
notice of CADE’s decision. Orders with conduct requirements specify a 
daily fine to be assessed if the order is disobeyed (Art. 25). CADE deals 
with conduct order violations by filing both a collection action for the daily 
fine and a separate action requesting a court order enforcing the conduct 
requirement.82 To date, however, CADE has rarely commenced suits to 
enforce conduct requirements. As discussed below, defendant firms subject 
to conduct orders typically seek to forestall their compliance obligations by 
filling an action for judicial relief from CADE’s decision.

Parties subject to investigations by SDE or SEAE or adjudicative 
proceedings by CADE need not await a fine collection suit to challenge the 
agency’s actions in court.83 Judicial relief can be sought not only against a 
final agency decision but at any time during the process. A summary 
description of the judicial review process in Brazil appears in the following 
box.

As a practical matter, parties involved in SDE investigations ordinarily 
do not file actions in court to review SDE determinations, because SDE’s 
decisions may be appealed to CADE. Since 2000, there have been a few 
exceptions. In 2003, two judicial injunctions were requested by defendants 
to prevent SDE from issuing its final opinion in the investigation of a steel 
product (vergalhões) cartel. The courts rejected both petitions. In the 
Helibrás case (discussed previously in connection with Article 53 settlement 
agreements), Helibrás unsuccessfully sought a court injunction against an 
SDE Article 52 preventive order requiring that technical manuals and spare
parts be made available to companies seeking to provide maintenance services to helicopter purchasers. No other suits have been brought against SDE, nor have any been filed against SEAE. In any such actions that are filed, SDE and SEAE, as executive branch agencies, are represented by the Federal Attorney General’s Office.

Box 10. Judicial Review in Brazil

Petitions by private parties for review of government agency actions are heard by the federal courts of first instance. By law, challenges to actions of the three BCPS agencies must be filed before the court located in Brasilia. The first instance judge has authority to adjudicate most claims (including claims that a statute has been applied in an unconstitutional manner, but excluding claims that a statute is unconstitutional as written), and may also conduct evidentiary proceedings to supplement the factual record.

Appeals by the private party or the agency from a decision by a first instance judge lie in the Court of Appeals for the geographic region in which the initial judicial decision was rendered. There are five regions in Brazil, each with a multi-member regional appellate court. Appeals are heard first by a “panel” of the court and then may be appealed further to a “section” of the court. The number of judges in a panel or section is fixed by the internal rules of each regional court. Appeals from the regional courts of appeal go to the Superior Court of Justice (STJ), where appeals are likewise heard first by a panel and then by a section.

Cases involving claims of unconstitutional statutory application may be appealed beyond the Superior Court of Justice to the Supreme Federal Court (STF), an 11 judge body that addresses only constitutional questions. Certain designated parties, including Public Prosecutors, are authorised to raise specified constitutional claims (including claims that a statute is unconstitutional as written) directly in the STF without first proceeding in a lower court. In the STF, cases on appeal from lower courts are heard first by a panel and then, if appealed further or certified by the assigned panel, are adjudicated by all eleven judges in plenary session. Cases filed directly in the STF are heard in the first instance by all eleven judges.

In contrast, many actions seeking judicial intervention have been filed during the pendency of CADE’s administrative proceedings. The defendants in the steel product (vergalhões) cartel case, pleading that they had been denied an adequate opportunity to present evidence in their defence, successfully obtained an order staying CADE from meeting to render final judgment on their conduct. An appeal by CADE is pending. In the retail fuel cartel and Microsoft/TBA cases, interlocutory petitions to the
courts raised the question of whether the defendants in a CADE proceeding may insist on settling the matter by means of an Article 53 cease and desist commitment. Initially, CADE suffered several adverse court decisions on this issue. More recently (and in the Microsoft case), it has been successful in arguing that the opportunity to enter a settlement is not a legal right, but a matter for mutual agreement between CADE and the defendant. Also, as described previously in the discussion of relations between CADE and the Public Prosecutor, several interlocutory petitions were filed by CADE’s Public Prosecutor during the period 2003-04. In the Nestlé-Garoto merger proceeding, for example, the Prosecutor asserted that CADE’s Attorney General should be disabled from rendering an opinion because she was the niece of an attorney who had advised Nestlé. Another action by the Prosecutor in the same case involved a claim that the Plenary had wrongly determined which commissioner should serve as acting President. A third action supported Microsoft’s petition in the TBA case seeking mandatory acceptance of a cease and desist commitment. All three of the Prosecutor’s petitions were unsuccessful.

The final decision issued by CADE at the end of an administrative proceeding is, of course, an agency act subject to judicial review. As noted previously, CADE’s experience is that parties do not ordinarily appeal from decisions imposing a fine for filing an untimely merger notification, nor from (the few) decisions in conduct cases that entail a fine but impose no requirements or restrictions on the defendant’s future conduct. In such cases, the parties either pay voluntarily or await the collection suit to raise their defence. Parties have not usually sought judicial review of CADE decisions imposing conditions on mergers, because the conditions were either negotiated or not considerer onerous enough to warrant resistance. On the other hand, parties routinely appeal CADE conduct decisions that entail more than imposition of a fine.

CADE’s position on judicial review is that courts should confine themselves to examining the legal adequacy of agency procedures and should regard any antitrust issue as a matter committed to CADE’s discretion. While some courts have accepted this view, others have examined and overturned CADE antitrust decisions. There is considerable disagreement within the judiciary about how to review CADE cases. Competition law is a relatively new subject for the Brazilian judiciary, and some judges who conclude that judicial review of antitrust issues is appropriate nonetheless focus on procedural points to avoid dealing with unfamiliar topics. In any event, judicial review adds years of litigation before a CADE case can finally be concluded. The steel cartel case, for example, was decided by CADE in 1999, but the first instance court did not render its decision until 2003, and the second instance court is now considering the case. Dockets of Brazilian
courts are usually overcrowded, and the complexity of antitrust jurisprudence militates against quick resolution of CADE’s cases. As described in further detail in the competition advocacy section of this report, the BCPS has recently engaged in a number of initiatives to promote understanding of competition law among members of the judiciary.

Typically, when parties file suit seeking judicial review of a CADE decision that imposes conduct restrictions or requirements, they also immediately petition the court to stay implementation of CADE’s order. CADE’s experience is that such motions for an immediate stay are frequently granted by the first instance court, but then overturned later on appeal. CADE’s Attorney General suggests two reasons why defendants have been successful at the initial stage. First, petitions for immediate relief are often heard by judges new to the bench, who tend to be susceptible to claims by private parties that they are in imminent danger of irreparable harm by a government agency. Second, petitioners have appeared in court *ex parte* (without the presence of government attorneys), and thus have had the advantage of making their claim in person while the government’s interest is represented only on paper. More recently, CADE has successfully asserted its right under applicable principles of civil procedure to appear before the court and present argument on such emergency motions.

Judicial review of CADE’s final decisions in conduct cases presents a mixed record. Of seven resolved second instance appeals relating to conduct decisions, CADE won one appeal in the steel cartel case (reversing the first instance court’s refusal to order the deposit of fines assessed by CADE) and four appeals in Unimed exclusivity cases. Two appeals in cases involving medical service fee schedules were decided against CADE. The courts in those two cases took the view that (1) fee schedules were merely suggested prices and did not represent an agreement, and (2) in any event, the competition law was not applicable to the medical profession. The first instance court in the steel cartel case, although upholding CADE’s determination of unlawful conduct, did so on less than satisfying grounds. The court concluded that, in the absence of an economic explanation, parallel pricing alone was sufficient to find a violation. In the court’s opinion, proof of collusion was not essential and CADE had therefore relied unnecessarily on such “plus factors” as a meeting among the defendants to find that collusion had occurred. Both of the steel cartel decisions, as well as the Unimed and medical association fee schedule cases, are being appealed further.

A separate set of appellate cases has tested whether the merger notification fee must be paid in full for cases in which the transaction will be analysed by ANATEL (the telecommunications sector regulatory agency)
rather than by SDE and SEAE. The merging parties asserted that they should be assessed only the one-third portion of the filing fee destined for CADE and not the portions allocable to the accounts of SDE and SEAE. Thus far, 7 judicial decisions have split 5 to 2 in favour of CADE’s position that the entire fee should be assessed.

Only one case involving the constitutionality of Law 8884 has been considered by the Federal Supreme Court. The case was initiated by the National Industry Confederation, a professional association that has standing under the Brazilian Constitution to raise claims of statutory unconstitutionality directly in the Supreme Court. The complaint asserts that various provisions in Law 8884, including particularly the substantive conduct prohibition in Articles 20 and 21 XXIV relating to abusive pricing, and the associated penalty provisions, are unconstitutional. A motion by the Confederation for preliminary injunctive relief was rejected on a 5 to 2 vote. The underlying claims remain pending before the Court.

The volume of court litigation facing CADE is formidable. A survey conducted by the CADE Attorney General in November 2004 showed 728 pending cases in which CADE was involved as a plaintiff, defendant, or intervener. Of those, 129 were fine execution proceedings, while 279 were cases in the first instance courts that involved some aspect of law enforcement other than fine execution. There were 253 cases in the appellate courts: 240 in the second instance courts, 12 in the Superior Court of Justice and one in the Supreme Federal Court. A final group of 67 cases involved miscellaneous matters such as employee litigation, actions in small claims court, and the like.

Outside the process of formal administrative proceedings and judicial review, CADE offers a separate mechanism for parties interested in obtaining CADE’s views on a particular form of conduct. Under a procedure established in 1998 by Resolution 18, any individual, business entity, or public agency may request from CADE a nonbinding advisory opinion, or “consultation,” on any matter within CADE’s competence. The applicant must submit information about the conduct at issue (which may include proposed merger transactions), and CADE will advise whether it considers the activity to constitute a violation of Law 8884. The request must refer to hypothetical or contemplated activity. In the application involves ongoing activity, CADE will require that notification be filed if the matter involves a merger that has evolved past the “trigger date,” and will refer conduct inquiries to SDE for investigation. The applicant for a consultation must pay a fee of BRL 5 000 (about USD 2000).

The 2000 Report noted (p. 195) that 24 opinions had been issued under Resolution 18 between its adoption in late 1998 and mid-2000, dealing with
such topics as proposed horizontal arrangements and competitive restraints imposed by state or local governments. Since 2000, activity under Resolution 18 has diminished significantly. Nineteen applications were filed in 2000, followed by 6 each in 2001 and 2002, then two each in 2003 and 2004. Of the 16 applications filed in the past four years, 5 involved consummated transactions that CADE converted to merger review proceedings under Article 54. Seven others were closed without action. The CADE opinions issued in the four remaining cases (1) disapproved a trade association proposal for the issuance of a suggested price chart; (2) approved a plan by a pharmaceutical manufacturer to post suggested retail prices for drug products on its website; (3) approved creation of a non-profit civil association to administer an ethical code for real estate project developers (subject to the condition that certain exclusionary provisions in the proposed code be deleted); and (4) concluded that notification under Article 54 was not required for certain acquisitions involving telecommunications towers. CADE is unaware of any particular reason why the number of applications under Resolution 18 has declined.

One further aspect of BCPS enforcement practice warrants mention here. The BCPS agencies are presently conducting an ambitious joint study project with Brazil’s Research Institute of Applied Economics (IPEA) to develop improved methods for employing quantitative and econometric techniques in the analysis of antitrust cases. Topics under examination by project research teams include methods for defining the relevant market; specifying and estimating cost and demand functions; and testing post-merger scenarios using modelling techniques; as well as protocols for assessing tacit collusion, cartel behaviour, predatory pricing, vertical integration, and vertical distribution restraints. Project papers surveying the most recent literature on these topics, and proposing additions or modifications to current analytic methods, were presented at a seminar held in Brasilia at the end of April, 2005. Seminar participants, including academicians, lawyers, economists, and members from regulatory agencies, provided comments on the papers, which are now being revised and prepared for release later in 2005.

### 3.3 Other enforcement methods

Brazil’s states do not have their own civil competition laws and no federal or state government agencies other than the BCPS have authority to enforce Law 8884. Anticompetitive conduct is, however, subject to criminal prosecution under the federal Economic Crimes law (No. 8137/90). Article 4 of that law defines criminal conduct to include:
agreements among competitors designed to fix prices or quantities, divide markets, or control supply or distribution channels;

(2) abuse of economic power, domination of markets, or elimination of competition by means of agreements among firms (including mergers and acquisitions, suspension of economic activities, and hindrance of competitors);

(3) exploitation of monopoly power by increasing prices without justification;

(4) sales below cost to hinder competition;

(5) price discrimination, through agreement or other means, to impair a competitor or the seller of an input, or to create a monopoly or eliminate competition; and

(6) destruction of manufacturing equipment, to create a monopoly or to eliminate competition.

The law applies only to individuals and not to corporate or other business entities. Violations are punishable by a fine and imprisonment from two to five years. The penalty may be increased by one-third to one-half if the crime causes serious damage to consumers, is committed by a public servant, or relates to a market essential to life or health.

All criminal statutes in Brazil are federal, so there are no state laws creating economic crimes. In practice, enforcement of Law 8137 is the responsibility of both state and federal prosecutors, a system that suffers to some degree from legal ambiguities respecting the division of state and federal jurisdiction. The BCPS agencies have no authority to enforce Law 8137, but are obligated to refer any evidence of criminal behaviour they encounter to the appropriate authorities.

In the past two years, there has been increasing cooperation between the BCPS and criminal prosecutors with respect to antitrust investigations. As noted previously, SDE examinations and civil dawn raid have provided evidence that criminal prosecutors can employ to obtain judicial authorisation for wiretapping, and information collected by SDE may also be employed by prosecutors in criminal cases. SDE staff members also engage in joint investigations with criminal prosecutors and, in some such cases, have participated in criminal dawn raids. SDE benefits from wiretap information provided to it and from the assistance of police officers to assure physical security during civil dawn raids. In cases involving firms with large computer databases, SDE has also been assisted by police experts in information technology forensics. The results have been an improvement
in the quality of evidence available to SDE in its investigations and a flurry of cartel price-fixing indictments and convictions under Law 8137. 93

The BCPS is committed to expanding and enhancing its cooperative relationships with prosecutors, not only to interdict anti-competitive conduct through direct law enforcement but also, as noted previously, to facilitate implementation of the leniency program. The competition advocacy section of this report describes in further detail recent BCPS initiatives among public prosecutors.

With respect to private antitrust enforcement, a complaining party dissatisfied with CADE’s decision in a case has neither a right to appeal within the BCPS nor standing to obtain judicial review. Under Article 29 of Law 8884, however, private parties may file their own suits in court for damages arising from anti-competitive conduct. 94 Private parties may also seek damages for antitrust injury by filing court actions under the Consumer Defence Code (Law 8078/90). Similarly, certain class representatives (such as public prosecutors, Procons, and non-governmental consumer organisations) may file class actions for damages under the Public Class Actions law (No. 7347/85). There are no available records about the number or outcome of private antitrust suits under Article 29 or other laws, but BCPS believes that very few actions seeking antitrust damages have ever been filed in Brazil.

If any private suit involves “the application of Law 8884,” Article 89 requires the presiding court to notify CADE and invite it to assist in the proceeding. CADE’s policy is to accept such invitations only when the conduct at issue in the private action has been the subject of a CADE proceeding and CADE has rendered a final decision on the conduct’s legality. About 30 notifications are received per year, often with respect to suits between business firms in which one of the parties has cited Law 8884 to support an argument. Representatives from the CADE Attorney General’s Office appear in the appropriate cases.

3.4 International aspects of enforcement

Anticompetitive conduct occurring outside Brazil that affects Brazilian markets falls within the ambit of Law 8884, which incorporates an “extraterritorial effects” test (Art.2 §1). Any foreign firm with a Brazilian “branch, agency, subsidiary, office, establishment, agent or representative” is deemed a resident of Brazil and may be served with process without regard to the representative’s legal status as an agent of the foreign entity (Art. 2 §2). 95 In BCPS proceedings, foreign firms are treated no differently than domestic firms.
The impact of international trade on Brazilian markets is fully integrated into BCPS antitrust analysis. In merger cases, for example, SDE and SEAE typically define the geographic market to be international if imports represent 30 per cent or more of the “apparent consumption value” (that is, total domestic production plus imports and less exports) of the relevant product. Where imports do not represent a share of that size, the relevant market may be defined as national but the merger will be approved if imports are likely to increase in response to a small but significant price increase. In evaluating the prospects for increased imports, the BCPS considers transportation and tariff costs, production capacity, local distribution conditions, non-tariff barriers, and consumer preferences to determine the price at which the supply of imports will become elastic.

The BCPS has sought to develop international cooperation through both bilateral and multilateral arrangements. Three bilateral agreements have been established to date, while others are under negotiation. The first formal bilateral cooperation agreement between the BCPS and foreign competition enforcement agencies was signed in 1999 with the United States (represented by the US Department of Justice and the US Federal Trade Commission), and was ratified by the Brazilian Congress in March 2003. The agreement provides for (1) notification respecting enforcement activities in one country that affect the interests of the other, (2) exchange of information (subject to applicable confidentiality restrictions), (3) jointly coordinated enforcement activities, (4) the option for one country to request that the other investigate conduct occurring within its borders that affects the requesting country, and (5) various technical cooperative activities, including training and the exchange of personnel. In December 2001, a similar bilateral agreement was signed with Russia and now awaits Congressional ratification.

A third bilateral agreement, also similar to the agreement with the United States, was signed with Argentina in October 2003 and is likewise awaiting Congressional ratification. This agreement reflects an effort by the BCPS to advance competition policy and cooperation among the Mercosur countries. Mercosur (“Mercosul” in Brazil) is a common market agreement established in 1991 by Brazil, Argentina, Paraguay, and Uruguay. Its competition component dates to late 1996, when the members signed an ambitious Competition Defence Agreement that called for the creation of a supra-national Competition Advocacy Committee (CDC). The CDC would be empowered to direct that competition enforcement agencies in each member country undertake investigations in particular matters and would have dispositive authority to decide cases and impose sanctions. The 1996 Agreement also provided for the adoption of cooperation mechanisms among the members, including information exchange, joint investigations,
registration of national enforcement agency case decisions, and personnel training. The Agreement was ratified by Paraguay in 1997 and by Brazil in 2000, but not by Argentina or Uruguay. It is unlikely that the Agreement will be implemented anytime soon, as some of the Mercosur countries do not yet have a competition law or an enforcement agency. Moreover, there is resistance among the members to the prospect of a supra-national law enforcement agency.

In an effort to establish a less controversial structure, Mercosur’s Technical Committee on Competition acted in October 2003 to approve a Memorandum of Understanding on cooperation. The MOU included provisions on notification procedures, information exchange, and technical assistance. The Memorandum was approved by Argentina in August 2004, but in Brazil is pending with the Ministry of Foreign Affairs. The difficulties associated with implementing agreements under the auspices of Mercosur have lead the BCPS to focus on bilateral agreements, such as the one with Argentina, to provide a practical method for facilitating cooperation on competition policy matters.

BCPS staff members, particularly from SDE, are often in communication with their antitrust agency counterparts in the United States and Argentina, to exchange public information about cases, debate analytic issues, and discuss investigational techniques. Outside the Americas, the BCPS maintains close contacts with antitrust authorities in France and expects to establish formal agreements with that country in the near future. A technical cooperation agreement is being negotiated with Portugal, focusing on mutual discussion of best practices and the exchange of personnel for training purposes. A relationship has also developed between the BCPS and staff of the European Union’s Directorate General for Competition, to exchange non-confidential information regarding investigations being conducted simultaneously by the two jurisdictions.

The BCPS participates in a variety of international organisations relating to competition policy, including the Competition Committee of the OECD (as an observer), the International Competition Network, UNCTAD, and the Latin American Competition Forum. Since 1999, the OECD and the BCPS have engaged in a cooperative project involving OECD contributions to the development of draft competition law amendments and participation by OECD representatives in seminars convened in Brazil. SEAE and CADE have had access to the OECD’s OLIS database for technical research since early 2001. Brazil is also an active member of the ICN. From 2003 to June 2005, SEAE served both as co-chair of the Competition Policy Implementation Working Group and as co-chair of Subgroup 3 of the CPI on Competition Advocacy in Regulated Sectors. CADE succeeded to those positions in June. SDE is co-chair of Subgroup 1 on General Framework of
the Cartel Working Group. BCPS activities at UNCTAD include participation in conferences, technical assistance projects (both as recipient and as donor), and meetings of the UNCTAD Intergovernmental Group of Experts (IGE). The BCPS and UNCTAD have joined to host training conferences in Brazil for regulatory agency staff and public prosecutors, as well as a seminar on competition policy issues in conjunction with the UNCTAD XI Conference, held in Sao Paulo in 2004.

SEAE plays an advisory role in Brazilian trade proceedings dealing with dumping and unfair import competition. Complaints from private parties alleging unfair imports are investigated by the Department of Commercial Defence (DECOM) in the Ministry of Development, Industry and Foreign Trade (MDIC). DECOM prepares a preliminary opinion, which is exposed to comments filed by the parties and interested government agencies. Thereafter, DECOM transmits a recommended decision to the Chamber of Foreign Trade (Câmara de Comércio Exterior or CAMEX) for final action. CAMEX is presided over by MDIC and includes in its membership the Ministries of Finance; Civil Matters; External Relations; Agriculture and Supplies; and Planning, Budget, and Management.

The opinion of the Finance Ministry in anti-dumping cases is formulated jointly by SEAE and the Secretariat for International Issues (SAIN). SEAE’s function is to analyse the degree of economic injury caused by the imports at issue and assess whether the relief proposed by DECOM is commensurate with the damage. SEAE may also comment on the competitive dynamics of the affected market and the economic viability of predatory prices, which are topics not ordinarily addressed by DECOM. As is true in many other countries, the effort to introduce competition policy analysis into anti-dumping cases in Brazil faces significant legal and political hurdles. SEAE is, however, sometimes successful in persuading CAMEX to terminate previously imposed penalties, if only by indirect means. Recently, for example, SEAE’s investigation of the Brazilian insulin market in connection with Novo Nordisk’s acquisition of Biobrás led to the termination of anti-dumping measures in that market. SEAE recommended that CADE request CAMEX to drop the existing measures as a means of promoting competition in the industry. In March 2005, the Trade Ministry acted on CADE’s request by suspending both the anti-dumping measures that had been imposed on the importation of insulin from Denmark and a price monitoring program for insulin imports from France and the United States.

The interface between the BCPS and MDIC is not limited to SEAE’s involvement in unfair trade issues. The BCPS agencies, together with MDIC representatives, are part of the Brazilian Mercosur delegation negotiating the Free Trade Area for Americas (FTAA). Among the subjects
addressed in FTAA negotiations are provisions to assure that anticompetitive practices will not restrain the trade liberalisation process; mechanisms to promote cooperation and information exchange among antitrust authorities; and procedures to coordinate trade and competition policy, including antidumping actions. Further, CADE and MDIC are presently engaged in developing a cooperation agreement designed to facilitate sharing of industrial sector information between the two agencies.

3.5 Agency resources, actions, and implied priorities

Funding sources for the three BCPS agencies are similar but not identical. The Brazilian government’s budgetary system entails two distinct processes, one for human resources and one for all other expenditures. Non-salary funds are expended for contract research, office equipment and supplies, employee training programs, conferences, travel expenses, and outsourced support functions (such as security, cleaning, and secretarial services) supplied under contract.

One source of non-salary funds for all three BCPS agencies is the Article 54 notification fee. Established in 1999 as a BRL 15 000 fee payable to CADE, the fee was increased to BRL 45 000 by the 2000 amendments to Law 8884, which provided that the receipts would be divided equally among the three BCPS agencies. Fee receipts began flowing to SDE in 2001 and to SEAE in 2002. Notification fees are not deposited directly to the agencies’ accounts. The Ministry of Planning, Budget, and Management (PBM) has authority over agency budget limits and determines what portion of the notification fee revenues attributable to each agency is actually allocated to it. Also, in the case of SDE and SEAE, the fee revenues are directed to the parent Ministry’s accounts, and Ministry budget officers then make a further allocation among Ministry offices.

Funds for CADE’s non-salary expenditures come from fee collections and a government budget allocation. SDE’s non-salary budget in recent years has consisted of the portion of notification fees allotted to it by the Ministry of Justice. SEAE receives a portion of the Article 54 notification filing fees and a separate budget allocation from the Finance Ministry, as well as the proceeds of fee charged to private parties who apply to SEAE for the authorisation of promotional lotteries. The following table shows the total annual amount of funds (from all sources) available to each agency for non-salary expenditures. CADE’s figures are higher because it must pay for building rent, telephone services, and many other support services that are centrally administered in the ministries and thus not included in the budgets of SDE and SEAE.
Table 11. Trends in Competition Policy Resources – Funds for Non-salary Expenditures (USD million)

<table>
<thead>
<tr>
<th></th>
<th>2000</th>
<th>2001</th>
<th>2002</th>
<th>2003</th>
<th>2004</th>
</tr>
</thead>
<tbody>
<tr>
<td>CADE</td>
<td>3.81</td>
<td>3.62</td>
<td>2.09</td>
<td>1.85</td>
<td>2.56</td>
</tr>
<tr>
<td>SDE</td>
<td>0.11</td>
<td>3.28</td>
<td>0.74</td>
<td>0.34</td>
<td>1.15</td>
</tr>
<tr>
<td>SEAE</td>
<td>0.53</td>
<td>1.95</td>
<td>2.66</td>
<td>3.16</td>
<td>3.42</td>
</tr>
<tr>
<td>Total</td>
<td>4.45</td>
<td>8.85</td>
<td>5.49</td>
<td>5.35</td>
<td>7.13</td>
</tr>
</tbody>
</table>

Source: BCPS, 2005

Funds for salaries and other expenses associated with human resources (such as retirement costs and supplemental transportation and child-care benefits) are provided to the BCPS agencies by their parent ministries or by the Ministry of Planning, Budget, and Management (PBM). Annual salary expenditures by CADE are shown below.

Table 12. CADE Salary Expenditures (USD million)

<table>
<thead>
<tr>
<th></th>
<th>2000</th>
<th>2001</th>
<th>2002</th>
<th>2003</th>
<th>2004</th>
</tr>
</thead>
<tbody>
<tr>
<td>Salary Expenditures</td>
<td>1.59</td>
<td>1.34</td>
<td>1.11</td>
<td>1.19</td>
<td>0.92</td>
</tr>
</tbody>
</table>

Source: CADE, 2005

In late 2003, Congress enacted a provisional order permitting CADE to retain 28 professional assistants on temporary contracts valid until December 31, 2005. CADE hired lawyers and economists to serve as analysts for the commissioners, expending USD 227,400 from its notification fee allocation for this purpose in 2004. Regular salary expenditures by CADE for 2004 were USD 694,400. SDE and SEAE were unable to provide historical salary expenditure data because they are both part of large ministries that do not routinely disaggregate salary data for individual offices. SDE reports that its salary expenditures for 2004 were USD 1.56 million, while the comparable figure for SEAE was USD 2.62 million, yielding a total for all three agencies in 2004 of USD 5.1 million.

Personnel data for the agencies are shown below. Professional employees are principally lawyers and economists, although other professions are represented.
### Table 13. BCPS Employees – 2000 to 2004

<table>
<thead>
<tr>
<th></th>
<th>2000</th>
<th>2001</th>
<th>2002</th>
<th>2003</th>
<th>2004</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Employees CADE</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Professional</td>
<td>55</td>
<td>32</td>
<td>70</td>
<td>68</td>
<td>85</td>
</tr>
<tr>
<td>Support</td>
<td>62</td>
<td>89</td>
<td>66</td>
<td>54</td>
<td>89</td>
</tr>
<tr>
<td>Total</td>
<td>117</td>
<td>121</td>
<td>136</td>
<td>122</td>
<td>174</td>
</tr>
<tr>
<td><strong>Employees SDE</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Professional</td>
<td>18</td>
<td>33</td>
<td>40</td>
<td>34</td>
<td>35</td>
</tr>
<tr>
<td>Support</td>
<td>10</td>
<td>16</td>
<td>16</td>
<td>16</td>
<td>20</td>
</tr>
<tr>
<td>Total</td>
<td>28</td>
<td>49</td>
<td>56</td>
<td>50</td>
<td>55</td>
</tr>
<tr>
<td><strong>Employees SEAE</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Professional</td>
<td>60</td>
<td>71</td>
<td>71</td>
<td>71</td>
<td>66</td>
</tr>
<tr>
<td>Support</td>
<td>140</td>
<td>148</td>
<td>148</td>
<td>93</td>
<td>94</td>
</tr>
<tr>
<td>Total</td>
<td>200</td>
<td>219</td>
<td>219</td>
<td>164</td>
<td>160</td>
</tr>
<tr>
<td><strong>Employees CADE, SDE, SEAE Combined</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Professional</td>
<td>133</td>
<td>136</td>
<td>181</td>
<td>173</td>
<td>186</td>
</tr>
<tr>
<td>Support</td>
<td>212</td>
<td>253</td>
<td>230</td>
<td>163</td>
<td>203</td>
</tr>
<tr>
<td>Total</td>
<td>345</td>
<td>389</td>
<td>411</td>
<td>336</td>
<td>389</td>
</tr>
</tbody>
</table>

Source: BCPS, 2005

BCPS employees are either permanent civil servants (who hold positions with duties defined by Brazil’s civil service law) or contract civil servants. Permanent employees must take a competitive examination to obtain their positions, but then enjoy a variety of benefits provided for career employees and cannot be terminated at will. Contract employees are not hired on the basis of an examination and their employment ordinarily terminates when the contract expires.

A critical feature of the Brazilian personnel system is that most contract employees are paid from non-salary funds and are prohibited from performing an agency’s substantive work. Thus, they are restricted to such...
functions as secretarial services, transportation, security, and cleaning. The principal exception to this rule involves contract employees hired using “DAS” authority. “DAS” is an acronym for “Direção e Assessoramento Superior,” which translates as “high level management and advising.” DAS authority comes in seven grade levels and was originally designed as a mechanism for hiring non-permanent contract employees to serve as managers. Over the years, the lower DAS grades have come to be used not only to hire non-permanent staff personnel but to supplement the salaries of permanent employees as well. Permanent employees who hold a DAS position receive, in addition to the salary associated with their civil service position, a portion (in most cases 65 per cent) of the salary associated with their DAS grade. Agencies covet DAS authority because the higher grades can be used to hire senior managers and the lower grades can be used as supplemental compensation to preserve junior-level permanent staff from recruitment by other agencies. The Planning Ministry (PBM) controls the number of permanent and contract positions available to an agency, as well as the number and grade level of “DAS” positions. DAS contract employees are subject to termination when the political administration changes, although such changeovers normally affect only the most senior officers.

The current allocation of permanent and contract employees and of DAS authority among the three BCPS agencies appears below.

<table>
<thead>
<tr>
<th>Table 14. BCPS Employee Status</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Permanent civil servants</strong></td>
</tr>
<tr>
<td>DAS</td>
</tr>
<tr>
<td>Non-DAS</td>
</tr>
<tr>
<td><strong>Total</strong></td>
</tr>
<tr>
<td><strong>Contract civil servants</strong></td>
</tr>
<tr>
<td>DAS</td>
</tr>
<tr>
<td>Non-DAS</td>
</tr>
<tr>
<td><strong>Total</strong></td>
</tr>
<tr>
<td><strong>Total</strong></td>
</tr>
</tbody>
</table>

Source: BCPS, 2005

The substantive work of an agency is accomplished by those permanent civil servants and DAS contract employees who have professional status. As shown by the tables, CADE’s professional workforce at the end of 2004 stood at 85, while the comparable figure was 35 for SDE and 66 for SEAE. Law 8884, when enacted in 1994, called for the immediate creation of a permanent staff for CADE (Art. 81). The significance of this provision relates to the fact
that permanent civil servants cannot be hired except to fill positions established in the civil service law. When sector regulatory agencies were created during the 1990s in Brazil, permanent civil service positions were also tailored for the professional personnel who would perform each agency’s substantive mission. No such position was ever created for CADE, which means that CADE must use DAS contract employees to perform mission duties that do not match existing position descriptions in the civil service law. As can be seen from the table, however, CADE has only 11 DAS contract positions available. Further, of the 39 permanent civil servants on CADE’s roster, only 16 (12 public attorneys in the Attorney General’s Office and 4 employees in administrative service positions) are actually assigned to CADE. Of the other 23, 17 are permanent employees from other federal agencies (principally Justice and Finance) and 6 are employees from state governments.

The absence of a career position, coupled with the general problem of low government salaries in Brazil, confronts CADE with a chronic shortage of appropriately qualified staff personnel. Job candidates interested in competition law work for the government tend to prefer employment with the more well-established and prestigious ministries. For the DAS contract employees that CADE is able to hire, turnover runs about 40 per cent per year. Employees holding the lower grade DAS positions earn about USD 400 per month, and even those at the higher DAS 4 level earn only USD 1600 per month. These rates are insufficient to retain persons with a university degree. Turnover rates are lower (about 25 per cent per year) for permanent civil servants whose salaries carry a DAS supplement, although even those employees are easily lost to other agencies who offer a higher DAS level. As the 2000 Report succinctly put it, and as is recognised unanimously by everyone associated with Brazil’s antitrust community, CADE is afflicted with “the lack of a permanent, stable group of career officials whose presence preserves ‘institutional memory’ and enhances enforcement expertise over time” (p. 207). The lack of an adequate permanent staff causes problems other than those associated with poor institutional memory, conspicuously including much of the delay encountered in CADE proceedings. The 2000 Report urged that the establishment of a career staff for CADE be made “a top priority within the government and the Congress” (p. 207). The proposed legislation to restructure the competition law provides, as did Law 8884 (Art. 81), that “a specific law” will be enacted to create a permanent career staff for the BCPS. On this point, however, the government has not yet released draft legislation.

The 2000 Report observed (p. 207) that SDE, with a total of 18 professionals on its roster in 2000, appeared to be understaffed. The number of professionals increased to 35 in 2004, but its workload has also substantially increased, with about 800 cases pending on its agenda. The
general view in the antitrust community is that SDE is still understaffed.
SDE’s Secretary advises that, although the merger review process has been
made more efficient, all the resources freed by that effort are employed in
cartel investigations. In the Secretary’s view, SDE staff is at full capacity.

At SEAE, the number of professionals working on competition policy
and analysis increased from 60 in 2000 to 71 for the years 2001 to 2003.
The number declined to 66 in 2004, but this reflects only a temporary
decrease associated with attrition during a reorganisation undertaken by
SEAE in late 2004. As described in the 2000 Report (p. 188), SEAE was
organised at that time into four major organisational components, reflecting
a division of the Brazilian economy into sectors for industry, services,
infrastructure, and agriculture. In October 2004, SEAE reorganised into
eight offices in anticipation of the changes that would occur upon enactment
of the proposed legislation revising Law 8884. The legislation assigns most
law enforcement activities to the new CADE, leaving SEAE to serve
primarily as a competition advocate on regulatory issues being considered
by the government or sector agencies. Consequently, SEAE has
consolidated its merger review activities in one office (located in Rio de
Janeiro), to which is also assigned all work relating to tariffs and anti-
dumping proceedings. Conduct investigations were likewise consolidated in
a single office, headquartered in Brasilia with a small branch in Rio. Five
other SEAE offices, all located in Brasilia, are organised to reflect the areas
in which SEAE interacts with the other organs of government: communications and the media; water, sanitation, and energy; health
insurance and pharmaceuticals; agriculture; and transportation. The eighth
office handles SEAE’s responsibilities for regulating promotional lotteries.

Staff turnover at SDE and SEAE, although less severe than at CADE, is
still troublesome. Because SDE and SEAE are part of large ministries, their
employees have the advantage of better access to permanent civil service positions. Nonetheless, the two agencies must develop incentives to
retain their permanent employees, and have been able to lengthen average
tenure for such employees to about six years by offering grade 3 and 4 DAS
supplements. On the other hand, the two agencies are no more successful
than CADE in retaining contract personnel by offering DAS levels in the
lower ranges. Tenure of two or three years is typical for such employees.

The following table shows BCPS enforcement activities over the past five
years. Approximately 5 per cent of the conduct cases were initiated \textit{ex officio}
by SDE. Of the remainder, half were initiated by private complainants and
half by government agencies (such as SEAE, Public Prosecutors, Federal
Attorneys, sector regulatory agencies, other government ministries, and
Procons). The fluctuation in “matters presented” over the past three years (31
in 2002, 51 in 2003, and 37 in 2004 is explained by a “house cleaning” at SDE
by the incoming administration, which completed a number of pending matters and identified some additional cases that required dismissal because the statute of limitations had expired.

According to the 2000 Report (p. 208), SEAE estimated that its merger review activities consumed as much as 70 per cent of the agency’s resources. The proportion was thought to be lower at SDE, but also quite high at CADE. The Report recommended (p. 211) a reduction in the resources devoted to mergers and a concomitant increase in the effort devoted to conduct investigations. SDE and SEAE consider that they have effectively increased the efficiency of merger review process and thus freed resources for redirection to cartel investigations. SDE estimates that it presently devotes about 20 per cent of its resources to merger reviews, while CADE states that it cannot provide an estimate of its resource expenditures on that function. According to SEAE, 65 per cent of its competition law resources were devoted to mergers until its October 2004 reorganisation, when the agency’s priorities were realigned to focus on competition advocacy.

Table 15. Trends in Competition Policy Actions 2000 - 2004

<table>
<thead>
<tr>
<th></th>
<th>Conduct Cases 1</th>
<th>Merger Cases 2</th>
</tr>
</thead>
<tbody>
<tr>
<td>2004: matters presented to CADE</td>
<td>37</td>
<td>511</td>
</tr>
<tr>
<td>Matters concluded</td>
<td>32</td>
<td>651</td>
</tr>
<tr>
<td>Total sanctions imposed (R$ million)</td>
<td>5.6</td>
<td>4.2</td>
</tr>
<tr>
<td>2003: matters presented to CADE</td>
<td>51</td>
<td>511</td>
</tr>
<tr>
<td>Matters concluded</td>
<td>22</td>
<td>526</td>
</tr>
<tr>
<td>Total sanctions imposed (R$ million)</td>
<td>8.3</td>
<td>2.2</td>
</tr>
<tr>
<td>2002: matters presented</td>
<td>31</td>
<td>519</td>
</tr>
<tr>
<td>Matters concluded</td>
<td>31</td>
<td>518</td>
</tr>
<tr>
<td>Total sanctions imposed (R$ million)</td>
<td>2.8</td>
<td>6.6</td>
</tr>
<tr>
<td>2001: matters presented</td>
<td>30</td>
<td>621</td>
</tr>
<tr>
<td>Matters concluded</td>
<td>34</td>
<td>584</td>
</tr>
<tr>
<td>Total sanctions imposed (R$ million)</td>
<td>Data not available</td>
<td>10.1</td>
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<tr>
<td>2000: matters presented</td>
<td>32</td>
<td>668</td>
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<tr>
<td>Matters concluded</td>
<td>39</td>
<td>523</td>
</tr>
<tr>
<td>Total sanctions imposed (R$ million)</td>
<td>Data not available</td>
<td>30.0</td>
</tr>
</tbody>
</table>

1. Conduct cases transmitted by SDE or ANATEL to CADE under Art. 39, law 8884.
2. Merger cases transmitted by SDE or ANATEL to CADE under Art. 54 ¶ 6, Law 8884.

Source: BCPS, 2005
4. Limits of Competition Policy: Exemptions and Special Regulatory Regimes

Law 8884, by its terms, applies to “individuals, public and private companies, [and] to individual and corporate associations,” however organised, “notwithstanding the exercise of activities regarded as a legal monopoly” (Art. 15). The BCPS takes the position that Law 8884 is applicable to the federal government and its agencies, although there has never been a case testing this proposition. In fact, the BCPS interacts with the federal government on competition issues by means of competition advocacy. State governments and their agencies are considered outside the ambit of Law 8884 for reasons of federalism.

Commercial enterprises owned by federal or state governments are clearly covered, and CADE has been involved periodically with merger and conduct cases involving Petrobrás, the federal hydrocarbons company. Although no conduct cases involving Petrobrás have been decided by CADE since 1999, SDE presently has an investigation underway into allegations of discriminatory treatment by a Petrobrás natural gas pipeline company. Pending merger cases involve the acquisition by Petrobrás of gasoline stations and LPG distributors from AGIP and a pipeline joint venture between Petrobrás and White Martins. There is no other recent experience involving federal enterprises, except for several acquisitions by the Brazilian Re-Insurance Institute (Instituto de Resseguros Brasileiro), the federal re-insurance monopoly. The BCPS believes that there few, if any, state-owned commercial enterprise and has no case history in that field.

Law 8884 applies to all private entities economy-wide and thus to companies operating in regulated sectors. The only exception to this principle has arisen in the banking sector, as described below. In applying the statute to regulated firms, CADE avoids creating conflict with the operative regulatory scheme. Thus, while CADE reviews mergers and attacks horizontal collusion in regulated sectors, it does not prosecute firms for unilateral conduct mandated or controlled by regulatory agencies.

The 2000 Report (p. 209) recommended that the BCPS agencies focus increased enforcement attention on possible anticompetitive abuses of by newly privatised, but still-dominant firms in network industries, including particularly the telecommunications, energy, and transportation sectors. Since 2000, at least some law enforcement activity has been undertaken in each of the regulated sectors, although BCPS characterises the total number of cases as relatively small. This section of the report describes BCPS enforcement activity in regulated sectors, while the next section discusses...
the activities of the BCPS agencies as competition advocates with respect to sector regulatory policies.

Although most sector statutes require the regulatory agency to consider competition principles in making decisions, few mention Law 8884 as such. CADE’s authority in those areas therefore arises by implication from the broad jurisdictional language in Article 15. The sector laws for hydrocarbons and telecommunications, however, refer expressly to Law 8884. The Hydrocarbons Law of 1997, covering the oil and natural gas sectors, requires the sector regulatory agency (the National Petroleum Agency, or ANP) to notify both SDE and CADE if it becomes aware of evidence suggesting a violation of the competition law. CADE, in turn, is required to notify ANP of any sanctions it applies to firms in the sector, so that ANP may adopt any appropriate legal measures of its own (such as cancellation of licenses).

With respect to oil and oil derivative products, including liquid petroleum gas (LPG), price regulation ended in 2002 for all stages of the production chain. Prices now float freely for extraction, refining, and local distribution. Essential transportation facilities, including pipelines and loading facilities at marine terminals, are regulated by ANP. CADE’s conduct proceedings since 2000 in this field involve price-fixing cases against gasoline retailers and LPG distributors and have been described previously. ANP monitors fuel prices closely and notifies SDE of suspicious patterns. Although several meetings between CADE and ANP were held in 2002 for the purpose of formulating a cooperative agreement to exchange information and views on sector competition issues, the project was never completed. SDE has been more successful, having established an agreement with ANP in 2000 for the conduct of investigations in the sector.

The federal government’s regulatory jurisdiction in the natural gas sector differs from that in most other sectors because it extends only to interstate commerce. Under the Brazilian Constitution, the individual states are vested with control over local distribution. Interstate gas prices were deregulated in 2002 at the same time as oil prices; ANP continues to regulate natural gas pipelines. At the state level, different approaches are employed by the 26 state governments. A number of states have continued direct operation of the distribution network, others have privatised the system and established a regulatory agency, and some states auction concessions to operate the network. Concession sales are reportable transactions under Article 54 if the turnover or market share thresholds are met, and the formation of a consortium to bid on a concession is likewise reportable. CADE has reviewed a number of transactions involving concessions. Thus, in 2004, CADE approved without conditions a concession grant to Gás Natural São Paulo Sul for distribution of natural gas.
in southern São Paulo state, while also assessing Gás Natural a fine for untimely notification. Similarly, CADE approved the transactions associated with the 2004 formation by the state of Goiás of a gas distribution firm in which the state retained a 51 per cent share. The remaining stock was sold to a consortium chosen through public solicitation.

A 2001 case in the natural gas sector illuminated CADE’s approach to examining conduct undertaken by regulated firms. Prior to 1997, natural gas distribution in the state of Rio de Janeiro was a state-owned monopoly. In 1997, the state divided the distribution assets into two enterprises serving separate geographic areas, privatised the two companies, and established a state regulatory agency. The following year, both firms raised their prices significantly more than the rate of inflation. Customers complained that the distributors were abusing their dominant position. CADE’s 2001 decision, dismissing the complaint, considered the applicability of the “state action doctrine” in Brazil. That doctrine, developed as part of antitrust jurisprudence in the United States, operates to exclude federal antitrust authority when a state displaces market competition and actively regulates the private conduct in question. CADE concluded that the distributors had not acted unlawfully because their prices fell within the price range permitted by the state regulator.

The 1997 Telecommunications Act is substantially more elaborate than the Hydrocarbons Act, providing explicitly for the application of the competition law to telecommunications firms and vesting the National Telecommunications Agency (ANATEL) with a formal role in the law enforcement process. Under Article 7 of the Act, “the general rules governing the protection of the economic order [which include Law 8884] shall apply to the telecommunications industry whenever they do not conflict with the provisions of the Act.” Article 19 provides ANATEL with “legal authority to control, prevent and curb any breach of the economic order in the telecommunications industry, without prejudice to the powers vested in . . . CADE.” The effect of these provisions is that conduct and merger cases in the sector may be considered by ANATEL, by CADE, or by both. The Telecommunications Act does, however, pre-empt the applicability of the merger notification requirements in Law 8884. This is because the Act creates a special regime for telecommunications mergers under which prior notification of transactions must be filed with ANATEL (the only circumstance in which Brazil provides for pre-merger control). ANATEL’s jurisdiction over both conduct and mergers cases is limited to “telecommunications services,” defined to include fixed line telephone systems and the broadcasting functions of television networks, satellite TV operations, and cellular telephone companies.
The 2000 Report (p. 219) noted that CADE and ANATEL had established a working group to address the potential problems presented by the overlapping jurisdictional provisions. CADE advises that, since 2000, the two agencies have successfully developed a cooperative working arrangement under which ANATEL assumes the role of SDE and SEAE in merger cases involving telecommunications services. Under the arrangement, ANATEL conducts the investigation and provides a technical opinion, while CADE renders the final judgment. With respect to conduct cases, in contrast, ANATEL shares concurrent jurisdiction with SDE and SEAE, so that any one or all three of those agencies may perform investigative functions and present recommendations to CADE. Over the years, CADE and ANATEL have signed several written cooperation agreements, each of which has subsequently expired. CADE reports that, until recently, the two agencies had been negotiating a new agreement. That project was suspended, however, when the term of ANATEL’s president ended. The procedures for interaction between ANATEL and both SDE and SEAE are not well developed, consisting primarily of informal contacts between agency staff members.

In the past five years, CADE has considered numerous conduct and merger cases sent to it by ANATEL. In 2001, for example, CADE addressed an abuse of dominance claim against the Globo Group, Brazil’s largest broadcast television network. Globo controlled both the Globo Channel, the prime broadcast channel in Brazil, as well as Sky TV, the most important Brazilian pay TV satellite company. The complainant was TVA Sistema de Televisão, the owner of competing satellite company DirectTV. TVA asserted that Globo wrongfully refused to license the Globo Channel to TVA for satellite broadcast. ANATEL investigated and concluded that there was no abuse of dominance because the Globo Channel was not an essential facility for satellite TV service. CADE agreed and dismissed the case, observing that TVA was a viable competitor even without the channel and that requiring satellite TV services to share programming would reduce competition and retard incentives for innovation. In a 2002 merger case, CADE approved without restrictions a joint venture by Portugal Telecom and Telefónica Internacional to create the cellular service company Vivo.

In merger cases, ANATEL has statutory authority to issue an order preventing consummation of a transaction until review is complete. CADE may issue a separate precautionary measure, or enter into an APRO under CADE Resolution 28, to deal with aspects of a merger that are not within ANATEL’s jurisdiction. For example, in the News Corporation – Hughes merger, described previously, ANATEL issued an order preventing the two satellite TV companies from consummating the underlying transaction, while CADE issued an order barring the parties from establishing any new
contracts providing for exclusive distribution in Brazil of television
programming.

CADE has sometimes requested that SDE or SEAE (or both) provide
supplementary technical opinions in merger cases falling within ANATEL’s
jurisdiction and in conduct cases that SDE and SEAE had not
investigated. Thus, CADE sought opinions from SEAE with respect to
the temporary injunction described above in the News Corporation – Hughes
merger. Likewise, opinions from both SDE and SEAE were sought in an
abuse of dominance case against Telecomunicações de São Paulo (Telesp).
The complaining firm in that case, Empresa Brasileira de Telecomunicações
S.A. (Embratel), asserted that Telesp was charging discriminatory tariffs for
accessing Telesp’s network. SDE and SEAE agreed that the conduct was
likely to be discriminatory and CADE issued a precautionary order
following their recommendations.

SDE and SEAE also pursue both merger and conduct investigations into
aspects of the telecommunications sector that are outside ANATEL’s
jurisdiction. Merger investigations in recent years have generally involved
markets that are vertically related to telecommunications services.
Acquisitions by land-line telephone companies of Internet service providers
and by satellite TV firms of TV program suppliers have been a particular
focus of interest. Thus, in 2002, SEAE examined another transaction
involving the Globo Group, which (in addition to SkyTV) also owns
SporTV, the prime Brazilian pay-TV sports channel. The transaction
involved Globo’s acquisition of a 25 per cent stake in ESPN Brasil, a
competing pay TV sports channel. SEAE concluded that Globo was in a
monopolistic position respecting the “premium sports channels for pay TV”
market and in a monopsonistic position respecting the market for pay TV
presentations of premium sporting events. Entry was difficult in both
markets, and SEAE therefore recommended imposing certain restrictions to
reduce the prospect that Globo could abuse its market power. SEAE’s
proposals were designed to bar Globo from (1) providing exclusive licenses
to SkyTV for the satellite broadcast of premium sporting events, or (2)
demanding exclusive broadcast rights for such events. The case is now
pending with SDE.

Conduct investigations by SDE and SEAE in markets related to, but
outside of, ANATEL’s jurisdiction include yet another case against the
Globo Group. An abuse of dominance complaint by Associação Neo TV
asserted that Globo was refusing to license SporTV to competitors of
Globo’s satellite TV services SkyTV and NET. SEAE’s proposals were
similar to those in the ESPN Brasil acquisition case. The matter is now
pending with SDE. In a pair of cases investigated by SDE that did not
involve Globo, CADE rendered decisions in 2004 rejecting alleged
predatory pricing in the retail sale of cellular telephones by Telefônica Celular, Telet Celular, and Telebrasília Celular.

The National Electrical Energy Agency (ANEEL), like ANP and ANATEL, was created in 1997, and its law also requires that effect be given to competition principles where possible. ANEEL has cooperation agreements with all three competition agencies, under which the parties agree to share information and technical expertise and jointly analyse the interaction between the competition law and the sector regulatory system. ANEEL provides SDE with reports of suspected competition law violations and with technical opinions in both conduct and merger cases. Since 2000, the only BCPS enforcement activity in the sector has involved mergers, all of which CADE has approved without restrictions after examination under the fast track procedure. The transactions have included acquisitions of small and regional producers or distributors of electrical power, and the formation of consortia to bid for distribution licenses and concessions to construct energy generation plants.

The Department of Civil Aviation (DAC) in the Brazilian Defence Ministry continues to hold regulatory authority over airlines in Brazil. There are no formal co-operation arrangements and little interaction between the competition agencies and DAC. The competition law applies fully to civil aviation, and the most important BCPS case activity since 2000 is represented by the prosecution of the major airlines for price-fixing on the Rio de Janeiro- São Paulo route.

The National Agency for Surface Transportation (ANTT) was created in 2002 and vested with responsibility for regulating freight railway services and interstate and international bus transportation. A 2002 agreement between SEAE and ANTT calls for the exchange of information, joint analysis of techniques for applying competition principles to sector regulatory issues, and discussion of methodologies for tariff regulation. There are also provisions dealing with cooperation in competition law enforcement proceedings (including joint investigations). CADE and ANTT adopted an agreement in 2003 with similar terms but with a particular focus on cooperation to avoid conflicts between competition law enforcement and sector regulatory decisions. Little or no activity has, however, occurred pursuant to either agreement.

With respect to railroads, much of CADE’s case activity has focussed on Companhia Vale do Rio Doce (CVRD), a large mining and steel company that was privatised in 1997. CVRD holds operating concessions for a number of freight railway lines and harbour terminal facilities that provide services both to its own mines and steel production facilities and to other customers as well. Some of the customers served by CVRD’s lines are
competitors in mining or steel production, a circumstance that has led to a series of cases alleging discrimination by CVRD. Where the discrimination does not involve tariffs regulated by ANTT, CADE has prime jurisdiction. One case, for example, dealt with a contract between CVRD and the Samitri Mineral Company for the transportation and export of Samitri’s iron ore production. The contract barred Samitri from selling its ore in certain foreign markets and from selling any ore at prices lower than CVRD’s. In its 2004 decision, CADE undertook what was in essence a joint venture analysis to conclude that the agreement was not unlawful, noting that CVRD had made a large investment to construct a dedicated rail line to Samitri’s mine site, and that CVRD therefore had a legitimate interest in the exploitation of Samitri’s iron ore assets.

Other pending rail sector cases involve mergers, including one 2000 transaction in which CVRD acquired four iron ore mining companies and their associated rail lines in the southeast region of Brazil. SEAE and SDE agreed that adverse effects could arise in both the iron ore and the rail service markets and proposed various remedial conditions to CADE. ANTT, in consultation with SDE, invoked its own statutory authority to issue a precautionary order imposing certain restrictions on CVRD until CADE issued a determination. In 2005, CADE determined that the transactions could proceed subject to conditions designed to forestall anti-competitive effects. With respect to bus transportation, a June 2005 CADE decision finding a bus company cartel was the first case of any kind in that sector since 2000. SDE has several other bus cartel investigations underway. SDE and SEAE are presently reviewing a merger between Gontijo Participações and Viação São Geraldo, two of the largest bus transportation companies in Brazil.

Each of Brazil’s seaports is controlled by a Port Authority, which grants concessions authorising private parties to operate terminals and to provide cargo handling services within the port facility. At some ports, there are also independent, privately-owned terminal facilities just outside the port boundaries. A case recently decided by CADE, known as “THC2,” involved terminal handling charges assessed by terminal operators against independent warehouses. The case involved allegations that certain terminal operators raised rivals’ costs by charging disproportionately more to deliver a cargo container to a warehouse located outside the terminal than they did to deliver the same container to a warehouse within the port. CADE found the price differentials to be an abuse of dominance because they constituted a significant part of storage costs and induced shippers to use the terminal operator’s warehouse, thus impairing competition in the warehouse storage market. In another proceeding involving the ports sector, an investigation is underway into allegations of price-fixing by tugboat operators in the Port of Santos.
The Central Bank of Brazil (BACEN) has regulatory responsibility for banks and other financial institutions. It exercises “prudential” regulatory control over new bank charters and bank mergers; sets requirements for capital, reserves, and investments; and mandates internal control and accounting systems. Separate regulatory bodies exist within the Ministry of Finance for the insurance and securities sectors. The 2000 Report noted (p. 229) that although banking is not exempt from the competition law, “the Central Bank continues [to] exercise sole authority over competitive issues in the sector.” In particular, the Bank has demanded exclusive control over bank mergers on the grounds that it must assure the proper disposition of “problem banks” and enforce constitutional limits on entry by foreign banking institutions.

In 2001, the Federal Attorney General’s Office issued a legal opinion concluding that the specificity of Brazil’s banking law took precedence over the more general language in Law 8884, and thus effectively vested the Central Bank with sole jurisdiction over banks for all purposes. CADE has never acceded to that opinion, taking the position that Law 8884 (which was enacted after the banking law) is applicable by its terms to all commercial enterprises, and that CADE, as an autonomous agency, is not bound by a legal opinion issued by the Executive Branch. Two courts of first instance have considered the issue of whether bank mergers must be notified to CADE under Article 54. One court held that they did, concluding that Article 54 applied even where the merger had been reviewed by the Central Bank. A second court in a different bank merger held the opposite, on the grounds that the Central Bank’s review was pre-emptive and that the Federal Attorney General’s legal opinion bound the entire Federal Government, including CADE. Appeals in both cases are pending. CADE has considered no conduct cases involving banks in recent years because SDE, as an Executive Branch agency, is bound by the legal opinion and thus does not conduct investigations in the sector. 114

Negotiations between CADE and BACEN were undertaken to resolve the controversy by agreement. A consensus bill, sent to Congress in 2003 and approved by the House of Representatives’ Constitution and Justice Committee in December 2004, is now pending before the full House. The bill provides that the Central Bank will have exclusive responsibility for reviewing mergers that involve a risk to the overall stability of the financial system. In all other merger cases, CADE will have dispositive authority. Authority for handling conduct cases in the banking sector will be lodged exclusively with the BCPS. CADE and BACEN have long had a working agreement that is employed principally as a mechanism for exchanging information. At present, the two agencies are negotiating both an expanded agreement to promote cooperation and a joint work plan for conducting merger reviews.
The applicability of Law 8884 to the pricing activities of private firms is, of course, constrained if the government controls prices. Apart from regulation of public utility networks, the only direct price controls in Brazil at present apply to pharmaceutical products. Under a program initiated in late 2000, price caps for about 90 per cent of both prescription and over-the-counter drug products are set by the Drugs Market Regulation Chamber (CMED). CMED’s members are representatives of the Ministries of Health; Finance; Justice; and Development, Industry and Foreign Trade. SEAE serves as the Finance Ministry’s delegate to CMED and SDE is the Justice Ministry’s representative. Information about their role in CMED deliberations appears in the discussion of competition advocacy. The existence of drug price regulation does not prevent the BCPS from enforcing the competition law with respect to mergers and other forms of conduct undertaken by pharmaceutical firms, as is demonstrated by the cases involving the generic drugs boycott and the Novo Nordisk – Biobrás insulin merger.

Standard procedures for the enforcement of Law 8884 in regulated sectors are included in the pending omnibus bill for sector regulatory agencies. Sector agencies are required to monitor their industries for compliance with the competition law, report suspected violations, and provide technical reports on request to the CADE for use in enforcement proceedings. CADE is required to notify the relevant agency of decisions rendered in conduct and mergers cases, so that the agency may adopt any necessary legal measures.

5. Competition Advocacy

Competition advocacy by the BCPS has two dimensions. The first reflects the agencies’ role as consultants to the government and to sector regulatory agencies concerning legislation and regulations that implicate competition policy. The second is as proponents at large for increased public recognition and acceptance of competition principles. As to the first dimension, one important advocacy function is to forestall the creation of anti-competitive regulatory programs. For example, in 2003 the federal government was concerned about the price of liquid petroleum gas (LPG), an essential commodity for the Brazilian population in rural areas. SEAE and SDE engaged in the debate about whether to propose legislation establishing an LPG price control system, arguing successfully that modifications in existing technical regulations, as well enforcement against anticompetitive conduct, would achieve better results than controlling prices.
Similarly, in the retail fuel sector, the BCPS agencies have encountered attempts by local public prosecutors to establish price control systems by judicial order. Prosecutors seek court orders to fix maximum gasoline prices (where prices are deemed to be too high) or, alternatively, orders to fix minimum gasoline prices (where prices are deemed predatory). In many of these cases, the BCPS has been able to persuade prosecutors that unduly “high” prices were the result of a local cartel that could be prosecuted directly, and that unduly “low” prices were simply the result of legitimate competition.

On another front, SEAE participated in the discussions of a proposal by the Ministry of Culture for a new regulatory program. The Ministry recommended that the National Cinema Agency (ANCINE), which focuses its efforts on promoting the local production of movies, be transformed into a regulatory agency for audio-visual products. SEAE represented the Ministry of Finance in intra-governmental discussions that culminated in a decision restricting the changes in this sector to a review of the fiscal incentives currently offered to filmmakers. SEAE is now consulting with the Ministry of Culture on a joint proposal for this review.

A second variety of competition advocacy involves proposing competition-based improvements to existing government programs that affect market operations. SEAE is engaged, for example, in a project to reform Brazil’s pesticide registration process to speed the market availability of “generic” pesticides. No pesticide certifications have been issued since 2002 and more than 100 requests are pending. SEAE estimates that streamlining the procedure would result in a reduction of up to 30 per cent in pesticides prices. Other government programs with respect to which SEAE is playing a similar competition advocacy role include projects to stimulate the production and use of vegetable oil (biodiesel) as an alternative source of energy, to create an efficient market trading system for carbon emissions certificates under the Kyoto Protocol, and to develop a price-cap rule for postal service tariffs.

A third variety of competition advocacy is commentary on regulations proposed for adoption by sector regulatory agencies. The BCPS agencies state that they seek to promote competition in regulated markets by analysing proposed rules, publishing studies of competition in particular regulated sectors, and inviting regulatory agency staff to participate in seminars and other discussions. Nonetheless, they characterise the effects of their efforts as “very limited.”
Box 11. Competition Advocacy Procedures: Proposed Amendments

The omnibus bill to revise procedures for the sector regulatory agencies includes provisions dealing with competition advocacy. Regulatory agencies are required to request an opinion from SEAE 15 days before proposed norms and regulations are posted for general public comment. SEAE is required to file within 30 days thereafter a public opinion on the competitive implications of the proposal. Because the bill subjects proposed regulations to a mandatory 30 day public comment period, the SEAE opinion deadline assures that regulated entities and members of the public will be able to review the SEAE posting and comment on it before the public comment period expires. The regulatory agencies are obligated to respond on the record to comments filed during the public comment period. The agency response must be posted at least 3 business days before the agency’s commissioners meet to discuss the proposal.

With respect to BCPS competition advocacy in specific sectors, the agencies report no recent activity relating to the regulation of oil, LPG, and natural gas, other than a 2003 conference sponsored jointly by the BCPS and the OECD. The conference, billed as an “International Workshop on the Interface between Competition and Regulation in the LPG, Fuel, and Natural Gas Sectors,” was attended by staff of the three BCPS agencies, ANP, and the Ministry of Energy, and by a number of international participants. In telecommunications, interaction between the BCPS and ANATEL on regulatory issues is similarly rare. Several current and former CADE commissioners participated in a 2003 training course on competition issues organised for ANATEL by the Brazilian Institute for the Study of Relations between Competition and the Consumer (IBRAC).

In the electrical energy sector, SEAE assisted the Ministry of Mines and Energy to develop auction rules for a wholesale pool entity through which power generation firms will sell their output. After extensive testing of auction methods, SEAE recommended (and the Ministry adopted) certain restrictions designed to forestall collusion and promote more accurate identification of distributors’ demand schedules.

The airlines industry has received considerable advocacy attention, particularly from SEAE. As described in the 2000 Report (p. 225), the airlines regulatory authority (DAC) has never been enthusiastic about liberalising the market. Until 2000, four large airlines dominated the Brazilian industry: Varig, TAM, Transbrasil, and Vasp. The devaluation of the Real in 1999 and increased fuel prices led to bankruptcy for Transbrasil in 2001. Vasp also went into decline and ceased operations in 2005. The proposed merger between TAM and Varig, recently abandoned, was
likewise motivated by the financial straits of those two companies. The plight of the traditional carriers was in stark contrast to the experience of GOL, a new, low-cost airline whose market share and route offerings increased dramatically after its entry in 2001.

SEAE prepared several technical papers in 2001 urging further liberalisation in airline regulation, but without effect on DAC’s policies. In 2003, DAC decided that the established carriers needed assistance, and imposed constraints on capacity by regulating the purchase of airplanes and prohibiting new entry on routes unless all the incumbents had a high load factor. SEAE issued a series of papers criticising these actions. In early 2004, DAC acted even more aggressively by purporting to prohibit GOL from commencing a sale on airline tickets at prices that DAC considered predatory. Another SEAE paper criticised this action as well. Even before that paper appeared, however, DAC’s acting Director General was summoned before a Senate Committee and asked to explain why he was arrogating law enforcement authority vested exclusively in the BCPS. He responded that DAC had inherent authority to safeguard the industry by any action necessary. This answer did not satisfy the Committee. Two weeks later, the government installed a new Director General and GOL’s ticket sale went forward. The Congress is now considering legislation that would create a civilian authority for passenger airline regulation.

In the freight railway and interstate bus transportation sectors, SEAE and ANTT agree that improvements in the regulatory system are required, but little action has been taken to arrive at specific measures. In 2003, SEAE contracted with the Research Institute of Applied Economics (IPEA) to develop recommended regulatory changes for buses, a project that is still pending. SEAE is consulting with ANTT about improvements in the auction system employed to award concessions for the construction and operation of toll highways.

With respect to seaports, the agency identified in the 2000 Report (p. 227) as responsible for developing overall regulatory policy for that sector (GEMPO), has been displaced by a new entity, GT Portos. This group, unlike GEMPO, includes the Finance Ministry among its membership, and SEAE serves as one of the Ministry’s representatives. Current activity includes discussions with ANTAQ, the National Agency for Ports and Navigation, concerning enhancement of competition in the dredging services market and proposed improvements in port efficiency to promote Brazil’s export trade. In the financial institutions sector, discussions between the BCPS and the Central Bank have usually focussed on issues relating to the division of jurisdiction, although some effort has been devoted to analysing possible pro-competitive improvements in financial regulations.
As noted above, SEAE serves as the Finance Ministry’s delegate and SDE is the Justice Ministry’s representative to the Drugs Market Regulation Chamber (CMED), the body responsible for setting price caps and otherwise regulating the market for prescription and certain over-the-counter drugs. SEAE and SDE joined in designing the methodology for determining certain factors in the statutory pricing formula applied by CMED, and also addressed the particular pricing issues posed when a new drug is first introduced to the market. The two agencies are participating in a technical group composed of CMED members, industry representatives, and consumers that has recently been created to consider eliminating price controls for over-the-counter drugs. Likewise, both agencies are participating in a group established to consider regulatory issues in the private insurance health market.

A fourth type of competition advocacy arises in the context of privatisation. Privatisation proceedings typically present two occasions for involvement by competition agencies. The first is at the planning stage, when procedures for conducting the sale are devised and asset packages are structured. In that context, the competition agency can advocate pro-competitive auction rules and discourage the creation of private monopolies. The second is at the time of the sale itself, when the competition agency acts as a law enforcement authority to prevent anti-competitive acquisitions. As noted at the outset of this report, Brazil has not conducted any privatisations since 2002. The records available to the BCPS do not show whether there was any agency involvement in the planning stage for the privatisations that occurred in 2000 and 2001. CADE did review the transactions associated with the privatisation of CVRD. The sale of Petrobrás shares was structured as a public stock offering that did not pose any competition policy issues.

A fifth variety of competition advocacy focuses on anti-competitive regulations adopted by state and local governments. Article 7 X of Law 8884 provides that CADE can “request from the Federal Executive Branch agencies, and from state, municipal, Federal District and territorial authorities, the taking of all acts required for compliance with this Law.” While CADE cannot compel acceptance of its recommendations, the statutory language provides CADE with a charter to comment on state regulatory programs. As described in the 2000 Report (p. 195), CADE had at that point made three requests under Article 7X, including a 1998 recommendation that the city of Brasilia deregulate taxi rates. The taxi recommendation was not adopted, although the municipality did act to reduce taxi rate levels. The 2000 Report (p. 210) recommended that the CADE exploit its political and moral authority as the national competition agency by employing Article 7 X and the consultation procedure under Resolution 18 to address anti-competitive restraints imposed by state and local governments.
CADE advises that it does not have records showing what activity, if any, has occurred under Article 7 X since 2000. Two recent CADE proceedings, described elsewhere in this report, have led to successful 7X requests. In the first case, involving concerted action by the fuel retailers association in Brasilia to obtain a municipal ordinance barring filling stations at supermarkets and shopping centres, the city repealed its ordinance in response to CADE’s recommendation. In the other case, involving Novo Nordisk’s acquisition of Biobrás, the Trade Ministry suspended certain anti-dumping measures that had previously been imposed on the importation of insulin. Aside from CADE’s activity under Article 7 X, SEAE reports that it is involved in a project to develop federal guidelines for local regulation of water and sewerage services.

A sixth form of competition advocacy is the study of competitive dynamics in individual Brazilian markets and the publication of reports on the sectors studied. SEAE regularly publishes technical “Working Papers” dealing with competition policy issues in particular markets. Since 2000, sectors addressed by SEAE papers have included pharmaceuticals, freight railways, aviation, petroleum, telecommunications, electricity, supermarkets, health insurance, and sewerage systems. In 2004, SDE commissioned research studies by the Research Institute of Applied Economics (IPEA) in the health care and banking sectors.

Training and educational seminars offered to other government agencies is a final type of advocacy undertaken by the BCPS. In the past two years, the BCPS has undertaken a number of initiatives designed to promote understanding of, and appreciation for, competition law both among the members of the judiciary and among public prosecutors. In December 2004, CADE joined with the OECD and a judge’s association to offer a 2-day workshop on selected competition topics to federal judges in Brasilia. SDE has hosted two conferences to provide training on competition matters for public prosecutors and the federal judges, and SEAE has assisted the Federal Prosecutor’s Office to organise a competition law course for prosecutors. BCPS officials have also been invited with increasing frequency to attend and participate as speakers at conferences organised by judges and prosecutors. In a separate initiative, SDE’s competition department (DPDE) has been cooperating with SDE’s consumer protection department (DPDC) to present joint conferences and training workshops about competition law for consumer protection entities in the Brazilian states. Since the beginning of 2003, four national conferences and more than 20 local workshops have been held.

The second dimension of competition advocacy entails efforts to promote increased recognition and acceptance of competition principles in society at large. The BCPS agencies fully appreciate the importance of such
advocacy. CADE and SEAE, in particular, have developed a variety of programs to advance public understanding. Over the past five years, the two agencies have made numerous presentations to the business community on competition policy and competition law enforcement topics. Groups addressed include the most important trade and industry associations, such as FIESP (the Federation of Industries of São Paulo State), CIESP (São Paulo State Industries Centre), and CNI (National Confederation of Industry); many of the Chambers of Commerce representing international businesses; and more than a dozen other commercial and professional associations. Additional presentations, focused on more technical legal issues, have been provided for practitioner groups. When the “Fast Track” merger procedure was instituted in 2003, for example, law firms were invited to SEAE sessions in Rio de Janeiro, Sao Paulo, and Brasilia to discuss the categories of cases that would be reviewed under the simplified process. Presentations on other legal topics have been made to the competition committee of the Brazilian Bar Association (OAB); competition law institutions such as the Centre of Studies for Lawyers (CESA), the Study Group on Law and Economics (GEDECON), and the Brazilian Institute for the Study of Relations between Competition and the Consumer (IBRAC); and to faculty and students at various law schools, university law and economics departments, and other academic institutions. In 2003, SDE made a series of presentations to discuss new techniques for cartel investigations and to promote the antitrust compliance certification program. More recently, representatives of all three agencies have been presenting and explaining details of the proposed legislation to revise Law 8884.

The websites maintained by each of the agencies are an important means by which the BCPS communicates with the public. The sites contain antitrust legislation, case decisions, resolutions, ordinances, enforcement guidelines, press releases, annual reports, articles, working papers, and links to related materials. CADE’s site also has a detailed FAQ section on competition issues and SDE’s site provides information concerning cartels and explains how to submit a complaint about anticompetitive conduct. Hardcopy publications include a booklet by CADE providing basic information about competition law and the BCPS, and the CADE Journal, which contains important CADE decisions and resolutions, and articles on competition law and policy issues by BCPS staff, private sector lawyers and economists, and academicians. SDE and the National Petroleum Agency (ANP) have joined to publish a brochure with information on anticompetitive conduct in the fuel market.

Promoting academic education in competition law and policy is another method of competition advocacy employed by the BCPS. CADE annually sponsors two well-publicised conferences at which a prize is awarded for the
best paper on competition policy written by a university student. All three agencies offer 4 to 8 week intern programs twice each year to acquaint university students with BCPS functions. The programs, which have attracted an increasing number of law, economics, and business school students, provide practical experience for future specialists in the field, as well as a broader knowledge of competition issues for students in other fields.

With respect to media relations, each of the three agencies has a communications advisor, and SEAE and SDE are also assisted by the communications staffs of their respective ministries. In dealing with the media, the agencies emphasise maximum transparency consistent with confidentiality restrictions. Press conferences are scheduled for announcements of important cases and competition policy initiatives, and press releases are prepared in a non-technical style suitable for a general readership. Journalists covering the BCPS give the agencies high marks for media relations, although expressing less enthusiasm about the confidentiality constraints. As journalists have become more educated about the BCPS, the quality and accuracy of the coverage has improved commensurately. BCPS officers are increasingly contacted by journalists as background sources on economic regulatory issues unrelated to the competition law.

CADE reports that it has been the subject of intense press interest in recent years. Statistics on the number of media stories concerning CADE show an increase from 213 in 2003 to 390 in 2004. SDE estimates that about 150 stories per year deal with its competition activities. An SDE survey of stories that ran in November and December 2003 and in July and August 2004, showed that 59 per cent were favourable, and 5 per cent were unfavourable. The remaining 36 per cent were characterised by SDE as merely informative. SEAE’s statistics about the number of stories concerning it are highly variable, showing 193 items in 2000, dropping to 94 in 2001, and then spiking to 253 in 2002 before declining again to 155 in 2003 and 86 in 2004. Stories about SEAE through the first third of 2005 stood at 64, a rate which extrapolates to 192 by year’s end. SEAE advises that the statistics reflect only those articles in which SEAE is cited by name, and that stories about competition law are erratic about mentioning SEAE specifically.

Among business leaders and large corporations, knowledge about the BCPS, the competition law, and competition policy generally has increased significantly in the last five years. Knowledge is also beginning to percolate among smaller firms and the general public, at least in the large population centres, although the common perception that competition law is supposed to control high prices remains an obstacle. Turning from the degree of understanding to the level of commitment, Brazil’s large business associations are remarkably supportive of competition policy, on the
grounds that its implementation will effectively promote Brazil’s competitiveness in international markets. The business community does not always agree with BCPS decisions in individual cases, but it supports legislation to consolidate competition law institutions and to introduce a pre-merger notification system.

6. Conclusions and Policy Options

6.1 Current strengths and weaknesses

Despite serious handicaps, the BCPS has made substantial headway during the past five years in implementing sound competition policy in Brazil. Especially since 2003, it has effectively addressed the most critical problems within its power to control. Most of the recommendations in the 2000 Report to which it could respond have been accomplished. Thus, the effort previously devoted to reviewing competitively innocuous mergers was significantly reduced by implementation of the fast track and joint review procedures, and the resources freed were re-directed to cartel enforcement. Merger notification standards were reinterpreted to limit filing requirements to transactions with a sufficient Brazilian nexus (despite the adverse effect of that interpretation on the agencies’ notification fee revenues). Investigative functions were consolidated and coordinated between SDE and SEAE to increase efficiency, and at least some enforcement attention was directed to sectors in which government monopolies had formerly operated. New statutory powers to conduct on-site inspections and to establish a leniency program were aggressively employed.

Many other improvements have been made in areas not addressed by the 2000 report. Both merger review and conduct case backlogs were cleared. An innovative system for certifying corporate antitrust compliance programs was introduced. Techniques for preventing the integration of merging parties during agency review proceedings were developed and employed, eliminating the perverse incentive for parties to delay the merger review process. Similarly, injunctive tools were employed to stop anti-competitive conduct in non-merger cases while investigative proceedings were underway. The capacity to undertake sophisticated economic analysis was advanced by SDE’s creation of a quantitative methods centre, and economic studies were commissioned to develop improved methods for employing quantitative and econometric techniques. In the courts, CADE established its right to participate in emergency hearings to stay CADE orders, and successfully required that assessed fines be deposited in court during judicial proceedings to stay fine execution.
The BCPS vigorously expanded its interaction with foreign antitrust authorities and widened its participation in multi-national antitrust organisations, both in South America and abroad. As to competition advocacy, the BCPS agencies (primarily, but not exclusively, through SEAE) successfully resisted several anti-competitive regulatory programs and proposals. All three agencies participated in the important effort to increase the understanding of competition law among public prosecutors and members of the judiciary, and SDE effectively employed its consumer protection department to help educate local consumer protection organisations about competition policy. All three agencies also engaged actively in promoting the development of a competition culture in Brazil. Finally, the agencies overcame long-standing disagreements to join in a unified proposal for substantial legislative revisions to the competition law.

On the other hand, the BCPS did not pursue several of the recommendations in the 2000 Report. CADE devoted little attention to addressing state and local anti-competitive restraints, both law enforcement and competition advocacy activity in some market sectors was barely visible, and CADE was unwilling to place sole reliance on the “first binding document” as the trigger event for merger notification. Other areas in which improvements could be made relate to the transparency of CADE’s decisions and guidelines, and its approach to private antitrust litigation. Nonetheless, the areas in which the BCPS deserves commendation substantially exceed, both in number and importance, those in which its performance was in some way deficient.

Particular strengths of the BCPS include a strong institutional dedication to high standards of integrity, autonomy, sound policy, and fair procedure; an excellent leadership cadre; and a supportive business community. Weaknesses include a counter-productive institutional structure and a staff that is neither sufficient in size nor compensated adequately to retain qualified employees over the long term. The consequences include poor institutional memory, inefficiency, and delay. There are also statutory provisions relating to merger notification and the leniency program that interfere with efficient and effective law enforcement. The unfamiliarity of the courts with competition law is another source of difficulty.

The following recommendations, designed to address the full array of competition law and policy issues facing the BCPS, are presented in two groups. The first deals with recommendations for action by branches of the federal government other than the BCPS, while the second group involves changes that CADE can implement.
6.2 Recommendations

Recommendations to the Federal Government

6.2.1 Consolidate the investigative, prosecutorial, and adjudicative functions of the BCPS into one autonomous agency

There is a clear consensus in Brazil, supported by a decade of experience, that the current structure of the BCPS is not merely inefficient but counter-productive. The proposed legislation, by combining SDE with CADE and redirecting SEAE to focus on competition advocacy rather than case investigation, consolidates all of the essential law enforcement functions of the BCPS into a single, autonomous agency. While there is no one correct organisational scheme for competition agencies, the single-agency model has proven successful in many jurisdictions and its adoption in Brazil will be an improvement over the status quo.

The 2000 Report (p. 215) observed that CADE’s independence was compromised under the present statute because law enforcement cases could be initiated only by SDE, an Executive Branch agency, and that consequently CADE lacked full authority “over the general direction of competition policy in the country” (p. 215). Although the proposed bill eliminates Executive Branch participation in CADE’s processes, the capacity of the Plenary to control the direction of law enforcement will be diminished even further because decisions by the Director General to close (or not to open) administrative inquiries may be appealed only to the Director General and not to the Plenary.

The form of single-agency model reflected in the proposed bill thus entails a strong prosecutor who is completely independent from the adjudicatory body. An alternate model that maintains the separation of prosecutorial and adjudicative functions but permits some indirect interaction between the two would entail empowering the President of CADE to appoint (and remove) the DG subject to approval by the Plenary. This model has also worked in other jurisdictions and deserves consideration to the extent that Brazil wishes to vest greater authority to control the law enforcement agenda in the hands of the President and the Plenary rather than in the hands of the Director General.
6.2.2 Protect the autonomy of the re-constituted CADE by extending the terms of the commissioners, the Director General, and other senior officers to at least four years (and more preferably five), and by making commissioners’ terms non-coincident

Both the existing law and the proposed legislation establish CADE as an autonomous body, free from control by the Executive Branch. Such autonomy is fully appropriate given CADE’s power to render judgment and impose penalties for violations of Law 8884. Autonomy does not, of course, mean complete insulation from the rest of the government. CADE’s decisions are subject to review by the courts, the integrity of its processes are monitored by the Public Prosecutor, and both the President and the Congress play a critical role in the appointment of commissioners and the other senior officers of the agency.

The language in the present statute (Art. 4 paragraph 1), providing that commissioners will serve a two year term with the possibility of re-appointment for a second term, detracts from CADE’s autonomy by creating an incentive for sitting commissioners to adjust their decisions in order to win re-appointment. Even if such adjustment never actually occurs, the short term limit creates the suspicion that it could. In any event, a two year term is inefficiently short for commissioners who are charged with resolving technical and complex issues litigated in an adversary process. The accumulated experience of commissioners is too valuable for such quick dismissal.

The proposed statute contemplates four year terms for the commissioners, the Attorney General, and the Chief Economist, and a two year term for the Director General. All of these positions are presidential appointments with Senate approval, and all (including the Director General) warrant appointment for at least four years, for the reasons described above. Consideration should also be given to establishing five year terms, on the grounds that officers of autonomous agencies should have terms longer than that of the appointing political agent. The President of Brazil serves a four year term, and setting agency appointments for the same duration means that each president will be able to replace the agency’s entire membership.

Whether or not commissioner terms are set for four years or five, the terms should be non-coincident, as the proposed bill provides. The prospect that a president could replace all of the commissioners during the course of a four year presidential term is not as troubling in terms of autonomy as the simultaneous replacement of all or most of the commissioners at a single point in time.
6.2.3 In making appointments, accord due consideration to the importance of technical expertise in economics and competition law

Competition agencies apply broadly written legal standards to what can be highly complex forms of commercial activity. Technical expertise is an important factor in arriving at decisions that accurately distinguish harmful from benign conduct. Accurate analysis is important not only because of the high stakes for the parties involved, but also because ill considered enforcement of a competition law can materially impair economic vitality, discourage investment, and reduce innovation.

6.2.4 Fix the Plenary’s quorum at four rather than five whenever the number of commissioners available to vote on a case is reduced to four by vacancies or recusals

The quorum of five commissioners is now required by the statute (Art. 49) in all circumstances. Case decisions are sometimes delayed by the absence of a sufficient number of participating commissioners to constitute a quorum. A modest exception would permit a quorum of four to resolve cases where the number of available commissioners was reduced to four by vacancies, recusals, or other disability.

6.2.5 Adopt legislation creating CADE career positions and provide adequate resources to hire and retain a sufficient number of qualified professional staff

No agency should be expected to operate for a decade using borrowed and temporary staff, especially where effective and efficient performance of the agency’s mission depends so greatly on accumulated institutional knowledge. Without career and permanent positions, CADE cannot compete effectively against other agencies to hire qualified personnel. The 2000 Report concluded (p. 200) that providing staff for CADE “should be a top priority within the government and the Congress,” a sentiment that can only be repeated here with emphasis on the word “top.”

The problems that CADE faces will not, however, be resolved simply by the creation of career staff positions. The number of, and the compensation associated with, those positions is also critically important. The present employee staff at CADE, even including the 28 temporary assistants, is not sufficient to permit expeditious completion of the agency’s work, thus contributing to the delay that afflicts CADE’s proceedings. The situation at SDE is, if anything, worse, with a staff of 35 professionals attempting to handle 800 pending matters. In any event, additional resources are
warranted if SDE and CADE are to increase efforts devoted to cartel enforcement (as recommended elsewhere in this report). The BCPS has already done essentially everything possible to wring more productivity from existing resources. Additional output is not possible without additional staff.

Adequate compensation (including DAS authority) is also important if CADE is to hire and retain qualified employees. Problems attributable at least in part to inexperienced and overstretched staff, such as unduly burdensome information requests and inadvertent disclosures of confidential information, can be expected to diminish as employee tenure lengthens.

A separate personnel staffing issue arises with respect to the CADE Attorney General’s Office. Although the lawyers in that Office report to the CADE Attorney General and not to the Federal Attorney General, the latter determines how many attorneys should be assigned to CADE. The current number is 13, down from the staff of 18 to 20 described in the 2000 Report (p. 187). Meanwhile, the number and complexity of pending court cases involving CADE as a party has increased significantly from 2000 to 2004. The actual market impact of many CADE decisions depends upon judicial enforcement, and assuring that CADE is adequately represented in the courts is therefore no less important than assuring that CADE has adequate personnel for its own processes. The number of attorneys assigned to the Attorney General’s Office should be increased.

6.2.6 Consider establishing CADE regional offices

As a final point on the issue of resources, consideration might be given to the economic feasibility of establishing CADE regional offices in locations across Brazil. No agency other than CADE has authority to enforce Law 8884, and many conduct cases warranting prosecution can be expected to arise in population centres outside Brasilia. Maintaining a local presence will also enhance CADE’s relationships with local public prosecutors and facilitate its efforts to promote the public’s understanding of and support for competition policy.

6.2.7 Revise proposed bill to eliminate allocation of fine proceeds to CADE and SEAE.

Under the present law, all revenues from fine collections are remitted to the Fund for the Defence of Diffused Rights (CFDD). The proposed bill allocates 25 per cent of fine revenues to CADE and an equal amount to SEAE, with the remaining 50 per cent directed to the Fund. It is undesirable to give a law enforcement agency a budgetary interest in the size of fines it
imposes by discretionary judgment. Even if the agency remains uninfluenced by the prospect of fine revenue, there is no means by which the agency’s impartiality can be proven to the companies on which fines are imposed. The better practice is to remit fines to a general account disassociated with the enforcement agency.\textsuperscript{126}

6.2.8 Modify the merger notification and review process to

- Adopt an explicit standard for reviewing the competitive implications of merger transactions.

Law 8884 does not now contain an explicit standard by which the legality of mergers is to be evaluated. To provide transparency for affected merging parties and guidance for the competition agency, the merger control law should include an express standard. The proposed legislation includes language prohibiting mergers that “eliminate competition in a substantial part of the relevant market, that can create or strengthen a dominant position, or that can dominate a relevant market.” This language, similar to that adopted in 2004 by the European Union, establishes a suitable basis for assessing mergers.

- Establish a pre-merger notification system.

Both the BCPS and the business community agree that the existing post-merger notification system in Brazil is unwieldy and inefficient. The proposed legislation establishes an effective pre-merger notification system by providing that the parties to a merger must preserve “the conditions of competition” between themselves and may not execute a notified transaction until it is evaluated by CADE.

- Eliminate the present market share notification threshold and adopt thresholds based on the domestic turnover of both the larger and the smaller parties to the transaction.

The present law requires a merger to be notified if the resulting entity controls twenty per cent of a relevant market, or if any participating company has total annual turnover of BRL 400 million. The statutory language does not specify that turnover is to be measured by sales in Brazil and thus may be read as referring to sales in the worldwide market. There are three defects to this formulation. First, the failure to restrict turnover to the Brazilian market sweeps into the notification net many transactions that have no cognisable competitive significance for Brazil. The international antitrust community concurs that countries should not seek to assert jurisdiction of mergers that lack a sufficient nexus with the country concerned.\textsuperscript{127} CADE has recently decided that the existing language should
be interpreted to cover only Brazilian turnover, but this restriction should be included in the statutory provision rather than left to the enforcement agency’s interpretation.

Second, one of the existing notification tests depends on market share. Again, the antitrust community agrees that notification requirements should be keyed only to standards that are objectively quantifiable and specifically recommends against the employment of market share as a test.\(^{128}\)

Third, the existing turnover test is triggered if only one party to the transaction meets it, regardless of the size of the other party. This, too, can result in the notification of mergers that have no possible anticompetitive potential. The international consensus recommendation on this point is that notification “should not be required solely on the basis of the acquiring firm’s local activities, for example, by reference to a combined local sales or assets test which may be satisfied by the acquiring person alone irrespective of any local activity by the business to be acquired.”\(^{129}\)

The proposed bill addresses all of these defects by requiring notification only if (1) at least one of the transaction participants has total turnover in Brazil of BRL 150 million and (2) at least one other transaction participant has total turnover in Brazil of BRL 30 million. Thus, turnover is limited to Brazilian sales, the market share test is eliminated, and notification is required only if both the larger and the smaller parties to the transaction have an appropriate amount of Brazilian turnover.

- Eliminate notification of non-merger transactions.

Where notification systems cover not only mergers but all restrictive agreements, the common experience is that the costs imposed on the business community and on the enforcement agency exceed the resulting benefits to competition. The proposed statute, by expressly restricting the notification requirement to “mergers,” effectively eliminates the language in the existing law that requires reporting of non-merger transactions.\(^{130}\)

- Provide for expedited review and clearance of transactions that do not raise competitive concerns

The present law does not require notification prior to the consummation of transactions, and thus does not automatically suspend transactions while the BCPS conducts its review. The proposed bill establishes a pre-merger notification system under which consummation of notified transactions is prohibited until review is complete. The international consensus respecting such “suspensive” notification systems is that they should include a mechanism permitting expedited termination of the waiting period for transactions that do not raise material competitive issues.\(^{131}\)
Under the proposed bill, the Directorate General must publish a summary notice of the proposed within five days after the notification filing is deemed complete. Thereafter, the Directorate General has 20 days either to request further information or to approve the transaction. In the case of approval, the Plenary has a 15 day period within which it may publish a notice announcing its determination to review the Directorate General’s decision. If the Plenary takes no action during that period, the transaction’s approval is confirmed and it may then be consummated. Thus, the proposed system entails an early termination mechanism under which non-controversial transactions will be approved no later than 40 days after filing (and perhaps sooner if the Directorate General acts in less than 20 days).

- Establish a final deadline by which CADE must determine whether to block a merger

Under the existing law, CADE must render a final decision on a merger within 60 days after the receipt of a recommendation from SDE (subject to suspension for the collection of additional information). Failure by CADE to meet its deadline means that the merger is deemed approved.

As noted above, the proposed bill introduces an early termination procedure under which an inoffensive transaction may be consummated 40 days after filing. For transactions that raise competition issues, the bill establishes a series of deadlines tracking each step in the process, rather than a single deadline for completion of the entire review. The Phase I investigation by the Directorate General must be completed within 60 days of the satisfactory production of information required from the parties, at which point the DG must either approval the merger or transmit it to the Plenary for judgment. (If the DG approves the merger, the Plenary has a 15 day opportunity to designate the approval for review.)

Once a contested case is lodged with the Plenary for review, the parties have 30 days to file a defence and thereafter the Reporting Commissioner has 20 days to order further investigation or schedule the matter for judgment by the Plenary. If there is further investigation, its completion triggers a 10 day period for the DG and the parties to file supplemental briefs, followed by a 20 day period during which the Reporting Commissioner must schedule the matter for judgment by the Plenary. There is, however, no deadline for the Plenary’s final determination.

The international antitrust community agrees that competition agencies must have sufficient time to analyse complex transactions, but recognises also that extended review periods can cause abandonment of transactions, impair transition planning by the merging parties, and force deferral in the realisation of merger efficiencies. The statement of general principle developed on this point by the ICN is that merger reviews should “be
completed within a reasonable time frame. A reasonable period for review should take into account, \textit{inter alia}, the complexity of the transaction and possible competition issues, the availability and difficulty of obtaining information, and the timeliness of responses by the merging parties to information requests.\textsuperscript{132} Similarly, the OECD states that merger reviews “should be conducted, and decisions should be made, within a reasonable and determinable time frame.”\textsuperscript{133}

The ICN recommendations provide additional specificity with respect to waiting periods in suspensive merger review systems, recommending that jurisdictions “seek convergence of their waiting periods with the time frames commonly used by competition agencies internationally. Thus, initial waiting periods should expire in six weeks or less, and extended or ‘Phase II’ reviews should be completed or capable of completion within six months or less following the submission of the initial notification(s).”\textsuperscript{134} It is important to note, however, that these recommended deadlines are for the termination of waiting periods, and are not deadlines for a final and definitive adjudication of the transaction’s merits. The ICN follows its waiting period deadline recommendations with the statement that parties should be free to consummate transactions upon expiration of waiting periods “unless the competition agency takes formal action to extend the waiting period (as, for example, by initiating Phase II proceedings), to impose conditions to closing, or to prohibit or enjoin the transaction.”\textsuperscript{135}

The proposed bill contemplates that, within forty days after notification is filed, Phase I review of the initial filing would conclude with either an early termination or conversion of the case into a Phase II investigative proceeding. Thus, the proposal conforms to the ICN recommendation respecting the duration of Phase I. Phase II under the proposal runs up to 165 days, at which point the matter must be scheduled for judgment by the Plenary if not otherwise resolved. While this is less than the six month period recommended by the ICN, the deficiency is that the last event subject to a deadline is submission of the case to the Plenary. The merging parties remain barred from consummation for however long the Plenary deliberates.

An effective solution would be to permit parties to consummate the transaction 20 days after the Reporting Commissioner schedules the case for Plenary deliberation, unless a Resolution 28 precautionary order is issued in the interim. A Resolution 28 order requires appropriate findings that a preliminary injunction is necessary and is itself an order subject to judicial review. Adding such a requirement to the end of the merger review process would require the Plenary to demonstrate on the record why a transaction should continue to be blocked for more than six months.
• Establish formal settlement procedures for merger cases

The existing statute does not establish any formal mechanism for settlement of merger cases by consent. Negotiated resolution of merger cases should be encouraged because many competitively problematic transactions may be saved by some appropriate modification of the merger’s elements. The proposed bill includes a suitable provision empowering the Directorate General (with the mandatory participation of the Reporting Commissioner) to negotiate a settlement agreement for a notified merger at any time before the case is lodged with the Plenary as a contested transaction. Once negotiated, the agreement must be published for at least ten days of public comment, after which the DG may either transmit the agreement to the Plenary for disposition or re-negotiate the proposal. The public comment period is a welcome feature of negotiated settlement procedures, as it helps assure the agency that it has correctly assessed the likely impact of the agreement on the relevant market.

Modify the leniency program to

• Eliminate exposure of leniency participants to prosecution under criminal laws other than the Economic Crimes Law

The existing leniency provision in Law 8884 (Art. 35-C) shelters cooperating parties from prosecution under Brazil’s Economic crimes Law (No. 8137/90), but not under other criminal laws (such as those against racketeering and conspiracy) under which cartel participants might be attacked. The incentives of a conspirator to seek leniency are impaired by exposure to such a risk. The statute should be amended to bar any form of criminal prosecution for conduct that constitutes a violation of the competition law and is the basis for a firm’s status as a leniency program participant.

• Reduce the exposure of leniency participants to civil damages awards

Under the existing law, leniency program participants receive no protection from civil damage suits by private parties. While this can serve to deter a conspirator from applying for leniency there are, in general, no good reasons to excuse a conspirator from liability for damages to those victimised by the conspiracy. Brazil’s legal system, however, applies “joint and several liability” to the members of a conspiracy. This means that a conspirator can be required to pay more than his share of damages if other members of the conspiracy are judgment proof. The principle underlying joint and several liability is that each member of a conspiracy (such as a price-fixing cartel) should be exposed to liability for the entire amount of damages caused by the conspiratorial scheme.
One option for dealing with the exposure of leniency applicants to civil damages would be to eliminate their joint and several liability, so that they would never be liable for more than the damages attributable to their own conduct. A further option would be to reduce or eliminate the damage award against the leniency defendant to the extent that offsetting funds are available from other conspirators.\footnote{136}

- Adopt regulations providing that incriminating evidence provided by leniency program applicants will not be used against them if they are found ineligible for participation.

The existing law provides (Art. 35-B, §10) that proffers by leniency applicants later found to be ineligible must be kept confidential by the BCPS and will not be treated as an admission that the party engaged in the conduct at issue or that the conduct is unlawful. The statute does not, however, constrain internal use of the information by the BCPS itself. This is another form of exposure to risk that can deter leniency applications. The BCPS should adopt regulations prohibiting program intake officers from disclosing to investigative personnel any confidential information received from program applicants later found ineligible.\footnote{137}

6.2.9 Consider designating specialised judges and appellate panels to resolve competition law issues

Whether or not CADE is successful in persuading the judiciary to review CADE’s decisions only for procedural irregularities and not to address antitrust issues, Brazilian courts will nonetheless confront antitrust questions in adjudicating criminal cases under the Economic Crimes Law and civil suits seeking antitrust damages. Although there are constitutional constraints on the creation of specialised courts, the chief judge of a regional appellate court may designate specialised panels to hear appeals of antitrust cases and may also suggest to the first instance courts in the region that specialised judges be designated to hear first instance antitrust cases. If judges are designated for service as specialists, they should receive appropriate training in the analysis of economic issues, which could then also be employed in resolving cases that involve sector regulatory agencies or that otherwise raise economic issues.\footnote{138}
6.2.10  **Limit the Economic Crimes Law to cartel violations**

The federal Economic Crimes law (No. 8137/90) prohibits not only cartel agreements among competitors to fix prices, divide markets, or rig bids, but also unilateral conduct involving alleged abuse of economic power, unjustified price increases, predatory pricing, and price discrimination. While unilateral conduct can be anticompetitive, it is not necessarily so, and exposing it to criminal law enforcement risks deterring or punishing efficient economic behaviour. CADE is better equipped to deal with such conduct under Law 8884. The Economic Crimes Law should therefore be amended to delete non-cartel conduct from its ambit.

6.2.11  **Consider limiting civil suits for antitrust damages to parties and conduct that have been subject to a specific finding of illegality by CADE.**

Private plaintiffs in Brazil may file suit against seeking antitrust damages under Law 8884 and other laws. Just as exposure to prosecution under the Economic Crimes Law can deter pro-competitive behaviour, exposure to private suits for antitrust damages can do likewise. Private damage suits may be commenced in any of Brazil’s first instance courts, and there is no information available to determine how frequently such suits are undertaken or how often they result in awards against conduct not properly characterised as anti-competitive. One method for confining private suits to legitimate claims is to amend the law so that such suits may be filed only against parties and conduct that have been subject to a specific finding of illegality by CADE. Such an amendment could include a sunset clause under which the restriction would lapse after a certain number of years unless renewed. Such a clause would provide an opportunity to collect information about and assess the record of private antitrust enforcement in Brazil. If such legislation is not considered appropriate, efforts should nevertheless be undertaken to collect information going forward about the volume, nature, and outcome of private antitrust litigation.

6.2.12  **Adopt the provisions in the omnibus sector agency bill establishing standard procedures for enforcing the competition law**

Although Law 8884 applies to firms in regulated sectors, most of the sector agency laws neither refer specifically to the competition law nor establish procedures for cooperation between the sector agency and CADE with respect to its enforcement. The pending omnibus bill for sector regulatory agencies includes suitable provisions requiring sector agencies to monitor their industries for compliance with the competition law, report
suspected violations, and provide technical reports on request to the CADE for use in enforcement proceedings. CADE, for its part, is required to notify the relevant agency of decisions affecting sector firms rendered in conduct and mergers cases, so that the agency may adopt any necessary legal measures.

6.2.13 **Adopt the provisions in the omnibus sector agency bill establishing standard procedures for the participation of SEAE in agency proceedings to promulgate norms and regulations**

Under the proposed bill reorganising the BCPS, SEAE’s focus is redirected to competition advocacy, and it is given specific responsibility for promoting competition by consulting with regulatory agencies and opining on proposed regulations. The pending omnibus bill for the sector regulatory agencies includes appropriate complementary provisions establishing a specific role for SEAE in sector rulemaking proceedings. Thus, regulatory agencies are required to request an opinion from SEAE 15 days before proposed norms and regulations are posted for general public comment, and SEAE is required to file within 30 days thereafter a public opinion on the competitive implications of the proposal. The regulatory agencies are obligated to respond on the record to comments filed during the public comment period.

6.2.14 **Adopt the pending bill providing for enforcement of the competition law in the banking sector**

The pending bill, devised jointly by the Central Bank and CADE, provides a suitable vehicle for resolving the long-standing disagreement between the two agencies over application of the competition law to financial institutions. The bill provides that the Central Bank will have exclusive responsibility for reviewing mergers that involve a risk to the overall stability of the financial system. In all other merger cases, the Bank will investigate jointly with the BCPS, and CADE will have dispositive authority. Authority for handling conduct cases in the banking sector will be lodged exclusively with the BCPS.
6.2.15 Address anti-competitive restraints by state and local governments

This renews a recommendation made by the 2000 Report (p. 195), which urged CADE to exploit its political and moral authority as the national competition agency by employing Article 7 X and the consultation procedure under Resolution 18 to examine anti-competitive restraints imposed by state and local governments. Article 7 X confers power on CADE not only to request action from federal agencies but from “state, municipal, Federal District and territorial authorities” as well. CADE has employed its Article 7X authority to address local regulation only rarely, and in recent years only when the regulatory issue arose in the context of a law enforcement proceeding. The 2000 report observed (p. 195) that CADE could perform “a highly useful function” by assessing local regulatory schemes, reflecting the view that anti-competitive restraints imposed by law are often more harmful to competition than any restraints imposed by private agreement. As described previously in this report, SDE’s competition department (DPDE) has been cooperating with SDE’s consumer protection department (DPDC) to present joint conferences and training workshops about competition law for local consumer protection entities in the Brazilian states. This program could serve as a vehicle for identifying local regulatory systems that warrant CADE’s consideration.

6.2.16 Serve as a competition advocate with respect to federal legislation and regulatory programs

Although the proposed bill provides SEAE with special responsibility for assessing the competitive implications of government regulatory activities, CADE will still retain its power under Article 7 X of the competition law to request that federal agencies take any actions necessary for compliance with the competition law. CADE has construed Article 7 X as vesting it with authority to recommend changes in anti-competitive regulations, and it should continue to maintain that interpretation. CADE plays a critical role in the regulatory process as the only autonomous agency with the appropriate authority and expertise to opine on competition policy issues. SEAE, as an Executive Branch agency, is ultimately responsible to the Minister of Finance and hence subject, at least potentially, to political control of its advocacy positions.
6.2.17 Update the 2001 Horizontal Merger Guidelines

Merger guidelines not only establish an analytical framework for the competition agency to employ in considering merger cases but also make the merger review process more transparent and predictable to the private sector. For this reason, the international antitrust community encourages competition agencies to review and revise their guidelines regularly to reflect current practice and implement improvements.\textsuperscript{139} The current merger guidelines issued by the BCPS in August 2001 do not appear to reflect the analytical elements actually employed in the examination of mergers. As noted previously, the guidelines do not mention the Herfindahl-Hirschman (HHI) index for measuring market concentration or the failing firm defence, although CADE in fact employs both concepts in its merger decisions. A project to review the guidelines would also provide an opportunity for the BCPS to address the recommendations issued by the International Competition Network for formulating merger review guidelines.\textsuperscript{140}

6.2.18 Assure that case decisions enable the public to assess rationality and fairness in application of the competition law.

Transparency is an important feature of decision-making by competition agencies because the private sector needs a clear understanding of legal constraints if it is to engage in efficient business planning. Moreover, the prospects for achieving a high degree of compliance with the competition law depend heavily on the advice provided by competition law practitioners to their business sector clients, and reliable advice cannot be provided if the enforcement policies are unpredictable. The International Competition Network, in comments directed to merger review proceedings but equally applicable to conduct cases, has recommended that

A reasoned explanation should be provided for decisions to challenge, block or condition the clearance of a transaction, and for clearance decisions that set a precedent or represent a shift in enforcement policy or practice. What matters is that the available information should allow the public to monitor consistency, predictability, and fairness in the application of the merger review process.\textsuperscript{141}

Similarly, the OECD has urged member countries to “ensure that the rules, policies, practices and procedures involved in the merger review process are transparent and publicly available, including by publishing reasoned explanations for decisions to challenge, block or formally condition the clearance of a merger.”\textsuperscript{142}
Decisions issued by CADE are fully reasoned, but do not always tie the analysis to applicable guidelines or identify whether the agency is introducing a new or modified analytic element. Some additional attention to the interests of the private sector in understanding the evolution of CADE’s analytic approach would be desirable.

6.2.19 Permit settlement of conduct cases by consent even where the defendant admits unlawful behaviour

Article 53 of the existing law provides for the settlement of conduct cases by consent. An Article 53 settlement entails no admission of liability or guilt by the defendant and no monetary fine is assessed by CADE. Such settlements are, however, extremely rare, principally because SDE will not enter settlement negotiations if it already has sufficient evidence to convict the defendant of the violation under investigation. Also, Article 53 is unavailable by its terms in any horizontal violation cases involving price fixing, bid-rigging, market division, and similar conduct (Art. 53 §5).

SDE’s policy on Article 53 is designed to prevent defendants from awaiting the conclusion of SDE’s investigation before seeking settlement. This approach, as well as the statutory denial of settlement in cartel cases, reflects sound policy where settlement entails no admission of liability and no penalty. A settlement mechanism should also be available, however, where a defendant in any type of conduct case does not wish to contest CADE’s charges and is willing to plead guilty, pay a fine, and accept an order terminating the offending conduct. Under the proposed bill, the minimum fine in a CADE proceeding will be BRL 6000 (USD 2400), rather than 1 per cent of annual turnover as the law presently requires. The ability to negotiate for a minimal fine should provide an incentive for firms to settle rather than engage CADE in protracted administrative litigation and judicial review proceedings. CADE could issue an appropriate remedial order (after a public comment period) and impose a small fine, thus effectively restoring competition without the delay and expense associated with litigation. It is difficult for a competition agency to function effectively if all of its cases are fully contested. CADE should consider this and other ways of encouraging defendants to resolve conduct cases by consent.

6.2.20 Treat private suits seeking antitrust damages as opportunities for competition advocacy and develop more information about the competitive impact of such litigation

Under Article 89, a court in which a private suit has been filed that involves the application of Law 8884 must notify CADE and invite CADE
to assist in the proceeding. CADE’s policy is to accept such invitations only when the conduct at issue in the private action has been the subject of a CADE proceeding and CADE has rendered a final decision on the conduct’s legality. For cases in which CADE has no proceeding of its own, CADE should consider treating such invitations as opportunities for competition advocacy. Particularly with respect to private cases that involve attacks on such conduct as predatory or abusively high prices, CADE could provide useful advice to the court about how to evaluate such claims under law 8884. In this respect, CADE should also undertake to develop a database containing information about the volume, nature, and outcome of civil suits for antitrust damages filed under Article 29 of Law 8884 and under other laws, such as the Consumer Defence Code and the Class Actions Law, that provide a basis for antitrust damage claims. Information of this kind is necessary to assess whether private antitrust litigation is contributing to or detracting from effective competition law enforcement.

6.2.21 Continue existing programs to:

- focus law enforcement efforts on cartel cases;
- develop law enforcement cooperation agreements with sector regulatory agencies and prosecute anti-competitive conduct by firms in regulated sectors;
- establish consensus with the Public Prosecutor’s Office respecting the role of the public prosecutors assigned to CADE under Article 12 of Law 8884;
- promote understanding of, and appreciation for, competition law both among (1) public prosecutors, to facilitate the cooperation of prosecutors in operating the leniency program and to discourage anti-competitive enforcement of the Economic Crimes Law, and (2) members of the judiciary, to improve the quality of analysis applied by the courts in cases raising competition issues;
- increase the recognition and acceptance of competition principles in society at large, as an advocate for development of a competition culture in Brazil.

CADE and SDE have existing programs underway in each of these five areas, as described previously in this report. All of these efforts are important to the advancement of competition law and policy in Brazil and deserve continued support.
Notes

1. Published as *Competition Law and Policy Developments in Brazil*, OECD Journal of Competition Law and Policy, October 2000, vol. 2, No. 3. Page citations are to this publication.

2. The real was subsequently released to float against the dollar as the result of a balance of payments crisis in 1999.

3. The proposed bill described in this report is the consensus draft of the BCPS agencies released by the government in February 2005. The draft is undergoing revisions before formal submission to Congress, and the description in this report should therefore be understood as a reflection of what reforms the agencies jointly proposed, not a prediction of what will emerge from the legislative process.

4. Alternative Bill to amend Law 3337/04 (Congressman Picciani).

5. Bill for a Complementary Law No. 344.

6. According to the BCPS, the reference to the "social role of property" in both the Constitution and the antitrust law reflect the proposition that property owners are not necessarily entitled to retain the totality of benefits arising from ownership, but may be obliged to share those benefits in some fashion with the rest of society.

7. The proposed legislation amending Law 8884 leaves the conduct violations specified in Articles 20 and 21 essentially unchanged, except that the reference to abandonment or destruction of crops or harvests in Article 21 XVII is replaced by an express reference to demands for or grants of exclusivity (including territorial exclusivity) in the distribution of products or services.

8. CADE’s Attorney General advises that this clause could apply if, for example, company A (a producer of widgets) falsely convinced widget buyers that company B (a competing widget manufacturer) used inferior raw materials, thus forcing B to cut prices in response to falling demand.

9. The final paragraph in Article 21 provides that “for the purpose of characterizing an imposition of abusive prices or unreasonable increase of prices, the following items shall be considered, with due regard for other relevant economic or market circumstances: (I) the price of a product or
service, or any increase therein, vis a vis any changes in the cost of their respective input or with quality improvements; (II) the price of a product previously manufactured, as compared to its market replacement without substantial changes; (III) the price for a similar product or service, or any improvement thereof, in like competitive markets; and (IV) the existence of agreements or arrangements in any way, which cause an increase in the prices of a product or service, or in their respective costs.”

10. The guidelines themselves state that they are also intended to serve as guidance for the public, and to that end have been issued pursuant to the Council’s authority under Article 7 XVIII of the Competition Law to “make the forms of violations of the economic order known to the public.”

11. Because predatory pricing is not conventionally characterized as a “horizontal” practice, BCPS staff anticipates that this aspect of the guidelines will be altered when the guidelines are next revised.

12. A cartel case, of course, also requires proof of collusion. The guidelines provide that substantiating evidence “need not be restricted to documentary evidence, but may include circumstantial evidence such as the absence of economic rationale for adoption of a practice that is not necessarily illegal.” Attachment II, § B1.2. Despite this language, CADE does not rely on the absence of an economic explanation to attack such conduct as parallel pricing. It requires “plus factors,” like meetings or data exchange among the participating firms, to find collusion.

13. SEAE, for example, restructured to create new units in São Paulo, Rio de Janeiro, and Brasilia devoted exclusively to cartel investigations.

14. Statistically, the BCPS characterizes the medical association cases as abuse of dominance rather than as horizontal conduct, on the grounds that prosecution is against a single dominant entity (the association) rather than against individual physicians (who typically have little choice but to become association members). This report, in contrast, treats the cases as “horizontal” because they entail arrangements that restrain trade among association members who are otherwise competitors.

15. In March 2005, in a separate action, CADE accepted a settlement agreement negotiated between SDE and ATPCO under which ATPCO terminated the three-day notice feature of its system with respect to Brazilian airlines.

16. As with the medical association cases, the BCPS characterizes the Unimed cases as abuse of dominance rather than as horizontal conduct. This report treats the Unimed cases as “horizontal,” again, because they entail arrangements that restrain trade among health professionals who are otherwise competitors.
17. SDE, however, has a proceeding underway to examine whether the agreement served as a cover for collusion between TAM and Varig with respect to the number of scheduled flights. SEAE’s initial investigation indicated that both airlines had terminated profitable flights after the agreement was implemented.

18. CADE also recommended that Brasilia repeal the restriction on parking lot filling stations, and its recommendation was recently adopted by municipal government. Meanwhile, the defendants have appealed CADE’s decision to the courts, arguing in part that an agreement to seek anti-competitive legislation can never be unlawful.

19. On similar grounds, CADE also rejected other predatory pricing complaints, including claims respecting the retail sale of cellular telephones (2004), beer (2004), and medicines (2000 and 2003).

20. This case is discussed in greater detail later in this report.


22. Prior to October 2000, all statutory references to fines were stated in terms of tax reference units, the value of which was adjusted for inflation. The tax reference unit was abolished in October 2000. Since that time, all newly-enacted statutory fines have been stated in terms of reais, the Brazilian currency unit. The terminal value of a tax reference unit is fixed at BRL 1.0641, or about USD 0.42 at the recent exchange rate of USD 0.39 for BRL $1.

23. CADE does not, for example, impose a separate fine on unlawful cartels for failing to file a notification. A practical consequence of this practice is that CADE does not maintain a “cartel registry.”

24. Law No. 9781/99 established the initial BRL 15 000 fee and directed that all proceeds be deposited to CADE’s account. Law 10149/00 increased the fee to BRL 45 000, with the proceeds to be shared equally among CADE, SDE, and SEAE.

25. These conditions are the same as those applicable in determining permissible conduct under Article 81(3) of the European Union’s competition law.

26. The standard is essentially identical to that in the new merger regulation (No. 139, Art. 2(3)) adopted by the European Union in 2004.

27. Certain passages in the Guidelines (such as paragraphs 13, 14 and 25), suggest that a “total surplus” standard will be applied to evaluating mergers, while other passages (such as paragraph 87) indicate that an increase in consumer surplus is necessary for approval of a merger that will enlarge the market power of the merging parties. CADE’s decision in the recent Nestlé-Garoto case employed the consumer surplus standard
without determining whether that was the only permissible approach to merger assessment.

28. Article 58 paragraph 2 contemplates that performance commitments will “provide for volume or quality objectives to be attained within predetermined terms.” In formulating commitments, Article 58 paragraph 1 also requires CADE to “take into consideration the extent of international competition in a certain industry and their effect on employment levels, among other relevant circumstances.”

29. The 2000 Report noted (p. 201), that CADE had imposed conditions on about 3 per cent of notified transactions in 1998 and 1999, the same percentage that characterizes the period from 2000 to 2004. Statistics for competition agencies in other countries show merger intervention rates in the same range. Some practitioners in Brazil have observed that CADE’s 3 percent rate is not consistent with the view that the merger notification thresholds are too broad. That is, if many innocuous merges that would not be reported in other countries are reported in Brazil, CADE’s intervention rate should be lower than rates elsewhere. One possible answer to this point is that CADE’s “structural” intervention rate is substantially lower than 3 percent, standing at 0.26 percent (7 transactions, consisting of four structural cases and three disapprovals, out of 2672 reported).

30. Prior to 2000, performance commitments imposed by CADE in several merger cases required that retraining and relocation programs be provided for employees displaced by the closing of production facilities. The most recent case involving such a requirement is the 2000 AmBev beer merger, described in the previous Report (pp.204-05).

31. SDE has recently been developing its own economic expertise. It has established a quantitative methods centre, headed by a senior economist, to increase the volume and quality of econometric analysis in SDE investigations.


33. ADC Telecommunications Inc. / Krone International Holding Inc., announced January 19, 2005. CADE expects to issue in the near future a formal resolution confirming this interpretation.

34. The 2000 Report noted (p. 207) that, in 1998, 7 per cent of notifications were judged by CADE to have been filed late, a number that jumped to 19 per cent in 1999.

35. To obtain an injunction under Brazilian law, there must be a clear underlying right at stake (that is, the claim must be well founded under
colour of law, or “fiumus boni juris”), and there must be a risk of irreparable harm to that right if relief is denied (that is, there must be danger in delay, or “periculum in mora”).

36. Article 4 of the Resolution also provides that the order may be issued without advance notice to the parties in exigent circumstances, but CADE has never employed that authority.

37. For example, the 2002 APRO entered with respect to the acquisition of Sé Supermercados by Companhia Brasileira de Distribuição required that no stores be closed and that the ratio of employees to overall sales be held at least equal to the average ratio for the top ten supermarket chains in Brazil.

38. Prior to implementation of the joint merger review procedure in January 2004, SDE and SEAE usually reached similar conclusions in merger cases, although they sometimes differed on the remedial conditions to be imposed in problematic cases. For most cases transmitted to CADE since January 2004, the two agencies have formulated a single joint recommendation. CADE virtually always approves transactions for which SDE and SEAE recommend approval. In cases where conditions are recommended, CADE sometimes changes the terms of the conditions proposed. Often, such changes arise from proposed modifications offered by the merging parties after the case reaches CADE.

39. A further provision added in 2004 by Joint Ordinance No. 8/2004 extended the summary procedure to transactions in which no participant has a Brazilian turnover greater than BRL 400 million. Except for transaction reportable under the 20 per cent market share test, this provision has been rendered moot by CADE’s decision to rely solely on Brazilian sales in applying the turnover threshold.

40. This was not formerly the case with respect to SDE, which routinely overran its 30 day deadline even after adjusting for information requests.

41. One section in the proposed law, dealing with procedures at Plenary meetings, provides SEAE with the opportunity to present oral argument respecting any case in which it has been involved. This provision contrasts with CADE’s existing procedural regulation (Resolution 12 paragraph 12), which states that only the “respondent, claimant or inquirer, or their respective lawyers” may be invited to make statements during CADE judgment deliberations. According to the 2000 Report (p. 206), SDE and SEAE “regretted” that they could not appear before CADE during deliberations on the AmBev beer merger case to defend their recommendations against criticism by the merging parties.

42. Under existing Article 54 paragraph 5, the fine for an untimely filing ranges from 60 000 to 6 million UFIR (tax reference units). Because the
UFIR has been abolished, the proposed law restates the limits as BRL 60,000 to 6 million. This results in a slight reduction in the fine limits, because the value of a tax reference unit is fixed at BRL $1.0641. The draft law likewise converts into reais the fine limits in all the other articles of Law 8884 that are now stated in terms of UFIR (specifically, Articles 23, 25, and 26).

43. SDE is divided into two Departments, one with responsibility for the competition law (the Department of Economic Protection and Defence, or DPDE), the other responsible for the consumer protection law (the Department of Consumer Protection and Defence, or DPDC).

44. CADE’s Attorney General is theoretically subordinate to the Federal Attorney General, but in practice operates independently. Similarly, although the staff attorneys in CADE’s Office of Attorney General are provided by the Federal Attorney General and are theoretically responsible to that office, they in fact act under the direction of CADE’s Attorney General.

45. Article 10 §III, which provides that the Attorney General (with CADE’s preliminary approval) may “request court measures with a view to curbing violations of the economic order” is considered problematic and has never been employed. Where injunctive relief is necessary, SDE invokes Article 52, under which orders to prevent anti-competitive injury may be issued during the pendency of an administrative proceeding.

46. Three of these cases are described in the portion of this report dealing with judicial review of CADE proceedings.

47. Another provision in Law 8884 that mentions the Public Prosecutor is Article 10 §IV, which authorizes the CADE Attorney General (with CADE’s preliminary approval) to settle cases pending in court “after hearing a representative” of the Public Prosecutor. There have been no settlements of pending court cases in CADE’s history, and hence no occasion to determine the role of the Prosecutor in that situation.

48. The terms of the Commissioners are expressly made non-coincidental, so that, in any four-year cycle, two terms will expire in the second year, two more in the third year, and three in the fourth year.

49. Prior to the 2000 amendments, SEAE had no investigative powers under Law 8884 as such. The 2000 Report noted (p. 188) that a separate law (No. 9021) provided SEAE with certain investigative powers. Under Article 10 of Law 9021, SEAE may require a firm to justify its actions where SEAE has evidence that the firm may have violated Law 8884 by imposing excessive prices or abusive price increases. SEAE ceased using Law 9021 after 2000 in favour of its expanded authority under Law 8884.
50. The SDE Secretary also has discretion whether or not to disclose the existence of a preliminary investigation. Maintaining such investigations in confidence was mandatory prior to the enactment of the 2000 amendments. Those amendments also vested SEAE with discretion whether to disclose the existence of an SEAE inquiry (Art. 35-A, §2).

51. The statute of limitations applicable to violations of Law 8884 depends upon whether the conduct at issue also violates a criminal law. If so, the limitation for institution by SDE of an administrative proceeding is 12 years from the date of the violation. Law No. 9873/99. If not, the limitation is five years. SDE Ordinance No. 849 (Sept. 22, 2000) Art. 54.


53. Article 30 paragraph 2 also provides that formal complaints addressed to SDE by the Senate or House of Representatives must proceed directly to an administrative proceeding without preliminary investigation.

54. SDE Ordinance 849 (2000) establishes SDE’s rules of operation for preliminary investigations, administrative proceedings, evidentiary hearings, expert witnesses, case referrals to CADE, Article 52 interim relief, Article 53 settlements, leniency, and the protection of confidential information.

55. In conduct cases with respect to which SEAE has opted to provide an opinion, the conclusions reached by SEAE are typically congruent with those of SDE, although the method of analysis may differ. CADE’s final decisions with respect to the legality of the conduct under scrutiny rarely diverge from the conclusions recommended by SDE (and SEAE), but CADE sometimes formulates a different remedy where a violation is found.

56. Under Brazilian law, wiretapping is available only in criminal investigations.

57. The implementing regulations for the program appear in Chapter V of SDE Ordinance 849 (2000).

58. A corporation or individual that attempts to enter into a leniency agreement but is found to be ineligible may enter into another agreement concerning illegal conduct of which SDE is unaware. In such a case, the offender’s penalty in the original proceeding will be reduced by one-third, without prejudice to securing the full benefits of leniency with respect to the new infringement (Art. 35-B, §§ 7, 8).

59. Another constitutional objection, not generally considered to be persuasive, is based on a provision in the Brazilian Constitution (Art. 98
I) that provides expressly for “conciliation” of small criminal cases in special local courts. The absence of a Constitutional reference to “conciliation” of any other criminal cases is asserted to imply that defendants in such cases are ineligible for leniency.

60. Such agreements provide effective protection to leniency program participants because other prosecutors defer to the jurisdiction of whichever prosecutor first undertakes action in a specific case.

61. According to one commentator, establishing a competition law compliance program has become a priority for multinational enterprises operating in Brazil. See, Zarzur, Cristianne, Cartel investigation in Brazil—moving forward into global trends, Global Competition Review (2004), available at http://www.globalcompetitionreview.com/ara/bra_cartels.cfm

62. Preventive orders are not issued in cartel cases because an order barring “collusion” adds nothing to the existing statutory prohibition.

63. Also under investigation in this case (although unaffected by the interim order) is the Association’s conduct in successfully lobbying the municipal government in Brasilia for an ordinance under which only Association members are permitted to sell fire equipment in the Federal District.

64. No similar publication requirement applies to settlements negotiated with the Reporting Commissioner once the case is pending before the Council. As a practical matter, however, the principle that settlement is inappropriate where the government already has sufficient evidence to find a violation assures that cases reaching CADE will rarely be eligible for a negotiated settlement.

65. CADE Resolution 20, Art. 2 (June 9, 1999).

66. The 2000 amendments did not extend to CADE the new authority in Article 35-A to request that the Federal Attorney’s Office obtain judicial warrants for unannounced searches. Article 35-A is reserved to SDE and SEAE.

67. CADE Resolution 20, Art. 3 (June 9, 1999).

68. CADE Resolution 12 (1998), Article 15. Resolution 12 establishes internal rules of operation for the Council, including procedures for Council meetings, evidentiary hearings, enforcement of judgments, and the protection of confidential information.

69. CADE may also recommend to the appropriate government agencies that compulsory licenses be granted for patents held by the defendant, and that any tax incentives or subsidies accorded to the defendant be terminated.
70. SDE’s procedural regulation states that the agency’s processes will be conducted to “observe, among others, the rules of lawfulness, purpose, motivation, reason, proportionality, morality, full defence, adversary proceedings, legal security, public welfare and efficiency.” SDE Ordinance 849, Art. 2 (2000).


72. The BCPS agencies state that they have tightened procedures designed to safeguard confidential material from disclosure, inadvertent or otherwise.

73. The bill retains the provision in the existing law under which complaints addressed to SDE by the Senate or House of Representatives must proceed directly to a formal investigation (“administrative inquiry” without a preliminary investigation (“preparatory procedure”). The provision is expanded so as to be applicable also to complaint recommendations from SEAE (which, as noted previously, no longer exercises compulsory investigative authority of its own).


75. CADE, in turn, decided the case in July 2005.


77. It is perhaps also worth noting that Brazil has a very long tradition of highly bureaucratized government in which lengthy delay is standard procedure. See Rosenn, Keith S., Brazil’s Legal Culture: The Jeito Revisited, 1 Florida International Law Journal 1 (1984).

78. The penalty provisions in Article 25 do not apply to precautionary orders and hold-separate agreements (APROs) entered in merger cases under CADE Resolution 28, because those items are not founded on Law 8884. Articles 12 and 13 of the Resolution provide that such orders and agreements will specify a daily fine to be assessed by CADE in the event of non-compliance. To date, CADE has not had occasion to assess any fines under those provisions.

79. Law 8884 provides that CADE has discretion to file judicial actions seeking execution of fines either in the Federal District (Brasilia) or in the district where the defendant is domiciled (Art. 64). CADE’s general preference is to file in Brasilia because it is convenient to CADE’s office and because the courts in Brasilia are more likely to have had previous experience with (and thus be more familiar with) CADE as a law enforcement agency. CADE does, however, pursue execution at the defendant’s domicile in cases where attachment of assets is necessary to satisfy the fine.
80. Interest accumulates at a statutory rate against the fine amount assessed, so that defendants will be discouraged from engaging in frivolous litigation simply to delay payment.

81. The Federal Attorney’s Office is responsible for collecting any fines imposed by SDE or SEAE.

82. Under Article 66 of Law 8884, a court may, in appropriate circumstances, order immediate compliance with the conduct provisions of a CADE decision “notwithstanding the deposit of fines in court or the posting of bonds.”

83. The competition law does not itself provide for judicial review of agency decisions. Article 5 § XXXV of the Brazilian Constitution guarantees judicial review of any act that causes damage to or threatens the rights of a party.

84. Although CADE decisions approving SDE Article 52 preventive orders would appear to be ripe targets for judicial challenge by the affected parties, the CADE Attorney General’s Office could provide no record of such litigation.

85. For the first regional court, which sits in Brasilia and frequently hears BCPS cases, there are three judges in a panel and five in a section.

86. In the regional courts and in the STJ, both panels and sections comprise less than the total number of judges on the court. Ordinarily, the full court meets only to address administrative matters.

87. Article 68 of Law 8884 provides that the execution of CADE decisions “shall be afforded priority over other kinds of action” (except for habeas corpus and certain writs). This provision does not, however, apply to actions commenced by defendants against CADE decisions.

88. CADE invokes various provisions of a civil procedure law (No. 8437/92) on this issue. The proposed bill to amend the competition law includes a provision making Law 8437 expressly applicable to decisions rendered by CADE.

89. Implementation of the second instance court’s decision has been stayed while the court considers the defendant’s motion for clarification.

90. Constitution Art. 103 IX. Because the case was filed against Congress and the President of the Republic, and did not arise from a CADE proceeding, CADE is not a party before the Court.

91. In the Supreme Federal Court case, a Unimed is asserting that application of Law 8884 to such non-profit health cooperatives as Unimeds would violate the right to association guaranteed under Article 5 XVII of the Brazilian Constitution.
92. The Resolution implemented Article 7 XVII of Law 8884, which empowers CADE to “answer consultations on matters within the sphere of its authority.”

93. No statistics are available on the number of criminal indictments for antitrust violations.

94. Article 29 also provides that any pending CADE proceeding that is examining the same conduct at issue in the private suit may not be stayed during the pendency of such a private action.

95. To obtain service of process on individuals located overseas, the BCPS must rely on rogatory letters issued by the Federal Supreme Court.

96. This market definition formulation was adopted by the BCPS in a 2003 merger case involving Woodward Governor Company and Knowles Intermediate Holding, Inc.

97. The role of international trade is also mentioned explicitly in Article 58 of Law 8884, which is the provision authorizing CADE to impose “performance commitments” on merging parties. The statute provides that, in formulating such commitments, CADE shall “take into consideration the extent of international competition in a certain industry and [its] effect on employment levels, among other relevant circumstances” (Art. 58 ¶ 1).

98. The four Mercosur members maintain a common external tariff and negotiate as a bloc in international trade fora. Chile and Bolivia became Mercosur associate members in 1996 and 1997, respectively, but do not participate in the common external tariff.

99. In addition to Article 54 notification fees, CADE also collects miscellaneous fees for providing consultations under Resolution 18, for photocopying services, and for the sale of publications.

100. This charge, instituted in 2002 and known as the “Fiscalization Fee,” generated revenues (in USD thousand) of $550 in 2002, $480 in 2003, and $300 in 2004.

101. CADE’s 28 temporary assistants are another exception.

102. By law, appointments at the highest three DAS levels must be made by the President of the Republic. In the DAS system, level 7 is a Minister’s position, level 6 is a Ministry Secretary (or at CADE, the President), and level 5 is a Ministry Deputy Secretary or Department Director (or a CADE commissioner).

103. CADE’s conspicuously higher number of non-DAS contract employees (124, compared to 15 and 16 for the other two agencies), suggests that CADE has an unduly large contingent of support service personnel. This
impression is misleading for two reasons. First, as noted above, 28 of CADE’s non-DAS contract employees are professionals hired on temporary contracts to undertake substantive work. Second, both SDE and SEAE receive support services from central ministry offices whose employees do not appear on SDE or SEAE rosters.

104. One civil service position description has proven to be especially helpful to both SDE and SEAE because it is broad enough to cover the mission work involved in competition law enforcement. The position, titled “Expert on Public Policy and Governmental Management” (Especialista em Políticas Públicas e Gestão Governamental, or “gestor”) is designed for employees engaged in policy analysis and implementation. Gestor positions are created and allocated by PBM, and are relatively few in number. At the end of 2004, SDE employed 12 gestores, while SEAE employed 23, most of whom were in positions with a DAS salary supplement. In contrast, CADE employed only one gestor, who likewise held a DAS position.

105. Although the lawyers in the CADE Attorney General’s Office report to the CADE Attorney General and not to the Federal Attorney General, the latter determines how many attorneys should be assigned to CADE. The current number is 13, down from the staff of 18 to 20 described in the 2000 Report (p. 187).

106. One cost of poor institutional memory was encountered in the process of preparing this report, as CADE found it difficult to respond to inquiries about its activities during the period from 2000 to 2001. Few employees remain from that era and archival research proved to be very time consuming.

107. Of the 800 matters, about half are complaints that have been docketed but as to which no determination has yet been made respecting whether to open an inquiry. About 200 are preliminary investigations, another 200 are administrative proceedings, and 25 are merger cases.

108. Even so, there are some functions at both SDE and SEAE that do not readily match ministry civil service position descriptions. Both agencies, therefore, also try to obtain gestor positions from PBM. As noted previously, at the end of 2004, SDE employed 12 gestores and SEAE employed 23.

109. The references usually appear in a list of “constitutional principles” deemed applicable to economic regulation. Article 5 of the Telecommunications Act, for example, requires that the telecommunications agency consider principles of “free competition, free initiative, consumer protection, and restraint of abusive economic power,” as well as “national sovereignty, the social role of property, reduction of
regional and social disparities, and continuity of service” when making decisions.

110. Law 9478/97, Art. 10.

111. For this purpose, CADE invokes Article 7 IX of Law 8884, which authorizes CADE to “request information from individuals, agencies, authorities and other public or private entities” in furtherance of its statutory duties.

112. Regulation was previously in the hands of the Transportation Ministry.

113. There is little intercity or interstate rail transportation in Brazil and intrastate bus service is regulated by the states. Truck transportation is unregulated except for technical and safety regulations.

114. The 2000 Report observed (p. 229) that the Consumer Defence Code applied to banks and that the consumer protection department of SDE had prosecuted a variety of cases against banking institutions. This has continued to be true since then, although the issue of the Code’s applicability to banks is now pending before the Supreme Federal Court.

115. CMED was created by Law 10742/03. Before 2003, price setting authority for drugs was vested in CAMED, a predecessor body established in 2000. The Sanitary Surveillance Agency is responsible for administering the price caps set by CMED.

116. IBRAC, a particularly prominent member of Brazil’s competition law community, is a non-governmental association of about 500 corporations, law firms, and individuals (lawyers, economists, and academicians) interested in the promotion and development of competition law and policy.

117. A case now under investigation by SDE may also lead to an Article 7 X request by CADE. As described previously, SDE is examining concerted action by an association of fire extinguisher manufacturers in Brasilia to obtain a municipal ordinance providing that only association members are authorized to sell fire equipment within the Federal District.

118. Under both Law 8884 and the proposed bill, SEAE’s capacity to employ compulsory investigative tools does not extend to general market studies. Authority to make enforceable demands for testimony or documents is available to SEAE (for SEAE’s direct use under the present statute and by request to the Directorate General under the proposed law), only where there is a basis to suspect some form of unlawful conduct. SEAE does not, however, consider the absence of compulsory process for general market studies to be problematic, as it believes that any market for which enforceable demands are necessary will present circumstances warranting a law enforcement investigation.
119. Part of the educational effort focuses on explaining the damaging effects of cartels and the disadvantages of undertaking “indirect” price regulation through court orders attacking “abusive” or “predatory” prices. Attention is also devoted to the closely related subject of why suggested fee schedules issued by professional organizations are undesirable.


121. The three agencies are working on a project to develop a joint website that will serve as a common portal for the BCPS.

122. One of the prizes is funded jointly by IBRAC and ETCO (Brazilian Institute for Ethics in Competition); the other is funded by CIEE (Centre for Integration of Corporations and Schools).

123. Economic principles have gradually been incorporated into law school curricula, and competition and regulation issues have become an area of specialization within university economics and law departments.

124. The BCPS cites the media boost it received from a November 2004 article in Exame magazine, one of Brazil’s leading business journals. The article, entitled “Sheriffs of the Market,” profiled the heads of each of the three competition agencies and of the Brazilian Securities Commission, and detailed the work performed by each body. After the Exame story, following stories about the agencies appeared in many of Brazil’s major newspapers (such as O Globo, O Estado de São Paulo, Folha de São Paulo, and Valor Econômico) and in the weekly magazine Época.

125. The executive and legislative branches should, of course, act to fill vacant seats without undue delay.

126. There is, on the other hand, no similar basis for objecting to systems under which fees attributable to services provided (such as for reviewing merger notifications) are remitted to the agency performing the service.


128. ICN Merger Notification Procedures, § IIB, comment 1.

129. ICN Merger Notification Procedures, § IC, comment 3.
130. Parties who wish to obtain CADE’s views on the antitrust legitimacy of proposed non-merger transactions may apply for a consultation under CADE Resolution 18, the fee for which (at BRL 5000) is far less than the BRL 45 000 notification fee.

131. OECD Merger Review Recommendation, § IA1.2 (4); ICN Merger Notification Procedures, § IVC, comment 5.

132. ICN Merger Notification Procedures, § IVA, comment 1.

133. OECD Merger Review Recommendation, § IA1.3.

134. ICN Merger Notification Procedures, § IVC, comment 2.

135. ICN Merger Notification Procedures, § IVC, comment 4.

136. In the United States, where private parties may ordinarily collect treble damages for antitrust violations, legislation was recently enacted to address the problem of leniency party exposure to civil damages awards. Section 213(a) of the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 (Title II of Public Law 108-237, 118 Stat. 661, codified as a note to 15 USC § 1) provides that, in a private damages action, a party who has been granted leniency by the US Antitrust Division will be subject only to award of the actual damages attributable to the party’s unlawful conduct.

137. As described previously, private parties have also raised other concerns about the leniency program, noting that uncertainty arises from (1) CADE’s statutory discretion (in cases where SDE was previously aware of the unlawful conduct) to assess a party’s cooperation and good faith in determining penalty reductions, and (2) the unclear constitutional status of the program as an arguable infringement of judicial power. To the first point, it may simply be noted that CADE has ample incentive to make fair assessments because otherwise the program will not effectively advance CADE’s law enforcement interests. As to the second point, there is no solution until the Supreme Federal Court renders a decision on the program’s constitutionality.

138. The only other recommendation offered here with respect to judicial cases involving CADE is that courts hearing challenges to CADE decisions imposing fines should strictly observe Article 65 of Law 8884. Under that article, parties seeking to stay the execution of fines must deposit in court appropriate collateral for the amount in dispute.

139. ICN Merger Notification Procedures, § VIIIC, comment 3; cf. OECD Merger Review Recommendation, § ID.

The BCPS should also either update its conduct case guidelines attached
to Resolution 20 or withdrew them, as they are rarely cited explicitly in
CADE decisions and do not appear to reflect current BCPS policies for
evaluating cases.

141. ICN Merger Notification Procedures, § VIIIC, comment 2.
143. The existing relationship between SDE’s consumer protection department
(DPDC) and local consumer protection entities might be employed to
facilitate such a data collection effort.
144. As part of this program, the BCPS should promote development of a
database containing information about the volume, nature, and outcome
of criminal prosecutions under the Economic Crimes Law.
145. CADE’s efforts to advocate a competition culture should continue, even if
SEAE also engages in such activity under the language in the proposed
bill vesting SEAE with responsibility for promoting competition “before
civil society in general.”
COMPETITION LAW AND POLICY
IN CHILE

A Peer Review

-- 2004 --
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An Update on Developments since April 2003

This report on competition law and policy in Chile is an edited version of the report that provided the basis for the peer review that was conducted at the IDB/OECD Latin American Forum on 8 April 2003 at OECD Headquarters in Paris, France. Some updates, such as Supreme Court affirmation of two competition decisions, have been incorporated into the text of the report. In addition, several reforms since then merit separate treatment. First, as anticipated, the proposed competition law that is described in the report has been enacted. Second, Chile’s competition enforcement authority, the National Economic Prosecutor, has adopted four reforms that implement the report’s recommendations.

Amendments to the competition law

Chilean Law No. 19.911, published on 14 November 2003, amends the prior competition law by creating a new Competition Tribunal and introducing a number of other reforms. The law will go into effect six months from its publication date.

As proposed, the Tribunal will be an independent entity that has judicial powers but is not formally part of the judiciary. It will have five members. The President of the Tribunal, who must be a lawyer with at least ten years of experience in the competition law field, will be appointed by the President of the Republic from a list of five nominees established by the Supreme Court through a public competition. The other members (two lawyers and two economists) will be chosen as follows. One lawyer and one economist will be chosen by the President from a list of three nominees established by the Central Bank (Council of Governors), also through a public competition. The other lawyer and economist will be appointed directly by the Central Bank from candidates selected by this same public competition. The Tribunal will also have four surrogate members, selected by the President of the Republic and the Central Bank from the same lists of nominees. All candidates are requested to have expertise in competition issues.

The members of the Tribunal have terms of six years, and may serve more than one term. During their terms, they can only be removed for cause. Neither public servants nor officers or employees of publicly held corporations (or their affiliates) are eligible. Members of the Tribunal will receive fixed remuneration plus a fee that will vary depending on the amount of work. (By law, the Tribunal must meet at least twice per week, but it is expected to meet at least three times per week.) The Tribunal will also have its own staff.
Other changes clarify how particular kinds of anticompetitive conduct should be considered and ban “unfair competition” only when the conduct is intended to gain, maintain, or increase a dominant position. The law now provides a limited “settlement” procedure. Imprisonment is eliminated as a sanction, but the amount of fines is raised, to US$ ten million. The head of the competition enforcement entity, the National Economic Prosecutor, is given new powers, including the authority to sign agreements with domestic agencies and foreign entities.

Reforms by the competition enforcement agency

The National Economic Prosecutor has adopted four reforms that address issues raised by the peer review. First, the Prosecutor has created a new unit within the Economics Department that is responsible for considering the competitive effects of proposed mergers. Chile still does not have a premerger notification programme and does not regard such a programme as necessary, but the creation of this merger unit is very important as an official and public statement of intention to assess mergers.

Second, the Prosecutor has created a new unit within the Legal Department whose function is to review proposed legislation and proposed regulations that could harm competition. In short, Chile has taken a significant step towards having a systematic programme of competition advocacy.

Third, the Prosecutor has adopted an internal order on how investigators write the “reports” that constitute their findings. For example, the order requires that investigators must always include information about the relevant markets and must co-ordinate their reports with the Legal Department to ensure the legal sufficiency of the analysis.

Fourth, the Prosecutor has taken steps to make the business community and the public more aware of competition law matters. On 30 November, the Prosecutor held Chile’s first “Competition Day” – an event that brought together about 250 lawyers and others to hear about the newly enacted amendments to the competition law and other relevant matters. Among the speakers was Mr. Fernando Sanchez Ugarte, President of Mexico’s Federal Competition Commission, who had chaired the peer review of Chile at the April 2003 meeting of the IDB/OECD Latin American Forum. Echoing the peer review report, he congratulated Chile for being a pioneer in competition policy, stressed competition policy’s central role in economic regulation, supported the proposed amendments, and suggested further action in some areas to reduce Chile’s vulnerability to international cartels and anticompetitive mergers.
Summary

Over the last thirty years, Chile has been a quiet pioneer in the field of competition law and policy in South America and among developing countries. In the application of competition policy principles in some infrastructure sectors, Chile and its competition institutions have been in the forefront. This review examines Chile’s competition law and policy using the approach that the OECD Competition Committee uses in peer reviews of OECD Members. It describes the current system, considers reforms that Chilean officials are considering or implementing, and recommends additional actions that should be considered in order to maximise competition policy’s contribution to Chile’s economic efficiency and growth. Chile’s current competition law was adopted in 1973 as part of a program to roll back the previous government’s steps towards a government-owned and planned economy. Enforcement resources were initially small, and enforcement was neither particularly vigorous nor a major part of Chile’s reform program, which emphasised trade liberalisation, privatisation, and deregulation. However, due in part to its relatively low key approach and in part to its consistency with Chile’s general free-market orientation, competition law enforcement has become an accepted, if not central, part of Chile’s legal and economic regulatory system. Although competition law and policy have experienced setbacks in some Latin American countries, Chile’s centre-left government has recently proposed a major “pro-growth agenda,” developed by the government and the private sector, in which procompetitive regulatory reform is the first agenda item and improving competition law enforcement is the first part of that agenda item. Other elements include regulatory reform in key areas, such as telecom and electricity, and reforms in areas such as capital markets that could also benefit competition and efficiency. The competition law part of this proposal is expected to be enacted this year. The proposed amendments to the competition law relate primarily to the creation and funding of a new Antitrust Tribunal. The new Tribunal would be independent and would have its own staff. Its members would be chosen for their competence and would be paid for 2-3 days of work per week. This is a very important reform. The institutions it would replace appear to have operated productively and independently, but there were significant handicaps, as some members were from Ministries, all were unpaid, and they worked only one half-day per week. It will be critical that every effort be made to reinforce and safeguard the Tribunal’s independence in practical terms. Even representatives of Chilean business interests seem to believe that the competition institutions
need more funding so that they can act more promptly without sacrificing the quality of their analysis. Chile should also consider whether additional legislative changes are necessary to reduce Chile’s vulnerability to anticompetitive mergers. The competition institutions have been particularly impressive in their work with infrastructure monopolies. Chile’s Antitrust Commission once prohibited the telecom regulator from allocating spectrum to two firms it had chosen and ordered the regulator to hold an auction instead. Regulators in the telecom and electricity sectors are not authorised to set tariffs unless the Commission has found a market to be not competitive. A Commission ruling that local telephony services were not competitive laid out six provisions aimed at creating a genuinely competitive market. In traditional law enforcement against firms operating in markets that could and should be competitive, the record is not as strong. In part, the difference is the result of the focus on infrastructure monopolies, a priority which may so far have been better for Chile’s economy as a whole. In part, however, the difference appears to reflect other considerations, many of which are being addressed but which merit further attention. For example, although Chile’s competition institutions, like most of their foreign counterparts, are increasingly basing their policies and decisions on economic principles, the decisions of the Antitrust Commission and the Supreme Court have provided little explanation of the impact of economic principles on the legal standards that are applicable to particular forms of conduct or to such central issues as defining “product and geographic markets” and deciding whether a firm has a dominant or monopoly position. Clarifying the applicable legal standards and increasing predictability should be a priority, particularly since the proposed amendments would abolish the Preventative Commissions, whose decisions have provided the most explanation. Chile’s enforcement authority, the National Economic Prosecutor’s Office, is taking some important steps to decrease uncertainty. Summaries and the full text of all Preventative Commission and Antitrust Commission decisions will be on the Office’s website by year’s end, and the Office’s own decisions will eventually be added. Given the current uncertainty and the conclusory nature of many Commission decisions, however, the Prosecutor’s Office should consider issuing nonbinding enforcement guidelines or policy statements or finding some other way to set forth its position on the elements of particular kinds of violations, to clarify the overall framework for its interpretation of the law and to provide guidance regarding its approach to key issues in competition analysis and procedure. Competition law and policy are not likely to make their maximum contributions to Chile’s productivity unless enforcement addresses a wider range of industries and becomes more proactive and aggressive in challenging all forms of conduct – mergers, monopolisation, and cartels – with substantial actual or likely anticompetitive effects. The competition institutions’ cautious approach seems to have helped facilitate the gradual acceptance of competition enforcement. But the tradition of caution, including an apparent reluctance to find violations and to impose fines, has in part reflected a view in Chile that economic...
ofences against the public are not serious and that the costs of monopoly may
not exceed the costs of competition law enforcement. A combination of
general competition advocacy explaining the cost of monopoly and cartels
with enforcement guidelines explaining the Office’s increased focus on
economic efficiency should help reassure academics, the private sector, and
policymakers that the benefits of vigorous competition enforcement in Chile
will far exceed the costs. Chile’s competition institutions have been very
active in competition advocacy concerning infrastructure industry monopolies,
and Chile is in the early stages of developing a broader programme. Notably,
the Ministry of Economy’s Market Development Division also operates as a
competition advocate (and provides members of Chile’s competition-related
Commissions). Chile should move towards providing the Prosecutor’s Office
and the Tribunal the authority and the capacity to serve as an advocate for
using competition policy in the analysis of all national law and all national
and local regulations that restrict competition. The value of this advocacy role
as a complement to the enforcement role is recognised in the
recommendations of the OECD’s 1997 Report on Regulatory Reform. The
goal is not to promote competition over other values, but to ensure that the
protection of other values does not unnecessarily interfere with firms’ ability
to respond efficiently to consumer demand. For their part, the Prosecutor’s
Office and eventually the Tribunal should seek to demonstrate to government
entities, the public, and the business community the value of having a
competition policy perspective even in assessing existing or proposed laws or
rules that on their face do not appear to be about competition. For now, the
Prosecutor’s Office should actively seek to identify situations where
regulations cause significant anticompetitive effects, the Office has some
relevant expertise, and a letter, report, speech, submission testimony, or other
intervention by the Office could either support the reform efforts of others or
explain why some reform is important. For example, the progrowth agenda is
proposing to reduce the harm caused by slow and non-transparent licensing
and other procedures, particularly at the municipal level, by enacting a law
decreeing that all requests not acted upon within a certain time period are
deemed to be approved. One way this “red tape” causes economic harm is by
creating unjustifiable entry barriers. Explaining this aspect of the problem and
supporting the effort to reduce it may continue to be a relatively inexpensive
piece of competition advocacy that is useful in its own right and as a
demonstration that competition policy is not anti-business. The Office (and
eventually the Tribunal) should also consider devoting significantly more
attention to explaining how competition law and policy benefits consumers,
businesses, and the economy as a whole. In view of the Chilean government’s
concern about equity issues, including social protection, education, and health,
the advocacy program could include emphasis on how competition policy can
serve as a tool to help policymakers pursue equity goals as efficiently as
possible.
1. The Economic and Political Context

1.1 Current economic context

Chile is a relatively small South American economy with 15 million inhabitants. It is also a very open economy; almost thirty years of consistent trade liberalisation have recently been manifested in a number of free trade agreements. During the 1990s, Chile experienced strong GDP growth, averaging almost 7 per cent annually, which was driven mainly by exports and a strong investment cycle in the natural resource sector (copper mining, salmon, and forestry). After the Asian economic crisis, growth rates declined to 2-3 percent and unemployment rose to nearly 10 percent. Chile’s economy has been quite stable, however, especially in comparison with neighbouring countries. Interest rates are low, fiscal responsibility has been maintained, and Moody’s has given its banking system the highest rating in South America. Moreover, the national government has moved to increase transparency, fight corruption, and develop stable institutions – steps that have given it a favourable rating in world-wide transparency and competitiveness rankings. Implementation of such reforms may have been facilitated by the fact that Chile is not a federation of sovereign states, but a national state. Chile also benefits from its legal system, which is regarded as one of South America’s best.

Since 1997, Chile has responded to the economic slowdown in a number of ways, including capital market liberalisation in 2000-2001. Almost all state-owned enterprises have been privatised, and public ownership of the copper mining firm CODELCO is not maintained for competitive reasons but rather to protect Chile’s future by being an asset that the government cannot spend. Despite its small size Chile is often seen by multinational firms as a platform from which to enter South America because of its economic and political stability. Chileans encourage this process but sometimes fear that it may lead to monopolisation of Chilean markets by the foreign firms (such as Spanish banks). In any event, the current pro-growth agenda embraces improved competition enforcement as means of stimulating greater efficiency and growth.2 Private sector representatives helped create the agenda, including the competition law aspects, but also criticize the government for hindering entrepreneurship and labour market flexibility.

1.2 Historical context

State intervention into Chile’s economy became widespread following the 1925 adoption of a Constitution that greatly increased the power of the executive branch. The government’s promotion of and engagement in
preferred forms of economic activity became more pronounced in 1931, when the worldwide economic depression led to a short-lived takeover of Chile’s government by socialist-leaning military leaders. Over the next two decades, the state pursued policies of import-substitution industrialisation through various means, including the creation of the Production Development Corporation, commonly known as CORFO, which by 1950 owned shares in eighty of Chile’s largest firms and a majority share of 39 of them. These policies created closer links between government and big business, and together with high tariffs they isolated Chile from international markets. By the end of the 1950s, the policies of the past were seen as having run their course, but there was no consensus on what new course to take.

1.3 Chile’s first competition law
Chile’s first competition law was enacted in 1959, one year after an international mission recommended abandoning price controls, enacting a competition law, and managing customs tariffs when prices rose too much. The law prohibited the state from granting monopolies to private parties and provided that acts or agreements tending to prevent free competition were civil (administrative) and criminal violations. The law was enforced by a Commission whose members were a Supreme Court Judge, the Superintendent of Corporations, Insurance and Stock Markets, and the Superintendent of Banking. The Commission could investigate cases, decide whether to recommend criminal cases, issue rulings in non-criminal cases as well as general rules, and decide whether a monopoly concession could be issued. These are strong powers, but it never became a strong agency. There are conflicting reports on the number of matters the Commission handled during 1959 – 1972. Whatever the number, most were completed in the first two years. From 1963 to 1972 the agency had only seven cases, all minor. In fact, since Chile’s government fixed the prices of many products and services throughout this period, it seems doubtful that the 1959 competition law was ever expected to play a major role in preventing enterprises from restricting output and charging monopoly prices.

1.4 General economic policies, 1970 – 1973
Chile’s economic policies changed dramatically in 1970, after a Socialist with Marxist leanings was elected president. The government increased hiring and wages, froze prices, and took ownership or control of farms and firms. Meanwhile, inflation soared, productivity shrank, and shortages (and long lines) became commonplace. In September 1973,
military leaders overthrew the government and established a new one that immediately began reversing the policies of the past three years.

1.5 Chile’s current competition law

Chile’s current competition law – the “Law for the Defence of Free Competition” – was adopted in December 1973 as part of the military government’s program. A new enforcement agency was in place two weeks later. The new law was and is substantively similar to its predecessor, but it created a new institutional system that remains in place today. The institutions included an enforcement agency, now called the National Economic Prosecutor’s Office, an important quasi-judicial body often referred to as the Antitrust Commission, and a number of Preventative Commissions (one Central and various regional). Pending legislative proposals would abolish the Antitrust Commission and the Preventative Commissions and replace them with a new Antitrust Tribunal. Before discussing how enforcement of the competition law has developed since 1973, it is useful to review the economic context in which that development took place. That thirty year period may be broken down into four phases.

1.6 Economic policies since 1973

The military government’s major reforms occurred or at least had their beginnings during the period from 1973-1982. At first, the government focused on undoing what its predecessor had done by reducing public sector employment (eventually by 20 percent), returning property that had been illegally seized, and liberalising pricing. (At the outset, the competition law and institutions may have been created largely as a political gesture aimed at calming consumers’ fears about price increases.) The government also began a more general liberalisation programme, including unilateral tariff reduction, which by 1975 had evolved into a programme led by a group of civilian “technocrat” economists who were known as “the Chicago boys” for their youth, their ties to the University of Chicago, and their sometimes extreme faith in market mechanisms. By 1982, the government had eliminated all price controls except for natural monopolies, liberalised capital markets, and privatised most tradable goods and some services, including banking. Competition policy was given little weight during this stage of the privatisation program, which led to some problems that are still being addressed, but the competition institutions were reportedly able to build some popular support by striking down economic privileges granted to or by the state. Towards the end of this period, bad loans resulting from an over-valuation of the peso and an almost complete lack of banking
supervision led to a serious financial crisis, which apparently persuaded some policymakers that deregulation can be harmful.

From 1985 to 1990, the government became more pragmatic on economic policy issues, but liberalisation of the economy continued. There was more privatization, including in the electricity, telecommunications, and steel production sectors. Eventually, the competition institutions began playing a more important role in some infrastructure sectors. Although economic reforms were quite successful, the social safety net continued to weaken because of government austerity programs and what was viewed by many as excessive deregulation. It has been suggested that since the government was weakening the safety net while deregulating in order to promote competition, some in Chile incorrectly associate competition policy with laissez-faire economics and hostility to welfare programmes.

In 1990, the military government was replaced by the first in a series of elected civilian governments. Although leaders of these governments had criticised aspects of the economic liberalisation programme, the basic programme has continued, albeit with what is seen as a more balanced approach (e.g., seeking to promote competition but not following a laissez-faire approach). Privatisation began to focus on air and rail transportation, mining, and electricity. Patricio Aylwin Azocar, who was elected President in 1989, took the position that “within an efficient economy there is no room for price controls,” and “[t]he market cannot be replaced as a mechanism for consumers to articulate their preferences.” Eduardo Frei Ruiz-Tagle, who was elected President in 1993, pursued similar economic policies. Economic growth of almost 7 percent per year facilitated efforts to rebuild the social safety net. Competition law was part of the rules of the game, but enforcement was not a priority, and few resources were allocated to it. However, the competition institutions continued to play an increasingly important role with respect to the activities and regulation of natural monopolies.

Since 1997, economic policy has focused on producing faster growth. Privatisation continued and is almost complete. Attracting capital was difficult, which led to a greater focus on investment and productivity, which in turn led to capital market reform and to a 1999 law that almost doubled the staff of the Prosecutor’s Office (to about 60 people) while also increasing salaries and relaxing civil service requirements so the Office could obtain a more professional workforce. The new amendments proposed by President Ricardo Lagos Escobar, who was elected in January 2000, indicate that competition law enforcement has again become more of a priority, and in the future Chile’s competition institutions could become much more important contributors to the country’s economic efficiency and the overall welfare of its citizens.
2. The Goals of Chile’s Competition Law

Chile’s government regards the principal goal of its competition law as being to promote economic efficiency with the expectation that in the long run this maximises consumer welfare. The law does not express this (or any other) goal, though, and it contains one provision that implies a non-efficiency goal. For at least the first fifteen years, Chile’s enforcement institutions gave decisive weight to a variety of values other than efficiency and consumer welfare. The absence of specific goals in the law, combined with a shift toward emphasis on efficiency in practice, is a pattern found in many OECD countries. One of the proposed amendments would add a statement of purpose to the law, that its objective is the “protection of competition.” Stating that goal explicitly would tend to make it more difficult for parties to invoke goals that are unrelated to competition or efficiency.

Both the shift in emphasis and the continuing relevance of non-efficiency goals are important. Three key issues are:

- whether the standards for assessing allegedly unlawful conduct have shifted to reflect the new efficiency orientation;
- whether and when non-efficiency goals change the normal analysis; and
- whether the business and the public are fully aware of the current interpretation of the law’s goals and the legal standards applicable in different kinds of cases.

The terms “economic efficiency” and “consumer welfare” typically refer to “consumer surplus,” as opposed to “total surplus” or to a subjective measure of consumers’ interests. Here, “consumer welfare” is conceived in terms of the overall benefits to consumers as a group. Efficiencies may benefit the group as a whole even though they have differential impacts and may put some particular consumers in a less advantageous position. This conception is a useful reference point, although there is no consensus definition of economic efficiency or consumer welfare. Express or implied goals that have some relationship to competition, but not necessarily to economic efficiency, can include protecting small business, preserving consumer choice, preventing increases in concentration, or ensuring that firms have freedom to compete. Treating such goals as decisive can permit anticompetitive conduct or prevent the realisation of efficiencies that would benefit consumers. For example, consumer choice and freedom to compete are both general competition policy goals, but they may sometimes be inconsistent with the use of efficient vertical restraints.
The Goals of Competition Policy: Consistency with Other Social Goals

This report focuses on the goals of Chile’s competition law, as contrasted with the goals of its competition policy. In applying their laws, countries have differing priorities and nonefficiency goals, but in a fundamental sense the core goals of competition policy do not vary. The term “competition policy” is used in different ways. Sometimes it is a synonym for competition law, and sometimes it refers to a set of policies of which competition law is a part. Often, and in this report, it refers to an approach to government regulation – an alternative to central planning, laissez-faire, and command-and-control – whose essence is that laws and regulations should not contain restrictions on competition and consumer choice that are not necessary to achieve their goals. Competition policy in this sense is complementary to competition law, but distinct from it. Some countries have formalised this sense of “competition policy.” A notable example is Australia, whose explicit National Competition Policy, overseen by a National Competition Council, provides that regulations should not restrict competition unless it can be shown that the benefits of the restriction to the community as a whole outweigh the costs, and the regulatory objectives can only be achieved by restricting competition. There is broad international consensus that the “core” goals of competition law and policy are promoting and protecting the competitive process for the benefit of economic efficiency and consumer welfare. Discussion of this topic at the February 2003 meeting of the OECD Global Forum on Competition also disclosed, however, that countries with developing economies may find it important to pursue non-efficiency goals, at times giving them primacy. For example, some argued that small economies should pay particular attention to claims that a merger will permit realisation of economies of scale, but others said that in developing economies it may be preferable to give more weight to preserving a competitive market structure, even at the cost of some efficiencies. In addition, most OECD countries are tending to eliminate “public interest” goals, such as export competitiveness, promoting small business, or maintaining employment levels, but it is not uncommon to find such goals in the laws of developing economies. Applying competition law can create conflicts with other policies, if it prohibits conduct that the other policy goal would permit or even require. To avoid a conflict, the competition law must provide for exemption or exclusion. By contrast, competition policy does not present a conflict with other societal goals such as protecting consumers from unsafe products or providing for disadvantaged members of society. Competition policy does not elevate competition over other values, maximise competitive rivalry at the expense of other goals, or prevent government regulation that promotes other values. Instead, it aims at maximising the welfare of society by preventing the economic inefficiency and waste that is caused when laws and regulations unnecessarily limit the ability of enterprises to respond efficiently to consumer demand. While individuals and societies often differ on what restrictions are in fact necessary to serve other social goals, there is no real disagreement with competition policy’s goal of increasing society’s welfare by increasing efficiency and competition and
decreasing economic waste and misallocation of resources. By calling attention to the costs that overly broad government restrictions impose on society, competition policy is a tool that can help policymakers choose an efficient regulatory system whenever they conclude that some restrictions on competition are necessary because of market failure or other factors. Several examples may help make this point. –In Canada the Competition Commissioner pointed out, in support of electrical industry restructuring, that market-oriented reform could be done in a way that was not only consistent with environmental objectives, but could actually help to achieve them. –Although licensing requirements and government standards can be beneficial when health or safety is involved, they can harm consumers if they are so broad that they ban efficient conduct. In the United States, competition policy showed that bans on providing optometry services in commercial settings such as shopping centres raised costs without providing offsetting benefits. Competition policy can help strengthen the “safety net” for the disadvantaged. Chile’s competition-oriented approach to telecom provides service efficiently and at lower cost, leaving consumers and the government more resources to spend on other essentials. And as a sort of “applied microeconomics,” competition policy might be useful in reforming aspects of Chile’s health regulations, which reportedly create perverse incentives that unduly limit care.

In Chile, for at least the first fifteen years of enforcement, the competition institutions apparently considered the freedom to compete more important than economic efficiency. During that period vertical restraints such as exclusive dealing and exclusive territories were essentially per se illegal because they prevent other firms from serving as distributors. There was no consideration of whether the restraints had efficiency justifications and so might benefit competition and consumers.5

Chile’s original approach recognised the importance of economic freedom as a value in Chile. The competition law bans restraints on “free competition in business activities,” and a 1979 amendment added a ban on restricting the “freedom to work,” which seems to have been intended to ban requirements that a professional join an organisation in order to work. Similarly, like the constitutions of many European countries, the 1980 Constitution gives citizens a right to exercise any economic activity. Most competition enforcers around the world at that time put substantial – sometimes decisive – weight on the goal of preventing restrictions on firms’ autonomy. Chile’s recent enforcement record contains examples of a more efficiency-oriented approach, which focuses on the impact of a restraint on the market rather than its effect on one or more firms. Nonetheless, the Constitutional and statutory emphasis on freedom suggests that Chilean competition cases may continue to give special weight to this value, perhaps even when doing so might seem counterproductive to advocates of a strict efficiency-based approach.6
In addition to competition-related goals, some countries either assign other “public interest” goals to competition law or permit competition law’s economic efficiency and consumer welfare goals to be over-ridden in order to protect a policy objective unrelated to competition. These public interest goals, many of which are elements of “industrial policy,” include promotion of employment, regional development, national champions (sometimes couched in terms of promoting an export-led economy or external competitiveness), national ownership, economic stability, anti-inflation policies, social progress or welfare (measure by some standard other than consumer welfare), poverty alleviation, the spread of ownership (or wealth) to historically disadvantaged persons, and national security. Including them in competition laws or permitting them to override decisions in competition cases reduces predictability and certainty, though, and their ambiguity facilitates invoking them to favour politically strong special interests, despite their “public interest” description. Moreover, mechanisms other than competition policy are generally more efficient and effective in achieving these goals.

Chile’s competition law contains one unusual provision implying a non-efficiency goal. In 1979, the law’s list of acts that tend to restrain free competition was amended to recognise the freedom of workers to unionise and to “bargain within each company.” Thus, it became a competition law violation to interfere with unionisation or intra-firm collective bargaining. Because unionisation and collective bargaining restrict competition among labourers and could be considered cartels that lacked an efficiency justification, but they are valued for their role in promoting social goals, most competition laws specifically exempt them. The provision may have been intended to distinguish bargaining within a company from industry-wide bargaining. By implication, interfering with industry-wide bargaining might not violate the competition law.

Chile’s competition institutions have sometimes given decisive weight to non-efficiency goals that are not mentioned in the law. For example, the military government’s unilateral tariff reductions in 1974 and the economic crisis of 1982 both created widespread concern about unemployment, and at least in merger cases the competition institutions reportedly considered the prevention of unemployment, local hardship, bankruptcy, and “the public interest” to be factors that might justify an anticompetitive merger. Sometimes, this was done by the Prosecutor’s Office or the Commissions, apparently with little or no explanation of how these different interests were being balanced. On other occasions, the law’s special exclusion process was used, with an executive decree and Antitrust Commission report finding that an otherwise illegal merger was necessary for the stability or development of domestic investments.
The competition institutions have clearly moved away from these non-efficiency, non-competition goals. Indeed, some statements seem to imply that economic efficiency is not merely the principal priority, but the only real goal of the law. Thus, innovation and consumer welfare are regarded not as goals in themselves but as the expected result of efficiency, while unfair competition is a priority only if it affects the market as a whole, and market structure matters only if it relates to conduct that harms the market as a whole. Protecting small business is said not to be a priority. Under this description, this is as “pure” an efficiency-based system as exists anywhere today.

On the other hand, one cannot help but suspect that non-efficiency goals have continued to play a role. They may help explain why Chile has brought relatively few challenges to potentially anticompetitive mergers. They may also help explain the result in some of the cases. For example, in 1994 the Antitrust Commission considered an appeal by Chile’s two largest airlines of a Preventative Commission decision that their merger would be anticompetitive. The combined firm would have close to 85 per cent of all domestic passenger traffic. The airlines did not offer a conventional failing firm defence, with claims or evidence of imminent bankruptcy or even of unprofitability. Rather, they claimed that their long run sustainability was in danger because they could not achieve scale economies, apparently without offering evidence concerning these economies. The Antitrust Commission’s decision said that the merger would produce efficiencies, but did not explore the issue or consider whether efficiencies would offset deadweight loss. Instead, the Commission apparently permitted the merger on the ground that the market was contestable and that potential entry would be sufficient to prevent the merged firm from exercising market power. But the Commission ordered the firm to set up a “self-regulatory” pricing system that tied its tariffs on noncompetitive routes to those on competitive ones, suggesting that the Commission was not confident that potential competition would keep pricing competitive. That ambivalence implies that industrial policy may explain this result better than competition policy. Interestingly, three years later, the Antitrust Commission fined the merged firm and one other for engaging in predatory pricing to drive out a small airline by offering large discounts on the one route on which the small airline was competing with them.

The competition institutions’ handling of recent mergers in the banking sector also led some to question the institutions’ view of the law’s goals. A merger of two large Spanish banks that also operate in Chile gave the merged firm 27 per cent of the national market. The Prosecutor’s Office challenged the merger as anticompetitive. The action led to a dispute over whether Chile’s bank supervision laws created an implied exclusion from the competition law. The Antitrust Commission found that it had jurisdiction
to consider the merger, but also found that the merger was not anticompetitive. This outcome may have been influenced by the enactment of legislation permitting easier entry for banks. Shortly thereafter, two large Chilean banks merged, creating a bank with 20 per cent of a national market in which the top five firms have a 70 per cent share. The competition authorities’ failure to challenge this merger led to some to suggest that the Prosecutor’s Office was applying a looser standard to the mergers of domestic banks.

A provision in a law to protect free speech is perceived as a statement that competition law has a special role in preventing undue media concentration. The Preventative Commissions are required to be consulted on all mergers or acquisitions involving the transfer of television and radio stations, and they must decide within 30 days whether the transfer would be anticompetitive. Special rules or standards are commonly found in many countries, in part because there is no consensus on how (or whether) competition law can provide a principled way to address these issues.

Another non-efficiency goal, fairness, may underlie the recent “general instructions” on price discrimination in the marketing and distribution of pharmaceuticals by laboratories, central distribution warehouses, importers, and drug stores. The government lowered entry barriers and eliminated price caps and maximum mark-ups, which led to a period of vigorous price competition characterised in part by secret discounts. After bringing several specific price discrimination cases, the competition institutions issued a “general instruction” requiring all market participants to make, and adhere to, public and non-discriminatory price lists. The instruction placed a restriction on firms’ freedom to offer secret discounts, and did so in a competitive market in which (presumably) none of the firms had market power. Therefore, in this situation, it appears that fairness concerns (a dislike for secret discounts) prevailed over both economic freedom and economic efficiency. (The Prosecutor’s Office is currently seeking fines against a number of firms that failed even to create and maintain published price lists. Such follow-up on compliance with Commission orders is very valuable as a means of establishing credibility as a strong enforcement institution).

The evolution of Chile’s position toward an emphasis on efficiency has not been clearly and consistently explained. Some business representatives and academics say that they are uncertain concerning the proper means of assessing dominance and the legal standards applicable to some kinds of conduct, and there appear to be grounds for their position. Competition officials note that Chile is a civil law country, but it should be possible to reduce uncertainty in such a setting. Competition law enforcement in Chile has reached the point at which clarification of the applicable legal standards
seems very important to the country’s productivity. The Prosecutor’s Office should consider preparing and issuing nonbinding enforcement guidelines that explain the Office’s views on the law’s goals and applicable legal standards. The new Tribunal should clarify applicable legal standards by writing decisions that articulate the elements of a violation (and the probative value of particular forms of evidence) in terms that relate to the law’s goals. Enforcement guidelines – or policy statements, articles, speeches, etc. – could serve an important competition advocacy function, as well as increasing transparency, if they sought to explain the law’s primary policy goals, how competition enforcement promotes those goals, the key components of the analytical framework used by the Prosecutor’s Office for deciding whether firms’ conduct or mergers are illegal, how efficiency considerations are weighed, and how the legal standards relate to achieving the law’s goals.

3. The Content of the Competition Law

3.1 The competition institutions

The 1973 law created a tripartite institutional framework – an enforcement agency (the Prosecutor’s Office), a special tribunal (the Antitrust Commission), and a number of largely advisory Preventative Commissions. Proposed amendments would replace the Antitrust and Preventative Commissions with an independent Antitrust Tribunal.

The National Economic Prosecutor heads the agency that investigates and brings enforcement cases. The Prosecutor, who must be a lawyer, is appointed by the President of Chile and may be removed by him at any time. For budget purposes, the Prosecutor’s Office (“Office”) is part of the Ministry of the Economy, but the Prosecutor independent of the Ministry. By law, he is subject to the supervision of the President through the Ministry of Economy, and is directed by law to “discharge its duties independently,” to “defend the interests entrusted to him based on his own discretion,” and to represent “the general economic interests of the community.” There is also a tradition of independence by the Prosecutors. Despite the current move to replace the Commissions with an independent Tribunal, there has been no call for greater independence for the Prosecutor’s Office.

The Office has not been powerful, although most of the Prosecutors have been highly respected and influential individuals. Until 1999, when the Office was able to nearly double its size (to about 60 people) and pay higher salaries, the Office was generally seen as a “second-tier” agency and had insufficient resources because its mission was not considered sufficiently
important. There is wide agreement that the Office did not at first take advantage of its new resources to become as strong as it could be, but that recent management changes and reorganisation may now make that possible. The current Prosecutor, appointed in August of 2001, is a well-respected career civil servant, a lawyer and sometime law professor who was Head Counsel in Chile’s Securities and Exchange agency, served as a member of the Antitrust Commission in 1994 – 1996, and worked briefly for the old Antitrust Commission in 1972.

The Prosecutor has reorganised the Office, which now has three main enforcement departments. A new Legal Department is mainly responsible for conducting investigations. There is also an Economics Department with seven economists who mainly work with lawyers on the investigations. A new Regulated Markets and Technical Analysis Department is composed mostly of “industrial engineers” – economists with special training in regulated industries – who work on regulatory issues generally, but also perform some day-to-day case work. Reflecting the Office’s increased interest in competition advocacy and in participating in international cooperation, a new Department of Studies and International Affairs has been created. Another Department serves as the Secretariat to the Commissions. One person in each region serves part-time as Region Economic Prosecutor, a position that would be abolished by the proposed amendments. A Deputy Prosecutor assists the Prosecutor in overseeing the operations of these Divisions and individuals.

The Preventative Commissions (Comisiones Preventivas) are the most unusual element in Chile’s institutional structure. Often described as consultative organs, these Commissions were charged with answering questions and determining how individuals, firms, and government entities had to deal with activities that restrict competition. They also can direct the Prosecutor’s Office to conduct investigations and may issue orders to halt any conduct they find illegal. In addition, at the request of the Prosecutor’s Office, they can (a) issue interim orders that for 15 – 30 days suspend anticompetitive agreements or set maximum prices, and (b) request any governmental entity to exercise its regulatory powers to prevent harm from conduct that is under investigation. The Central Preventative Commission, which has jurisdiction over Santiago and matters involving more than one region, consists of a representative of the Ministry of the Economy (who serves as chair), a representative of the Ministry of the Treasury, two university professors (a lawyer and an economist) appointed by the “Rector’s Council of Chilean Universities,” and a representative of the Neighbourhood Associations. It meets one half-day per week. There are 11 Regional Preventative Commissions, some of which have not taken any decisions in recent years. All commission members serve without pay.
The Antitrust Commission (or “Resolving Commission”: “Comisión Resultiva”) is the highest body in the Chilean competition system. Its nature is that of a special court. It is not an organic part of the judiciary, but is chaired by a judge from the Supreme Court and is subject to the Court’s supervision. Its other members are Chiefs of Service from the Economy and Treasury Ministries, a law school dean, and a dean of an economics department. The Commission’s main function is to decide cases brought by either the Prosecutor’s Office or private complainants. (When a case is initiated by a private complaint, the Prosecutor’s Office may choose whether to participate as a party, though the Commission can ask the Office for a report.) In addition, the Commission may (but rarely does) open an investigation on its own initiative, and it may in appropriate cases call upon police assistance in “lock-forcing” and executing search warrants. It also decides appeals concerning the Prosecutor’s information requests and the Preventative Commissions’ decisions. It has the broadest remedial powers; its remedies may involve fines, cease and desist orders, dissolving or restructuring businesses, and disqualifying individuals from holding office in professional and trade associations. Commission members meet one half-day per week. The members of this Commission too serve without pay.

The Commission also has other, less judicial powers. Sometimes an investigation by the Prosecutor’s Office does not lead to a legal challenge, but rather to a report that discusses competitive conditions in a market and urges the Commission to propose the modification or abolition of laws or regulations that are creating competition problems. Also, in addition to issuing binding orders to entities found to have violated the law, the Commission may issue “general instructions” – binding rules that direct all members of an industry to act in particular ways in order to avoid restraining free competition. The previously mentioned general instruction against price discrimination in the pharmaceuticals industry is one example. In another recent situation, acting on a request by the Central Bank, the Commission “instructed” department stores and other suppliers of retail credit to adhere to the same interest rate disclosure rules that the Superintendency of Banks imposes on financial institutions within its jurisdiction. The rationale for the instruction appears to be the prevention of unfair competition by providers of credit that are not covered by the Superintendency’s rules.

In addition, the Antitrust Commission currently plays a role in determining when the normal competition rules do not apply, though this system is proposed to be abolished by the new law. A “well-founded positive report” by the Antitrust Commission is required before the state may confer a monopoly on a private party or authorise conduct prohibited by the competition law. Similarly, the laws regulating the telecom and electricity sectors provide that the regulator may set tariffs only when the
Antitrust Commission finds a lack of competitive conditions. The exercise of these powers is described in more detail below.

As a result of orders it has issued in cases involving government procurement and licensing, the Commission has jurisdiction to oversee aspects of those processes. In 2001, the Commission had five cases in which it reviewed whether requests for bids meet the standards laid down in an earlier Commission decision.

Resources

The Prosecutor’s Office’s budget is funded almost entirely by the allocation it receives each year in Chile’s Budget Law. For budget purposes, the Office is part of the Ministry of Economy, but it has a separate budget line. Until 1999, the Office was never authorised to have more than about 35 posts. In 1999, legislation intended to improve competition enforcement increased the number of posts to 60 and authorised higher salaries, while also liberalising civil service rules so that the Office could hire qualified employees. The Office’s resource levels in the last five years are set forth in Annex A, Table A-1.

There is no budget for the Antitrust Commission or the Preventative Commissions. The Commissioners are not paid for their work. A separate Department in the Prosecutor’s Office serves as the Secretariat for the Commissions. Under the proposed amendments, the Tribunal would become a separate, independent body with its own budget and staff.

Procedures

The Prosecutor’s Office must investigate all legally valid complaints and may open investigations ex officio. The latter used to make a substantial share of the Office’s workload, but the percentage of such investigations has fallen significantly in the last few years. The decline in ex officio investigations could be problematic if it develops that the Office does not aggressively look for indications of possible illegal conduct. Upon notice to the chair of the Antitrust Commission, the Prosecutor may declare investigations confidential and may obtain police assistance. The Prosecutor must ordinarily provide notice to the target of an investigation, but the Antitrust Commission may waive this requirement when notice would jeopardise the investigation. The Prosecutor has the power to compel the production of documents and the co-operation of public agencies, state-owned entities, private firms, and individuals. Public officials must keep confidential all information they obtain by reason of their duties, except that such information may be used in enforcement activities and in proceedings.
before the Commissions or courts. Interference with an investigation by the Prosecutor’s Office is punishable by imprisonment for up to 15 days.

The results of investigations by the Prosecutor’s Office are usually set forth in a “report”—essentially an administrative decision—that is delivered to a Preventative Commission or the Antitrust Commission. If the Office decides that an official proceeding should be begun, the report is accompanied by a “requerimiento”—a formal charge seeking a fine or other remedy. The report is a matter of public record.

Preventative Commission and Antitrust Commission procedures are governed by the competition law and other laws, with Antitrust Commission procedures being more detailed and formal. A complaint by the Prosecutor’s Office or a private party to the Antitrust Commission must be answered within 15 days. Thereafter, although the procedure is primarily a written one, there is generally a 10-day “discovery” period; during the first two days of this period, interested parties may designate up to four people to testify under oath on specified “points of proof,” and other forms of evidence may be submitted throughout the period. A single Commissioner hears the testimony. Even with a limited number of witnesses, this initial taking of testimony may take weeks, because it seldom takes place more than one half-day per week. The testimony is transcribed and becomes part of the record of the case, together with the parties’ documentary submissions and any evidence the Commission obtains on its own. Eventually, the Commission calls for a “hearing,” which consists of oral argument by counsel for the parties. In theory, the Commission then issues a decision within 45 days, but this limit is often extended; in two ongoing cases, the time period has been extended for very long times.

Proceedings can take a long time, because of the part-time nature of the process and because there can be long periods between the designation of witnesses and the taking of testimony, between the taking of testimony and the “hearing,” and between the hearing and the final decision. Casework sometimes continues during these periods, but in private cases long periods may go by in which little or nothing is happening. Even cases brought by the Prosecutor’s Office are sometimes subject to long delays. It is possible, though, for cases to proceed more rapidly. In July 2002, a mall complained that another mall’s restrictions on its tenants’ activities were illegal. In December, the Prosecutor’s Office decided that the restrictions were illegal and presented the case to the Antitrust Commission. There was no discovery period, oral argument was held in January 2003, a decision was issued in mid-March, and the decisions was affirmed by the Supreme Court before the end of the year.
Individuals may make complaints to the Prosecutor’s Office without being represented by counsel. As a legal matter, complaints to the Preventative Commissions may be made by individuals, but by tradition they are made by counsel. By laws, all complaints to the Antitrust Commission must be made by counsel. Overlaps in the authority of the different competition institutions to open investigations, together with a complex set of rules about taking appeals from negative decisions by the different institutions, have created a situation in which experienced practitioners engage in “forum shopping” to gain advantages.

Parties other than the Prosecutor may appeal Antitrust Commission orders to the Supreme Court only if they require the dissolution or restructuring of a firm, the disqualification of an individual to hold certain positions, or the payment of a fine. The Prosecutor may appeal such orders and also any decision finding that a defendant did not violate the law.

The decisions of the Commissions are public. A private firm has published the Antitrust Commission’s decisions up to 2000. In a major new initiative, the Prosecutor’s Office has prepared a database containing summaries of 334 Antitrust Commission rulings and 344 Preventative Commission rulings, and is publishing the databases on its website.

Additional summaries are being added, and will call attention to key points in addition to being summaries. There are plans to publish by year’s end the full text of the nearly 2,000 rulings that have been handed down since the law was adopted.

The Prosecutor has recently decided that the Office’s “reports” on investigations should also be included on the website, and 17 are ready to be posted. This is an important development, because the reports are public records that can be obtained on request but have never before been published. The reports apparently contain relatively detailed interpretations of the law and applications of it to the facts at issue, and their earlier publication would undoubtedly have meant less uncertainty about applicable legal standards. However, given the current level of uncertainty, the time it will take to publish all reports and rulings, and the fact that even the collected reports and rulings is not likely to provide an overall analytic framework for interpreting the law or an up-to-date interpretation of some of its provisions, one of the most important recommendations of this report is the issuance of enforcement guidelines or policy statements.

Remedies

The Prosecutor’s Office may seek criminal sanctions for violations of the competition law, but in practice this does not occur.
The maximum fine is approximately US$ 230 000, but fines are rare and seldom approach this maximum. In fact, as discussed further below, during almost 30 years of competition enforcement, fines have been imposed in only 73 cases (including 9 horizontal, 4 vertical, 43 monopolisation) and have totalled less than US$ 1 000 000. The average fine has been about US$ 13 500. The Antitrust Commission’s highest fines on average (about $55 000) were in eight unfair competition cases, and the Supreme Court has on average reduced the Commission’s fines by almost 50 percent. The proposed amendments to the law would increase substantially the applicable civil fines – to US$ 15 300 000 – and eliminate the criminal sanction. The amendments also provide for fining directors, administrators, and all who have acted in furtherance of the illegal conduct, and will make directors, administrators, and those who have benefited from the conduct, secondarily liable for the fines imposed on their firm.

The competition law does not provide any “consent” or other formalised procedure to dispose of a matter with a binding negotiated order and/or fine. This may essentially force firms to engage in a full defence of their conduct even when they and the Prosecutor’s Office could settle the matter in a much less costly manner. The proposed amendments include a “conciliation” procedure, which will apparently permit the Prosecutor’s Office and a party to agree to a negotiated order, subject to its acceptance by the Tribunal. This is a significant step, although the amendment apparently would not authorise the Prosecutor’s Office and a party to send the Tribunal an agreed proposal to terminate a matter on the basis of a negotiated order and fine.

In general, anyone harmed by the illegal action of another has the right to sue in court for damages caused by that action. In competition matters, no damages can be awarded unless a Commission has found that the defendant violated the law, because a civil court would not be competent to make that decision of illegality. There may be another avenue for private suit under the 1980 Constitution. Anyone who is denied a constitutional right has a remedy – “recourse to protection” – in the Court of Appeals. This might be a means for obtaining a court order against anticompetitive conduct. Competition officials do not follow private litigation under these general principles of Chilean law, and they do not know how frequently they have been used in the competition area.

**Proposed new enforcement structure**

The main purpose of the pro-growth agenda’s proposed competition law amendments is to create an independent Competition Tribunal to replace all of the Commissions. The relevant amendments, which are currently being
discussed in the legislature, would subject candidates for membership to a public examination of their qualifications, require a minimum of two days of work per week on the Tribunal, provide funding for up to three days of work per week, provide a clear separation of functions between the Tribunal and the Prosecutor’s Office, and provide complete independence from the government.

3.2 The law’s substantive framework

Article 1 of the law contains a very broad prohibition of acts or agreements “attempting to restrain free competition in business activities.” This ban is a criminal provision, but the law’s civil aspects predominate. As amplified somewhat by Article 2’s illustrative list of conduct deemed to tend to restrain free competition and Article 6’s passing reference to “any abuse incurred by whosoever monopolises a business activity,” Article 1’s ban is the basis for all enforcement actions, whether they involve horizontal agreements, vertical agreements, monopolisation (abuse of dominance), mergers, or unfair competition. Both the generality and the criminal nature of the initial ban are consistent with the view that the law was based on the United States’ Sherman Antitrust Act. Chile is primarily a civil law jurisdiction, though, and thus neither its law nor its practice looks to United States cases as a guide.

Article 2 is an illustrative list of anticompetitive arrangements. It sets out five specific categories of “actions or agreements” covered by Article 1. A sixth section clarifies that the list is illustrative, not exhaustive, by referring to any other action for the purpose of eliminating, restraining, or hampering competition. The first, third, and fourth categories are standard; but the second and fifth are unusual. The categories include actions or agreements that relate to the following:

- **The distribution of quotas and reduction or suspensions of production.** This apparently applies to horizontal agreements, and the covered agreements would constitute hard core cartels.

- **Transportation.** It is unclear why the transportation sector is mentioned specifically. At least in recent years, this provision has not had any impact on how transportation cases are handled.

- **Trade or distribution, such as imposing quotas, allocating territories, or exclusive distribution.** This covers a variety of non-price vertical restraints. Some believe that it also covers horizontal market allocation, though this would appear covered by the first category.
• **Determining prices of goods or services.** This applies both to horizontal price fixing agreements and to resale price maintenance.

• **The freedom to work, unionise, and bargain.** This unusual provision is discussed above in connection with the goals of Chile’s law.

There is some continuing uncertainty about the legal effect of Article 2. In the early years, the Prosecutor’s Office and the Commissions apparently took the position that Article 2 was not merely illustrative of conduct that *tends* to restrain free competition, but a declaration that the listed forms of conduct are always (or *per se*) illegal. That approach justified the condemnation of non-price vertical restraints without consideration of efficiencies or market power. The competition institutions no longer take that approach to vertical restraints, and this has been interpreted by some as a recognition that Article 2 (a) is merely illustrative of conduct that *can* violate Article 1, and therefore (b) does not establish or authorise the application of a different legal standard. This argument implies that Article 2 does not authorise *per se* treatment of any competition law violations, including hard core cartels, resale price maintenance, and unfair competition. On the other hand, competition officials generally take the position that hard core cartels are illegal *per se*, basing this position on either Article 2 or on a flexible interpretation of Article 1. The argument based on Article 1 seems significantly more persuasive.

The amendments proposed as part of the pro-growth agenda will revise the list in Article 2 to drop the two unusual items and to set forth more precise descriptions of the covered conduct. The agenda mentions:

(a) explicit or implicit agreements or collusive practices whose object is to fix resale or buying prices, limit production, or allocate zones or quotas;
(b) the abuse of a dominant position by an enterprise or group of enterprises with a common owner by fixing buying or selling prices, tying arrangements, allocation of markets or quotas, or other similar conduct; and
(c) predatory practices to gain or increase a dominant position. The amendment appears to drop nonprice vertical restraints from the list. If Article 2 is the law’s authorisation for use of the *per se* rule, dropping nonprice vertical restraints codifies the current practice of using rule-of-reason analysis to assess such agreements. However, the new language does not answer the important and long-running question whether Article 2 justifies subjecting the listed forms of conduct to the *per se* rule.
3.3 The law’s coverage

Article 1’s ban applies to all individuals, to all enterprises (regardless of state ownership), and in some circumstances to government ministries or other agencies. An unusual feature of Chile’s law, which it shares with Russia and some other transition countries, is that it applies to some extent to decisions by government ministries or agencies even when they are acting in a regulatory capacity, and not just when they are acting in a proprietary capacity. It has been applied to discriminatory government action that creates an “unlevel playing field.” The law is not interpreted as covering governmental “output restrictions” in the form of non-discriminatory quality standards or other limitations on who may enter a market. On the national level, the law has been applied to the Ministry of Transportation, the Telecommunication Undersecretary’s Office, the Electricity and Fuels Superintendence, the General Waters Directorate, and the State Procurement Directorate. It also applies to municipalities.

Virtually all competition laws have an express or implied exclusion for conduct that is required by law, including private action that is authorised by government regulations or official decisions. In general, the basis for this exclusion is a concern that applying competition law could or would interfere too much with other government regulation. Chile’s position concerning regulated conduct is unclear. With respect to competition actions against government entities acting in their regulatory capacity, Chile has apparently attempted to avoid interfering with legitimate government regulation by limiting the law’s coverage to discriminatory regulations or conduct. Deciding what is discriminatory can be difficult, however, and there is some potential for interference with legitimate regulation. On the other hand, excluding executive action from the law’s coverage would prevent use of a tool that Chile, Russia, and some other countries have found very useful. Deciding when private conduct is “sufficiently” regulated pursuant to some other policy to warrant an exclusion is itself a significant policy problem.

Industry-wide exclusions

There are no express exclusions in the competition law. As in other countries, statutory monopolies do exist and there are instances when laws (such as those governing intellectual property) grant exclusive rights. Since possession of a monopoly is not a violation, these laws do not actually create exclusions, as long as abuse of the monopoly or exclusive right is subject to the law. In Chile, this is generally, and perhaps universally, the case. For example, Chile accords the usual kinds of intellectual property rights, and also provides that anticompetitive use of those rights can be penalised under
the competition law. Chile’s Constitution provides that the state is the sole owner of all mines, regardless of who owns the surface land; this includes ownership of the right to explore for and exploit liquid and gaseous hydrocarbons. It appears, however, that the competition law would apply if the state acted to abuse its monopoly. There is no express exclusion for labour, but the Constitution and other laws guarantee the right to create unions and to engage in intra-firm collective bargaining. Under common principles of statutory construction, there is an implied exclusion for the agreements that are inherent in those processes. The Antitrust Commission once declined to rule on a minimum fee schedule for engineers on the ground that labour is not subject to the law. That interpretation has not been tested recently, since other laws authorise such fee schedules if they are strictly voluntary, but competition officials believe that the Commission would today find the law applicable in such a case. There is nothing to suggest that labour organisations are excluded from coverage. There is no express exclusion for agriculture, and since there have apparently been no cases challenging, for example, farmers’ co-operatives, there are apparently no decisions that explore the extent to which the extensive government regulation of farmers creates an implied exclusion. In a recent bank merger case it was argued that the bank supervision law exempted such mergers from the competition law, but the applicability of the competition law was confirmed.

Other Exclusions

Article 4 provides that private parties may not be provided a monopoly to carry out business activities. This provision is interpreted as stating the general rule that except through legislation, the state may not grant a monopoly to private parties or authorise them to engage in conduct banned by Article 1; such grants or authorisations may ordinarily be given only to “governmental, semi-governmental, public, autonomous, or municipal organisations.” If national interests are at stake, the President of Chile may permit a private party to be given a monopoly or authorised to engage in conduct covered by Article 1, but to do so he must issue a well-founded executive decree, based upon a well-founded positive report by the Antitrust Commission. Since the President must obtain a positive report from the Commission, this process seems less a public interest override than a reflection of Chile’s unusual ban on grants of monopoly rights. In the 1970s and 1980s, this process was used on several occasions, primarily to authorise mergers that were considered necessary for one or both of the parties to survive, but the process has not been used in recent years and it seems likely to be eliminated by the proposed amendments.
4. Substantive Competition Law Violations

Chile’s very broad ban on acts or agreements that attempt to restrain free competition provides a sufficient basis for a full range of competition enforcement. A significant number of basic substantive issues appear to be unresolved, though, because principles have evolved yet explanations of the law’s requirements have been infrequent. In the early years, agreements within the categories of Article 2 were essentially illegal per se. Increasing use of economic principles has meant moving away from rules that were clear, although arbitrary and sometimes perverse. Rulings of the Preventative Commissions have sometimes explained their reasoning in a manner that could provide predictability and certainty, but those rulings are not definitive. The Supreme Court decisions are definitive but cannot be expected to develop basic competition law jurisprudence. The Antitrust Commission, which would be expected to develop and explain competition law jurisprudence in a definitive manner, has been hampered by its lack of resources.

Among the issues that have apparently not been systematically or definitively addressed are the following:

- Does Chile continue to have per se rules? If so, what conduct is illegal per se? Some academics and government officials say that the law requires use of the rule of reason in all cases, and some competition officials have claimed that they are required to prove excess prices or profits, as well as entry barriers, even in price fixing cases. Other competition officials view cartels as illegal per se but are less certain about the status of resale price maintenance and unfair competition.

- If hard core cartels are not now considered illegal per se, should they be? Would law enforcement be better able to contribute to Chile’s economic efficiency and growth if it used a per se approach, under which certain agreements are irrebuttably presumed to harm competition and to be unjustified?

- If the rule of reason is used, what must be proved to establish a violation? Agreements that are not illegal per se can sometimes be condemned without the extensive market definition and market power analysis that would be involved in, for example, an abuse of dominance case.

- Is resale price maintenance illegal per se? A recent case seems to say no, but some officials say that this may not be the case.

- Should the competition law ban unfair competition that has no effects on the market as a whole? Some value the ability to condemn forms of unfair competition that have no other remedy. The principle that unfair
competition violates the law even without market-wide impact may be well enough established that new legislation would be required to take a different approach.

- How are product and geographic markets defined? What is the test, and what evidence is required? There is apparently no general definition of “product market” or “geographic market,” and no general procedure for defining markets in particular cases.

- Are dominant position and market power the same thing? If there is a difference, what difference does it make in an actual case? What is the test for whether a firm has a dominant position or market power? What kind of evidence is useful, relevant, or required? Is dominance or market power presumed if a firm has a market share above a certain level? Must there also be some showing of barriers or impediments to entry? At what market share does the presumption arise? How can this presumption be rebutted? Could any market share or concentration safe harbours be identified, as in the guidelines of various OECD jurisdictions?

- In merger cases, are there presumptions based on market share? What is the significance of entry barriers? Chilean officials have said that they apply both a “dominance” test and a “substantially lessen competition” test in merger cases. What does this mean, in terms of what must be shown to make a prima facie case? What must be shown in order to establish an efficiency defence? Rules or principles governing these questions are important for substantive merger analysis, whether or not Chile continues not to have a premerger notification system.

The most interesting and unusual aspect of Chilean competition law enforcement is how much of it has involved infrastructure industry monopolies. It has been suggested that many South American countries erred in beginning with a North American model, because that model is not necessarily well suited for addressing fundamental problems that follow a history of state intervention in economic activity. By concentrating first on infrastructure monopoly, Chile appears to be an exception.

The following discussion of how the competition law is applied to particular restraints contains some mention of the number of different kinds of cases considered by the Antitrust and Central Preventative Commissions during the period 1974 – 1993 and in 2001. Such information reflects statistical analysis that is set forth in Annex B to this report.
4.1 Horizontal agreements

During the 1974 – 1993 period, the Antitrust Commission apparently ruled on 45 horizontal agreements, finding 29 lawful and 16 unlawful. The Central Preventative Commission handled only six such cases and found five violations. Available data do not show how many of these cases involved agreements among competitors that were integrating their operations (i.e., potentially efficient joint ventures), how many involved price fixing or other agreements that would be “hard core cartels” under the OECD’s 1998 Recommendation, and how many involved other kinds of “suspect” agreements among independent competitors (e.g., agreements to observe uniform hours of operation or otherwise refrain from particular ways of competing, horizontal agreements to refuse to buy or sell except on collectively defined terms). In 2001, it appears that the Antitrust Commission made an interim ruling on one horizontal case, while the Central Preventative Commission had no such cases.

It is not surprising that there have been few challenges to true hard core cartels, which are hard to investigate and harder to prove. Moreover, Chilean officials and academics agree with the view expressed at the February 2003 meeting of the OECD Global Forum on Competition that in a small economy, the small business elite may be able to restrict output and increase price through tacit collusion (i.e., without reaching an explicit oral or written agreement). It was also suggested that if businesses had reached an explicit agreement, the small and closely knit business community would make it nearly impossible to find an executive willing to provide evidence against his co-conspirators, because doing so would mean never again being able to hold an executive position in Chile. The Prosecutor’s Office was able to use testimony from a cartel member in at least one case, however.

Apparently, the Prosecutor’s Office has generally sought to prove price fixing through surveys showing otherwise unexplainable uniformity of prices or price movements. If there is no other plausible explanation, such uniformity can be persuasive evidence of price fixing. The Antitrust Commission has apparently found price fixing on the basis of such survey evidence. But in other cases the Commission has not accepted economic or other circumstantial evidence of an agreement. According to Professor Paredes, the timing and nature of the price movements and other circumstantial evidence in a 1993 case against Chile’s two most important pharmaceutical laboratories clearly showed a cartel agreement, but the Antitrust Commission rejected the case because of lack of “concrete” evidence that company representatives had actually reached an agreement.

Evidence showing entry barriers and excessive profits and other indicia of monopoly pricing may have been required in some cases in order to show that
competitors engaged in a hard core cartel. In other jurisdictions, evidence on these topics could be relevant circumstantial evidence about the existence of an agreement, but such evidence would not be required to prove it. If there is clear, direct evidence of the agreement, evidence on entry barriers or excess profits would have no independent value on that issue. Jurisdictions in which price fixing and other cartel activity is not illegal per se might regard evidence of barriers as necessary to show anticompetitive effects, but it is unlikely that evidence of monopoly pricing or profits would be required.

The Prosecutor’s Office succeeded in proving price fixing in a 1995 pharmacy case. Low prices by a new entrant set off a price war among the four pharmacies operating in Santiago. To end the price war, the four firms agreed to fix prices, and the Office was able to show this through price surveys and statements from some executives who had participated in the conspiracy. The three incumbent pharmacies were fined about US$ 80 000 each, while the new entrant was fined about half that amount because of its co-operation in providing evidence of the cartel.

There are at least four ongoing cartel cases. Two involve cartels among the same milk processors. The first case began in 1997, the second in 2001. That both cases remain unresolved does not reflect well on efficiency of the litigation process. The gravamen of these complaints is that the processors have set the prices paid to milk producers too low. While these cases have been pending, the Antitrust Commission has regulated the processors’ pricing practices. In the first case, the Commission’s interim order is designed to prevent arbitrary price discrimination by requiring milk processors to have, and to adhere to, written, publicly available statements setting forth the terms and prices for their raw milk purchases. In the second case, the Commission at one point issued an interim order preventing members of the alleged buyers’ cartel from lowering the prices they will pay. That order lasted for several months.

Another ongoing case involves gasoline (petrol) distribution. The market is very concentrated at the wholesale level and increasingly concentrated at the retail level as well. There is little price competition, and it is generally perceived that prices are quick to rise and slow to fall. The Prosecutor’s Office has initiated a proceeding against four firms without specifically alleging collusion. The case is now in discovery. By way of relief, the Office is seeking mainly structural remedies. For example, the Office is asking the Antitrust Commission to recommend that the government modify two laws that create entry barriers (one preventing the installation of new gas tanks in some areas and the other preventing all but the government-owned firm from laying pipelines). It is also seeking an order requiring a firm to grant access to its pipeline, and an order directing
all four firms not to agree to fix prices. The final ongoing cartel case involves collusion between two cable companies.

The Prosecutor’s Office is moving to improve enforcement against hard core cartels. One of the proposed amendments in the pro-growth agenda would decriminalise the law but substantially increase the fines that can be imposed. Since the Chilean public and policymakers have not yet accepted the view that hard core cartels are a serious crime, trading unused criminal sanctions for much more significant fines may lead to more actual enforcement action. The Prosecutor’s Office should review the literature about sanctions for hard core cartels to prepare materials for cases and competition advocacy, to support imposing significant fines against violators. This literature documents the extent of harm cartels cause—estimated by some to be as much as 20 per cent of the volume of affected commerce, and sometimes more—and shows why fines should be several times the illegal gain, in order to prevent firms from simply treating the fines as a cost of doing business.13

In addition, the competition institutions should clarify that hard core cartels are illegal per se or consider the desirability of reinstating the per se rule. Many countries take an essentially per se approach, which has obvious enforcement benefits. The costs are mainly the result of incorrectly characterising joint ventures as cartels. Given the cautious approach Chile’s competition institutions have shown, there may be little risk of such mischaracterisation.

Finally, Chile should focus also on such horizontal agreements as exclusionary boycotts (which are considered hard core in many jurisdictions), facilitating practices (such as information exchanges), and what might be termed “soft core cartels” (such as agreements to observe uniform hours, or to refrain from truthful non-deceptive advertising or other means of competing for customers). Facilitating practices may or may not be anticompetitive in and of themselves, but they can and should be prohibited when they significantly increase the risk of actual or tacit collusion. Some of these types of agreements are not only potential facilitating practices, but they are usually anticompetitive in and of themselves. Some are illegal per se in some jurisdictions, and when the per se rule does not apply, it may be possible in some cases to make use of rebuttable presumptions. For example, instead of requiring proof of relevant product and geographic markets, one could have a rebuttable presumption that the products or services covered by the agreement constitute valid markets. One could also rebuttably presume that the parties have sufficient power for their agreement to be successful. In any event, all of these sorts of agreements are much easier to prove than secret, hard core cartels.
4.2 Vertical agreements and practices

Chile has devoted far more attention to vertical agreements and other practices concerning the relationship between firms at different levels of the distribution chain. During the period 1974 – 1993 the Antitrust Commission ruled on 53 cases involving vertical arrangements, including discrimination, and 35 monopolisation cases that involved either vertical agreements (tie-in sales) or price discrimination. There were also far more vertical than horizontal cases in 2001.

The competition institutions long gave essentially per se treatment to vertical restraints and practices, condemning them without inquiry into whether the firm had market power or whether the practices had efficiency justifications. Refusal to sell without a plausible justification was consistently condemned. Price discrimination was considered illegal unless discounts or other favourable terms were available to all buyers according to “objective” elements. Cost-justified volume discounts were always seen as objective, but price differences reflecting other cost differences were not accepted. In the late 1980s, other forms of cost justification began to be accepted, but the area remains murky, and the lack of a clear legal standard in this area can be particularly harmful because it can deter firms from offering or negotiating for legitimate, procompetitive discounts.

The economic analysis of vertical agreements and practices has evolved a great deal in the last 30 years. Whether or not nonprice vertical restraints or price discrimination have efficiency justifications, it is now widely accepted that they are not harmful – and are probably efficient – if the firm imposing them does not have market power. In competition enforcement regimes with a strong efficiency orientation, therefore, proof of market power may be a required element in demonstrating a violation. Regimes that do not take such an economic-oriented approach may condemn restraints they consider unjustified even in the absence of market power.

Chile’s increased attention to efficiency considerations was reflected, for example, in a 1992 advisory opinion to Daihatsu approving its proposed exclusive distribution system on the grounds that the market was so competitive that no monopoly abuse was possible. Moreover, the Antitrust Commission’s 2001 decision in a case against Toyota shows that Chile may have gone further than most by suggesting that resale price maintenance is not illegal per se. Toyota fixed minimum resale prices for original replacement parts. The Commission said that resale price maintenance can have efficiency justifications and that there was vigorous competition in the automobile market, but it decided that consumers do not have a choice when buying original replacement parts and that therefore, the efficiency benefits (such as better service) were insufficient. Two members dissented on the
grounds that the automobile market was competitive and the restraint promoted efficiency and consumer welfare,

While somewhat exemplifying Chile’s evolution in this area, the Toyota case is also an example of why its approach to vertical restraints (and other rule-of-reason cases) needs further clarification. Essentially, the majority in the Toyota case found that the relevant market was the sale of original replacement parts for Toyotas. In that market, Toyota obviously was a complete monopolist. On the other hand, the dissent appears to have said that there is no separate market for original replacement parts for Toyotas, and that the relevant market was automobiles and replacement parts. Neither the brief discussion in the decision nor the one-sentence summary of the dissent mentioned the need to define product and geographic markets or began to address the complexities of that process in this case. Both the majority and the dissenters may have rigorously analysed the issues, but since the analysis does not appear in the decision, even competition experts cannot tell how the Commission believes such issues should be addressed.

4.3 Monopolisation or abuse of dominance

More of Chile’s competition cases have involved monopolisation (also called abuse of dominance) than any other kind of potential competition law violation. Chile’s focus on monopolisation during the period 1974 – 1993 is typical for a country whose economy is in transition from government ownership and control. Available data do not indicate how many of Chile’s monopolisation cases involved infrastructure monopolies, although it is clear that the competition institutions have devoted very substantial resources to those sectors.

At least in recent years, Chile’s sectoral regulators have apparently had the authority and the power to deal with matters involving the prices and requirements of the services that the Antitrust Commission has found non-competitive. As a result, unlike their counterparts in Central and Eastern Europe, the Chilean competition institutions have not had to bring monopolisation cases challenging public utilities’ pricing or other practices. Rather, their major cases involving these sectors have involved acquisitions and other structural matters. Those cases are discussed in a later section of this report.

If public utilities were not the targets of many of Chile’s monopolisation cases, then the number of monopolisation cases is surprisingly large. The distribution of these cases, by industries and by practices that were challenged, is not clear, nor is it clear how Chile has treated conduct that exploits market power, such as monopoly or “excessive” pricing, as opposed to conduct that maintains or extends market power, such as predatory
pricing or other exclusionary acts or agreements that raise entry barriers. Competition law challenges to excessive pricing by firms in potentially competitive markets may not have long-term benefits, because they may prolong the monopoly by deterring entry that could destroy it. For this reason, excessive pricing is not considered to be abuse or monopolisation in some jurisdictions, and it is seldom challenged in many others. Efficient capital markets and other factors may make new entry a more effective remedy than litigation. In developing and transition economies, where new entry is less likely to be as quick, such cases are more common, although some of them decline on policy grounds to bring such cases. Chile’s Commissions considered at least two excessive pricing cases in 2001. One involved the Santiago subway, which presumably faces no threat of entry. They seem to have had only one excessive pricing case that may have involved a potentially competitive market (clinical gases), and one predatory pricing case (a complaint against Carrefour that was ultimately rejected). They had at least two price discrimination matters, one of which (pharmaceuticals) apparently did not involve market power at all and the other of which (the purchase of raw milk) involved alleged price discrimination by cartel members whose agreement presumably removed the threat of entry.

One interesting monopolisation case involved a firm with an exclusive right to operate the system for handling inter-bank payments by internet. Access to the firm’s system was required by any firm wanting to provide internet bill-paying services, and the firm itself had affiliates offering those services. The Banking Superintendency’s rules provided that in order to offer services using defendant’s system, a firm had to have a contract with a bank – thus in a sense making the banks responsible for the firms that offer internet bill-paying services. The firm denied a new entrant access to its “essential facility” even though it had the required contract with a bank, and this action was found to have illegally created entry barriers.

Although the Antitrust Commission may order “the dissolution or restructuring of companies,” and the Supreme Court upheld the Commission’s de facto order that Telefonica sell shares of stock, the Commission appears to be very reluctant to use its full divestiture authority to require the sale of assets.

Despite the large number of monopoly cases, the interviews and limited documentary research conducted for this review suggest that the competition authorities’ work in this area has not been very important outside the infrastructure industry sectors. Part of the reason may be that the lack of formal or informal guidelines about market definition and assessing dominance may be deterring complaints by the Prosecutors’ Office and the public.
4.4 Mergers and acquisitions

Mergers have evidently gotten increased attention in the last few years. There are currently four merger investigations being conducted by the Prosecutor’s Office and two cases being considered by the Antitrust Commission. Competition officials observe that in Chile’s very open economy there are few anticompetitive mergers and that in recent years, at least, the potentially problematic mergers have been reviewed. Some of Chile’s most important recent merger cases have involved acquisitions of firms operating in infrastructure sectors such as telecommunications and electricity. Since the cases constitute an important part of Chile’s overall regulatory approach to those markets, they are noted below as part of the discussion of competition law and policy in regulated markets.

Until recently, however, it appears that Chile has never had a significant merger control program except in infrastructure industries. The statistical information on cases during the 1974 – 1993 period does not include mergers as a separate category or subcategory. Some believe that small but potentially anticompetitive mergers have been ignored, while large, controversial ones have been the object of investigations or challenges that were initially publicised and eventually closed without action. There is also criticism of the Antitrust Commission’s finding that the Coca Cola – Cadbury Schweppes transaction was lawful. It seems fair to say that the competition institutions have actively sought to prevent mergers from deterring the development of competition in the few but important potentially competitive elements of infrastructure sectors, but they made less effort to determine whether mergers in other markets were likely to create a monopoly or facilitate collusion. The law’s lack of a specific mandate for merger work may partially account for the extremely cautious approach the Prosecutor’s Office and the Commission have traditionally taken. It could also be that the caution is a legacy of “the Chicago boys,” but the competition institutions’ approach to vertical restraints in the 1970s and 1980s suggests that they had very little impact on competition law enforcement.

The competition law does not include a specific prohibition of anticompetitive mergers, and Chile has no premerger notification system. The absence of a separate merger section does not imply a lack of coverage, though, and Article 1 is broad enough to reach an anticompetitive merger under either of the commonly applied substantive rubrics: “substantially lessen competition” or “create or maintain a dominant position.” The Prosecutor’s Office has said that Chile applies both tests, but it is unclear what this means in terms of what must be proved. The Office has also said that there is an efficiency defence in merger cases.
Prenotification to the competition institutions is required only for transactions involving television and radio. In such cases, a 30-day notice period, which seems too short for a serious analysis, is required. (Transactions involving newspapers must apparently be notified after the fact.) Banks and some other financial institutions must notify the Bank Superintendency before merging, and the Superintendency could ask the competition institutions to review a matter. The parties to proposed mergers sometimes consult with the Prosecutor’s Office in advance of closing, but consultation is at the discretion and timing of the firms. Parties to the largest and most important mergers rarely consult in advance with the Office. Although Office representatives do not say that the lack of premerger notification is a significant problem, it has led to some problems. For example, when challenging the stock acquisition that gave ENERSIS total control of ENDESA, the Prosecutor’s Office argued, unsuccessfully, that ENERSIS was required to give the Office advance notice in the particular situation and thus it should receive the maximum penalty for having failed to do so.

The lack of a general consent order process now makes it impossible to resolve problems in proposed mergers effectively through advance consultation. Discussions between the parties and the Prosecutor’s Office are unofficial, the Prosecutor’s Office is not authorised to enter into an agreement for divestiture or other prospective relief, and there is no procedure by which such an agreement could be considered by the Antitrust Commission. The proposed amendments appear to resolve this problem, through a “conciliation” procedure that will apparently permit the Prosecutor’s Office and a party to agree to a negotiated order, subject to its acceptance by the Tribunal.

The most prominent recent merger outside the infrastructure sectors was the acquisition by Coca Cola of Cadbury Schweppes’ soft drink brands and licenses. Acting on a complaint by Pepsi Cola and certain soft drink bottlers, the Prosecutor’s Office conducted an investigation and made a report that noted risks to competition but did not contain a “requerimiento” – a formal charge seeking a fine or other remedy. Pepsi Cola and the bottlers also filed complaints with the Antitrust Commission, which opened a proceeding to which the Prosecutor’s Office became a party. In that proceeding, Coca Cola argued that the relevant product market was much broader than “carbonated soft drinks”, which was the market definition alleged by Pepsi Cola (based on precedent from other jurisdictions). In the carbonated soft drink market, Coca Cola already had a 73 per cent market share, which the acquisition would raise to 82 per cent (nearly 100 per cent of orange flavoured soft drinks and mixers). This international merger, whose competitive impact was assessed in many different countries, presents an interesting
comparative test of merger oversight. Market conditions in those countries vary, of course. Coca Cola did not even seek to acquire Cadbury Schweppes’ assets in the United States; because recent cases there made it clear that the acquisition would not survive antitrust scrutiny. Australia, France, and South Africa all raised antitrust objections to the acquisition in their markets.

At least until the mid-1980s, Chile’s competition institutions considered a variety of goals in their assessment of mergers. This could be inconsistent with the current focus on efficiency, if other goals are asserted as reasons to strike down an efficient transaction or to permit one that harms competition. It is unclear whether and to what extent the competition institutions have stopped considering non-efficiency public interest considerations such as employment, in merger decisions.

4.5 Unfair competition

The competition law does not mention unfair competition as a violation, but Article 1 is broad enough to cover it, and there have been many cases. Most of the cases have involved trademark abuses (including parallel imports) and comparative advertising. Some in Chile believe that the competition institutions devote too much time to unfair competition cases, which generally involve private disputes, do not necessarily protect competition in the market as a whole, and thus do not make the best use of the competition institutions’ expertise. Typical examples of unfair competition are commercial bribery, misleading advertising, deception (by “passing off” and other means), defamation of competitors, and misuse of trade secrets. In most jurisdictions, claims about these practices are usually dealt with in private lawsuits brought by the injured competitors, while government-enforced consumer protection laws may ban the same or similar practices when they harm consumers.

Despite unfair trade laws’ focus on protecting competitors, unfair trade practices can, in the aggregate, be harmful to competition because they undermine confidence in the market’s integrity, and they may also distort market information and thereby affect purchase decisions. In economies where the “rules of the road” are not clear and access to courts by injured parties is limited, government enforcement against unfair trade practices can be important to the creation of competitive markets. In those conditions, unfair competition enforcement by the competition institutions may well be beneficial, but only if the institutions have enough resources to do such work without interfering with their core obligation to enforce the competition law in cases where market power exists or may be created. But if the rules are reasonably clear and parties injured by unfair competition
have a practical way to bring a private action, it could well be preferable to codify the principle that unfair competition does not violate the competition law if the conduct does not harm the market as a whole.

In Chile, the competition institutions do not seem to be flooded with unfair competition cases. Some of the cases (e.g., parallel imports) may be preventing harm in the market as a whole. In any event, bringing some big, highly publicised unfair competition cases can call the public’s attention to the competition institutions and their mission. Since comparative advertising is another main subject of unfair competition cases, it is noteworthy that a case provided by the Prosecutor’s Office in connection with this review states that such advertising must be objective and verifiable, as well as truthful and nondeceptive. Some OECD countries permit (or even encourage) any comparative advertising that is truthful and non deceptive, and regard it as anticompetitive to insist that such advertisements also be objective and verifiable. Although there is some movement towards this more liberal position, there are also OECD countries whose restrictions on comparative advertising are significantly stricter than those in Chile.

5. Competition Law and Policy in Regulated Sectors

For many OECD competition authorities, activity relating to regulated sectors of the economy is largely a matter of competition advocacy because the sectoral regulator has the exclusive power to make many of the key decisions relating to competition. In their advocacy, OECD competition authorities have increasingly sought vertical separation in infrastructure industry monopolies. An OECD Council Recommendation urges consideration of this approach, while acknowledging that it is not always appropriate. This issue has been important in Chile, where the balance of power is different because the competition law can sometimes be applied even to a sectoral regulator or other part of the government. This section focuses on the competition institutions’ advocacy and enforcement work concerning infrastructure monopolies. The competition institutions never play a direct role in setting prices; in general, tariffs are set by sectoral regulators with the participation of the Ministry of Economy’s Market Development Division.

5.1 Telecoms

Chile’s telecom industry has been privatised. To a great extent, it is owned by foreign firms. The telecoms law states that providers may generally set the price of their services, except that access charges are always fixed, and other prices may be fixed if the Antitrust Commission
finds that competitive conditions do not exist. In practice, this means that Chile’s telecom regulator sets tariffs for local fixed telephony (pursuant to Antitrust Commission rulings) and for access charges; in the mobile market, only access prices can be fixed, and long distance charges are free by law. The competition institutions have done far more in the telecom sector, however, than making these periodic determinations on the existence of competitive conditions.

Prior to privatisation, Chile’s telephone system was dominated by two state-owned companies – Compañía de Teléfonos (“CTC”), which provided local telephony services, and Empresa Nacional de Telecommunicacion (“ENTEL”), which provided domestic and international long distance service. By 1990, the national telephone company of Spain (Telefonica) had obtained control of CTC and a twenty per cent share of ENTEL. The Prosecutor’s Office challenged Telefonica’s holdings. The Preventative Commission, the Antitrust Commission, and eventually (in 1993, after having rejected six previous Telefonica appeals) the Supreme Court ruled that Telefonica had to sell its interest in one of the two firms. Telefonica sold its interest in ENTEL.

While this case was proceeding, the competition institutions also played a crucial role in deciding whether competition would be impaired if local telephone companies were permitted to offer long distance service. Asked this question by the telecoms regulator, the Preventative Commission found that such entry would be anticompetitive, the Antitrust Commission affirmed the decision, and the Supreme Court directed the Antitrust Commission to open its own proceeding to examine the issue. In 1993, the Commission concluded that local and long distance should not be separated, because doing so would be difficult and developing technology seemed likely to eliminate the rationale for such separation. It ruled, however, that entry into a new market must be by a separate corporate subsidiary, and it laid out various other principles that should be incorporated into new provisions in the telecom law. The Supreme Court affirmed this decision, and a 1994 amendment to the law added the Commission’s principles, beginning with the obligation of the local service provider to establish a “multicarrier system” so that the user could choose his or her long distance provider. In 1998, the Commission concluded that national and international long distance service no longer needed price controls. By 2001, Chile had ten firms offering the former and ten offering the latter. Overall tariffs had decreased by 30 percent.

The competition institutions also determined how the telecom regulator allocates spectrum in the mobile telephony market. Two firms operating at 800 megahertz petitioned for additional spectrum at 1900 megahertz in order to compete more effectively against two firms that already had some
spectrum at that level. The telecoms regulator agreed. One of the incumbents complained, and the Prosecutor’s Office initiated a proceeding. Eventually, the Antitrust Commission ordered that the regulator use an auction to decide which firms should obtain rights to the spectrum. (Another order in this proceeding directed the regulator not to give the first two firms preference merely because they had applied first for the megahertz.) The entire process took about two years, and the two firms initially approved by the telecoms regulator were the successful bidders at the auction. Relying in part on this fact, some telecoms officials regard the case as one in which the competition institutions were used to delay the allocation of new spectrum. While such “nonprice predation” can and does occur, in this situation that criticism does not seem to give adequate weight to the present and future benefits of establishing the principle that spectrum (and other assets) should be auctioned in a competitive and transparent manner. Some telecoms officials also believe that on occasion the competition institutions become too involved in technical matters, but the two agencies apparently work well together for the most part.

A number of other important cases have been decided or are currently pending. In one case, the Commission issued the maximum fine against Telefonica for using its power in the fixed local telephony market to gain a competitive advantage in the mobile telephony market. Telefonica owns a number of mobile firms, which offered a subscription to mobile users under which there was in effect no charge for the network services. The Supreme Court upheld the finding but (as it often does) halved the fine. There is an ongoing case, currently at the discovery phase, involving alleged collusion between two cable television companies.

Under a law to protect free speech, the Preventative Commissions must be consulted on all mergers or acquisitions involving the transfer of television and radio stations. The law’s text provides merely that the Commissions must decide within 30 days whether the transfer would be anticompetitive, but the law is perceived as expressing a special concern for media concentration. The adequacy of a 30-day review seems questionable. The Commissions have reviewed many proposed transfers without objecting to any.

There is an ongoing issue concerning the determination of access charges. Currently, access charges are asymmetric: high for incumbents and low for new entrants. This system has facilitated entry and competitive rivalry, but some are concerned that it may harm efficiency. In addition, Telefonica has sued the government on the ground that the system cost it US$ 237 million in excessive access fees. Notably, the pro-growth agenda originally contained several proposals for regulatory reform in telecoms, but
the proposed amendments have apparently been withdrawn and replaced by a programme that involves regulatory changes that are at this point unclear.

5.2 Electricity

Before privatisation began in the 1980s, Chile’s electricity sector was dominated by two SOEs – ENDESA, which operated on the national level and engaged in generation, transmission (through ownership of TRANSELEC), and distribution, and CHILECTRA, which distributed electricity in the Santiago metropolitan area. Had competition policy principles been given serious consideration when privatisation occurred, ENDESA might have been divided vertically (and perhaps horizontally) before it was sold, but this did not occur. Several buyers acquired minority interests in ENDESA, while ENERSIS acquired CHILECTRA. Since then, Chile has been engaged in a lengthy struggle to limit the anticompetitive effects of vertical integration, which relate in large part to the resulting barriers in generation and marketing, both of which are potentially competitive. The struggle has included both unsuccessful attempts by the Prosecutor’s Office to force vertical separation and the usual sorts of regulatory strategies for preventing abuse of dominance.

The first formal intervention by the Prosecutor’s Office occurred in 1992, after ENERSIS acquired some of ENDESA’s stock. The Prosecutor’s Office sought divestiture of these shares, but the action was unsuccessful. In 1994, when ENERSIS increased its ownership interest to 25%, the Prosecutor’s Office brought another unsuccessful case, but in 1997 the Antitrust Commission issued binding “general instructions” aimed at increasing competition and transparency. The instructions required the electricity regulator to issue new rules and ordered distribution companies to call for bids and sell their supplies on objectively stated and non-discriminatory terms. The order also required that ENDESA transfer ownership of its transmission assets to TRANSELEC and that TRANSELEC be operated as a separate corporation, subject to the same rules as publicly held stock companies, and in which other generators or other firms could invest.

The Antitrust Commission’s 1997 instructions greatly improved the regulatory system, but in 1999, after ENERSIS attempted to increase its interest in ENDESA from 25% to 60%, the Prosecutor’s Office brought yet another action. While the case was pending, the Office’s case was weakened when Canadian interests acquired TRANSELEC. The Prosecutor’s Office again failed to obtain structural separation but obtained improved general instructions and an order that ENDESA and CHILECTRA could not merge
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or have interlocking directorates, and must be audited by different firms. That order is under review by the Supreme Court.

According to one recent report, there are currently 58 firms in the electricity services sector, 20 of which are concessionaires for generation, four for transmission, and 36 for distribution. The Antitrust Commission plays a special role in this market, since by law prices may be set only for services that the Commission finds are not subject to competitive conditions. The market is regulated by Chile’s National Energy Commission and the Superintendency of Electricity and Fuels, acting under a 1998 regulation that sought to increase transparency and competition. Chile’s pro-growth agenda includes further pro-competitive reform in this sector. An ambiguity in the electricity law is holding up investment in new transmission assets, which in turn is deterring investment in new generation facilities. The main purpose of the proposed amendments is to clarify how investors in transmission assets will be able to obtain a return on their investment.

5.3 Banking and financial services

Chile adopted a new banking supervision law in 1997 to modernise the sector, adopting international supervision standards while also allowing banks to undertake more activities. The sector has been fully privatised, and a recent report indicated that 13 domestic and 17 foreign banks operate in Chile.

The competition institutions have had limited dealings with this sector. As discussed above, the Prosecutor’s Office challenged a merger of two Spanish banks that gave them 27 percent of Chile’s banking market at the national level, but the Antitrust Commission found this not to be anticompetitive. Since the Spanish banks case was decided, the Banking Superintendency has acknowledged the competition institutions’ authority to address competition issues in the sector. In addition, new legislation governs the circumstances when approval by the Banking Superintendency is needed and the procedures for that process.

More recently, Chile’s two largest banks merged and obtained a 20 percent share nationally, but this merger was not challenged although five-firm concentration reached 70 percent in the national market. As also noted above, the competition institutions issued a general instruction requiring non-bank providers of consumer credit to use the system for disclosing interests rates, etc. that the Superintendency imposed on banks.

There is a potentially important debate going on in Chile now about whether the banking and financial services markets are competitive. The Banking Superintendency points out that it has relaxed entry requirements
while keeping rules that safeguard the banking system. And although some in the Prosecutor’s Office express concern about increased concentration in banking, others have no such concerns. On the other hand, other government officials do express concern that the industry is not competitive. This review did not analyse these sectors in depth, and the specific concerns that were articulated may be unwarranted for a variety of possible reasons, but the general concern is itself notable. Concentration is high, and despite Superintendence action to facilitate entry, there is a perception that entry is difficult and foreign entry is generally through acquisition rather than the creation of a new firm. It is noteworthy that the debate seems to have focused on national concentration levels for all banking services, without having addressed what would be the first step in any competition analysis – whether and to what extent bank mergers and other practices should be analysed in the context of particular banking services and local or regional geographic markets.

It has also been said that the large banks in Chile make loans almost exclusively to large firms and (sometimes) to individuals. While others question this view, there are reports that, directly or indirectly, loans to small and medium size firms (“SMEs”) come largely from CORFO, which has evolved from being the traditional investor/owner of much Chilean enterprise into an industrial promotion agency; using World Bank and IDB credit lines, CORFO provides the funds that many banks lend to SMEs. Loans to SMEs are riskier and costlier than other loans, but some see the banks as being excessively conservative as a result of a lack of competition. Some Chilean officials express concern over the fact that there is only one credit card network in Chile.

An interesting feature of Chile’s financial system is that 70 per cent of all consumer credit comes from retailers rather than financial institutions. Outside the banking sector, the only financial service that was mentioned as a matter of competition concern involves pension plans. Chile has an elaborate pension system, which this review did not seek to analyse, but it is said that price competition among the plans is apparently not strong. It has also been suggested that the plans’ high administrative costs reflect a lack of competitive pressure that results from oligopolistic interdependence.

5.4 Water and sewer services

Water and sewerage companies are among the few in Chile that continue to be largely state owned. Fifty-two firms operate, of which six are private. In 1997, the Antitrust Commission approved the acquisition of a water company by ENERSIS, the dominant electricity supplier. In doing so,
however, the Commission recommended that the conglomeration of public utility companies should be subject to closer government surveillance.

The Antitrust Commission’s recommendation led to enactment in 1998 of the Sanitary Services Act, which increased transparency and sought to pave the way for the future introduction of competition where possible by restricting integration among public service companies operating in the same area. Thus, water and sewerage companies may not combine with gas, electricity, or local telephone companies in the same area if they serve more than one half of the area’s population. Since the Department of Public Works grants concessions to firms on the basis of competitive bidding, there is competition for the market even though there is none within the market. The law also encourages competition by requiring water distribution and sewerage collection firms to permit water production and sewerage disposal firms to use their network and contract directly with “large consumers.” The Antitrust Commission is responsible for deciding whether utility concessionaires are natural monopolies and hence subject to maximum tariffs and other rules set by the relevant agency. The Sanitary Services Superintendency fixes the maximum rates and may authorise utilities with fewer than 25 000 water connections to provide services jointly if this results in efficiencies that lead to lower rates.

5.5 Transportation

The state does not own or operate any transportation companies except for three companies that are managed by an independent board – Santiago Metro, a passenger train, and a ferry service. Transport companies are free to compete on price and service, subject to safety and other regulations with limited economic impact. The state does not subsidise transport companies except to ensure transportation to isolated areas. In a pending case, the Antitrust Commission is considering a complaint by a consumer organisation alleging that the Santiago subway is abusing its monopoly by charging excessive prices.

In 1979, Chile adopted an open sky policy regarding passengers and merchandise. The air transport sector has been fully privatised. A recent report indicated that 34 airlines operate in Chile, seven of which are private domestic firms. Most transport cargo, mail, and passengers. There are 25 additional non-regular cargo airlines. As discussed in the section concerning the goals of Chile’s competition law, the Antitrust Commission once approved the merger of Chile’s two largest domestic passenger airlines, subject to a requirement that the merged firm in essence set its own maximum tariffs, and several years later found that the merged firm had...
sought to drive a new competitor out of the market by a predatory lowering of its price on the one route on which it competed with the new entrant.

5.6 Other sectors

Natural gas. When the first natural gas pipeline between Chile and Argentina was created during the 1990’s, the Antitrust Commission played a role in ensuring that the transportation and distribution was conducted under competitive conditions. Natural gas prices may be set freely, but the sectoral regulator may ask the Antitrust Commission to declare that competitive conditions do not exist when the regulator finds that a firm’s rate of return exceeds certain guidelines. If such a declaration is made, the regulator may set maximum tariffs.

Mining. Chile’s Constitution provides that the state is the sole owner of all mines, regardless of who owns the surface land. This ownership does not create monopoly problems, however, because a system of concessions provides mining rights to a variety of firms. There is some interest in seeing whether the concession system can be made more efficient. Chile participates directly in mining through its ownership of the national copper company, CODELCO, and the national mining company, ENAMI. There are also 27 private Chilean mining companies, and 17 foreign firms are engaged in exploration while 27 are engaged in exploitation.

Ports. State-owned ports have been leased on a long-term basis to private concessionaires that are responsible for operating them, and there is to be no future public investment in new ports. The Central Preventive Commission is required by law to establish the competition rules for the operation of Chile’s ports, and it has issued an order laying down rules regulating horizontal and vertical integration. For example, “important users” of a port may not have more than a 40 per cent interest in the port.

6. Competition Advocacy

Chile’s competition law is unusually specific in providing advocacy powers. Supported by the Prosecutor’s Office, the Preventive Commissions may request any public body to exercise its regulatory powers to protect competition, and the Antitrust Commission may request the amendment or repeal of any statutory or regulatory provision. In its response to a questionnaire from the International Competition Network, the Prosecutor’s Office said that it engages in little competition advocacy, but the response understates its activities. The competition institutions have not engaged in a wide range of competition advocacy, but they have done important work,
particularly with respect to infrastructure monopoly sectors. Chile’s institutions have used their broader law enforcement authority to order some of the kinds of regulatory reform that OECD competition agencies could only advocate, the clearest example being the order to use an auction to decide which firms would receive additional bandwidth. Therefore, the institutions’ record in promoting competition principles in designing regulatory systems is understated if one looks only at advocacy.

There is no single, all purpose definition of competition advocacy because competition authorities around the world need to use advocacy to deal with a variety of challenges. In general, it means the promotion of competition market principles in policy discussion and regulatory processes. In practice, the scope of advocacy presentations can vary widely. A set of bullet points about basic issues, such as how monopoly harms the public but enriches the monopolist, is advocacy. So is an extended legal and economic argument in a sectoral regulatory process. Advocacy activities can include testifying, making written submissions, or issuing papers to legislature, ministries, courts, sectoral regulators, or municipalities. In addition, they can include making speeches to professional and trade associations, academic institutions, and conferences, and writing articles for publication in specialised or other journals or other publications. Even holding press conferences and otherwise publicly explaining the importance and implications of competition and market principles could be considered advocacy. For developing countries without well established competition regimes, promoting competition principles to the general public is an ongoing task, and indeed perhaps the most important task, at least at first.

Chile’s competition institutions engage in considerable advocacy to other government entities on topics relating to infrastructure monopoly sectors. For example, the competition institution’s review of the competitiveness of the electricity and telecom markets determines whether rates are free or fixed. Although the competition institutions do not necessarily provide “advice” as part of this process, the review itself manifests both a major competition principle and an unusual way of ensuring that the principle is followed. The major principle is that prices should be free unless there is a finding that conditions are not competitive. The assurance that the principle will be followed lies in assigning this task to the competition institutions rather than the sectoral regulator. Thus, the exercise is competition advocacy, and both the magnitude of the task and the Office’s commitment to it are reflected in the fact that the ongoing review of the electricity sector is being conducted by a team of four economists and two lawyers – more than 25 per cent of the professional in the Office’s three main substantive departments.
There is also some competition advocacy in connection with the Prosecutor’s service on two intergovernmental bodies. Notably, the Prosecutor chairs the national commission that investigates distortions in the price of products that are being dumped. Since antidumping remedies are generally viewed by the competition community as anticompetitive actions that benefit domestic producers at the expense of consumers and the economy as a whole, this is a potentially useful though awkward function. Together with the representative of the Central Bank and sometimes the Ministry of Foreign Affairs, the Prosecutor sometimes successfully opposes the imposition of requested remedies, but his discretion is limited by the law that created the commission. The Prosecutor also serves on a body that hears appeals in certain customs cases, which seldom if ever raise competition issues.

7. Policy Options

- Adopt the pro-growth agenda, taking into account some possible changes.

It seems reasonably clear that the amendments will be enacted without major change, hopefully during 2003. Enacting and implementing the amendments should be a priority, because the new Tribunal will have more independence, more qualified members, and a larger budget. Exchanging unused criminal sanctions for substantially increased fines also seems to be a sensible move, even though it runs somewhat counter to the current international trend.

One aspect of the proposal regarding the Tribunal may warrant additional consideration. The proposal requires Tribunal members to work a minimum of two days per week and provides funding that may support up to three days per week. This means that collectively, Tribunal members should be able to devote to the Tribunal about twice the total amount of time worked by all of the current commissioners combined. In addition, the Tribunal’s staff will be somewhat more than twice as large as that of the Department that now supports the Commissioners. These are significant increases. However, the Prosecutor’s Office also recently doubled in size, and more cases are being brought by consumer organisations and other private parties. Moreover, the current Commissions are somewhat slow in deciding cases and tend to write conclusory decisions that leave the private sector unsure of the standards that are being used to judge their conduct. Generating faster and more complete decisions will take more time and resources. Thus, although the resources will be increased, there is already reason to be concerned that even more might soon be needed.
Whether the Tribunal can do what is expected of it with only part-time members is partly a budgetary issue, but it is also an institutional one. Where members are part time, it can be more difficult to pay members enough to address complex matters. Requiring members to work at least two days per week partially addresses this problem. On the other hand, this commitment may make it more difficult to obtain Tribunal members who have expertise but no conflicts of interest. Private-practice lawyers and economists with expertise in competition law may be unwilling to give up their clients and resign from their firms in order to take on part-time work on the Tribunal, and recuse themselves when necessary in particular cases. The commitment could also be problematic for academics, most of whom apparently have private clients or relationships with law firms. If it appears that this could be a problem, Chile could consider a Tribunal with some full-time members and a larger number of part-time members.

The proposed modification of Article 2 should be revised to clarify whether acts and agreements on the list are subject to different legal standards than other acts and agreements covered by Article 1.

The Prosecutor’s Office should also consider whether the proposed conciliation procedure would permit the Office and a firm to enter into an agreement that would, if accepted by the Tribunal, dispose of a matter on the basis of an agreed fine. If it would not, the Office should consider proposing a modified amendment that would permit this practice. The concept of a negotiated fine is apparently not familiar in Chile and may seem to some to be an unseemly “bargaining with the law,” just as a few years ago the idea of giving leniency to a “whistleblower” seemed to some to be improper. However, it is common practice in much of the world, and if a defendant is willing to pay an appropriate fine in order to avoid the cost and uncertainty of litigation, such an arrangement is efficient for the government as well. If the Tribunal considered the agreed upon fine to be too small, it could reject the agreement and order the litigation to proceed.

Clarify legal standards with guidelines or policy statements, while continuing the important initiative to publish the text and summaries of decisions, and eventually the Office’s reports, on the Prosecutor’s Office’s website. Considering the legal and economic sophistication of competition officials and others in Chile, it is remarkable how much uncertainty there is on even quite basic issues such as the means of defining markets, evaluating dominance or market power, assessing the legality of a vertical restraint, and even the standard applicable to cartels.

When a decision-making body does not clearly explain its reasoning, uncertainty about the applicable legal standards can discourage firms from making investments or experimenting with new distribution systems,
deprive injured parties of knowledge that they may have a remedy, and reduce respect for law enforcement. The enforcement staff may share the public’s uncertainty, leading it to devote unwarranted attention to matters that the decision-maker would consider frivolous or to disregard issues that the decision-maker would consider vital. The staff may find out “the real story” through informal means, which helps enforcers but does not remedy public uncertainty.

The Prosecutor’s initiative to put more information on the Office’s website is an important one. Moreover, the new Tribunal will have time to prepare more explanatory decisions. Still, a more comprehensive approach, using nonbinding guidelines or other clarification, should be a high priority. The Prosecutor’s Office should seek supplemental funding if necessary to address the following issues, among others:

- What conduct, if any, is illegal per se? This issue is related to the above recommendation to clarify whether conduct listed in Article 2 is subject to different legal standards. Is unfair competition a violation even when it has no effects on the market as a whole?
- How are product and geographic markets defined? What is the test?
- What is the test whether a firm has a dominant position or market power? What evidence is useful, relevant, or required? What is the agency’s approach to the key steps in its analysis? Is dominance or market power presumed if a firm has a share above some level in a market (or a market with entry barriers)? At what share does the presumption arise? Can any market share or concentration safe harbours be identified?
- In merger cases, are there presumptions based on market share or concentration levels in markets (or in markets with entry barriers)? What test is used to decide when a merger is unlawful, and what is the agency’s approach to the key steps in its analysis? What must be shown to make a prima facie case or to establish an efficiency defence?

The Prosecutor’s Office does not have specific legal authority for issuing enforcement guidelines, and this is not a common practice in Chile. The purpose of guidelines would be to clarify the Office’s interpretation of the law. Guidelines about competition issues have been adopted in other Latin American countries. In response to criticism that its standards were not transparent or comprehensible, Mexico’s competition commission issued guidelines that explain its approach to defining markets and assessing dominance. Brazil used “Resolution 20” to introduce guidelines on evaluating anticompetitive agreements and has also issued merger
guidelines. As guidelines have become increasingly common, the cost of preparing them could be minimised by selecting appropriate models and adapting them to Chile’s situation.

If the Prosecutor’s Office questions the propriety of “guidelines,” it should consider other ways to clarify the overall analytic framework it uses and its interpretation of the elements of particular violations. The Office might issue “policy statements” or add an interpretive introduction to the case materials on its website. A series of speeches on law enforcement (with written texts that are more detailed than the speeches), or a series of short articles on the Office’s website or elsewhere, could also be helpful, though perhaps somewhat less so than products that are clearly identified as guides or policy statements.

Increase the amount and the visibility of competition advocacy outside the infrastructure monopoly sectors, so that the Prosecutor’s Office or the Tribunal become central to the government’s consideration of the wide range of regulatory matters that affect competition and to which competition principles should be applied. There is no budget allocated to the Prosecutor’s Office specifically for competition advocacy. The Office manages its own budget and already allocates significant resources to competition advocacy in infrastructure monopoly sectors. Moreover, it is beginning to allocate resources to outreach to law firms, private sector organisations, and universities, and has also been actively involved in developing the competition law aspects of the pro-growth agenda. Since the Office’s work with infrastructure monopolies is sometimes mandatory and in any event valuable, budget reality will for now require very careful selection of advocacy activities in order to keep costs to a minimum. The Office already co-ordinates to some extent with the Ministry of Economy’s Market Development Division, and creative thinking about the way these institutions interact might produce synergies while holding down costs.

Although the Prosecutor’s Office must of course take into account the likely costs of competition advocacy, the lack of a more active programme could also be costly. The competition institutions are not well known in Chile, and although market liberalism seems more firmly established in Chile than in many Latin American countries, it faces continuing challenges in that many consumers are not aware of the benefits of competition and of avoiding unnecessary regulatory restrictions on competition, while some academics and business representatives seem to prefer a more laissez-faire approach. In this context, building a broader competition advocacy programme should include three inter-related goals.
First, the Prosecutor’s Office (and the Tribunal, when it is established) should work to integrate competition policy into a wider range of the government’s regulatory policy and analysis and to ensure that a competition institution is involved in – if not the centre of – this process. Chile’s inclusion of the competition institutions in the process of regulating infrastructure monopolies provides a model on which the competition authorities can seek to build, but where on some natural monopoly issues the competition institutions have a decisive voice and must invest substantial resources, in many other regulatory issues they would presumably play the smaller but important role of commenting from a competition policy perspective on issues that will be decided by other parts of the government. And although the Market Development Department of the Ministry of Economy apparently engages in some activities along these lines, the OECD’s 1997 Regulatory Reform Report recommended providing competition authorities the authority and the capacity to advocate reform throughout the government.

Second, the Prosecutor’s Office should seek to demonstrate the value of competition policy by becoming a more visible advocate and taking positions on important issues that raise competition policy issues. For example, one issue covered by the pro-growth agenda is the harm caused by slow, non-transparent licensing and other procedures by municipal and other government entities. Although direct governmental responsibility for this matter is in the hands of other government entities, the harm they are trying to halt is largely the inefficient and other anticompetitive effects of unjustified entry barriers. If this topic were not on the pro-growth agenda, it could be a good one for competition institutions to study and call to the attention of the government and the public through a published report explaining the cost to Chile of such entry barriers. Since the topic is being addressed, the Office could support the movement for reform by emphasising the competition policy aspects of this problem. In this and other areas where competition institutions may be unable to eliminate competition problems, they can bring concrete benefits to Chile’s economy by helping create consensus on the need for reform, while also winning support for competition policy by showing that it is not anti-business, as some fear.

Third, the Prosecutor’s Office (and eventually the Tribunal) should engage in a more broad-based effort to explain how competition law
and policy benefits consumers, businesses, and the economy as a whole. This programme should seek to educate the public about the costs of monopoly, cartels and competition distorting regulations, while also reassuring the business community that competition enforcement in Chile focuses on economic efficiency. (There would be synergies between this work and the development of guidelines or policy statements.) In view of the Chilean government’s current concern about equity issues, including social protection, education, and health, the advocacy program could include emphasis on how competition policy can serve as a tool to help policymakers pursue equity goals as efficiently as possible.

- Pursue traditional law enforcement more vigorously in a wider range of industries.

Despite the benefits the competition institutions have achieved in infrastructure markets, they should adopt a more proactive and aggressive approach to competition enforcement in markets that can and should be competitive. The focus on sectors with natural monopoly elements has led or contributed to a relatively low level of enforcement in potentially competitive markets. Taking into account both the relatively low level of enforcement and the infrequency and low level of fines, it seems unlikely that Chile’s competition law is currently doing much to deter anticompetitive conduct.

- Consider providing increased funding for the Prosecutor’s Office.

Chile has increased its investment in competition law and policy and will soon increase its investment further by funding the new Tribunal. However, in light of the importance of increased attention to guidelines, competition advocacy, and traditional competition enforcement, the Office’s need to continue its recently increased involvement in international competition matters, and the value of the Office’s work on issues relating to infrastructure monopolies, Chile should consider a moderate increase in funding for the Prosecutor’s Office. This is a crucial time for competition enforcement in Chile, and increased funding could easily pay for itself through increases in the efficiency and productivity of Chile’s economy.

- Reconsider Chile’s approach to merger control and perhaps to hard core cartels.

Chile’s lack of a premerger notification programme should be reconsidered. Developing countries sometimes choose not to have premerger notification or even substantive merger control because they
believe they lack the necessary skills, they want to avoid being buried in paperwork, and they seem to embrace the view that mergers which do create anticompetitive problems can later be undone or kept in check by enforcement against abuse of dominance. But Chile has the legal and economic expertise, paperwork burdens can be managed by adjusting filing thresholds, and there is general consensus that it is preferable to prevent an anticompetitive merger than to try break up or to control the dominance created by the merger, once “the eggs have been scrambled”. With respect to hard core cartels, if it is true that Chile’s law now requires applying the rule of reason in all cases, then Chile should consider returning to its previous per se approach. The risk created by use of the per se rule is that it will be applied to pro-competitive conduct such as the integration of firms’ operations that should in fact be treated as a joint venture. Given the sophistication and caution of Chile’s competition institutions, this seems to be a very small risk.
Notes

1. Other than CODELCO, there are only two real SOEs: the National Petroleum Enterprise, “ENAP”; and a small firm that supports the development of small mining operations, “ENAMI.”

2. Other components of the agenda include procompetitive regulatory reform in electricity and other areas, developing e-commerce and e-government, tax incentives for investment, better use of public expenditure in the higher education and health care, and facilitation of job-training and part-time work. The plan appears to be broadly consistent with views expressed in an article that examines the institutional and economic structure of the state in Latin America, finds it incompatible with an adequately functioning market economy, and calls for reform. Saavedra, Eduardo, and Soto, Raimundo, Reformas Económicas e Institucionales Del Estado en América Latina, Universidad Alberto Hurtado (Diciembre de 2000).

3. Chile’s investment policies during this period are discussed in Eduardo Moyano, Foreign Investment Policy and Promotion in Chile, in Foreign Direct Investment Policy and Promotion in Latin America (OECD, 1999).

4. As originally proposed in the pro-growth agenda, this amendment would have made the law’s efficiency orientation even clearer, by stating that the law’s object is “the defence of free competition in the markets, as a means to develop and preserve the right to participate in economic activities, promote efficiency and, thereby, the welfare of consumers.” This text would have codified Chile’s current position concerning the primary goals of the law while also confirming Chile’s special concern for economic freedom. [During a major “Competition Day” conference in Santiago on 30 November 2003, the head of Chile’s competition authority stated that the more specific goals referred to in the original draft will be used help define the more general term in the final law.]

5. For example, Resolution Nº 257 (1987), explained that exclusive territories infringe competition by “preventing the access by other businessmen who may be interested in distributing such product.”

6. Spain’s competition law has a similar emphasis on what it calls “the exercise of freedom of enterprise.”


8. Paredes-Molina, Ricardo D., Jurisprudence of the Antitrust Commissions in Chile, the Law and Economics of Development (Buscaglia, Ratliff, and Cooter, Eds.) (19__).
9. Article 2 says that the listed acts and agreements tend to restrain free competition. This clarifies that the conduct need not have had an effect in order to be condemned, but it does not necessarily mean that the conduct covered by Article 2 should be any more likely to be illegal per se than any other conduct covered by Article 1. In the first place, Article 1 refers to “attempts” to restrain free competition, so it too has no requirement of an actual effect. In the second place, conduct that tends to restrain competition does not necessarily do so.


14. To the same effect, see Carey, Jorge, World Law of Competition, Part 4: Chile (1986).

15. OECD (2001a), Recommendation of the OECD Council concerning Structural Separation in Regulated Industries. The underlying issues and OECD Members’ experiences are discussed in OECD (2001b), Restructuring Public Utilities for Competition.


17. Paredes, supra n.8

Annex A

Table A-1. National Economic Prosecutor’s Office Resources

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<th>Year</th>
<th>Person Years</th>
<th>Budget (in 000s of US$)</th>
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<td>795</td>
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<td>1997</td>
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Table A-2. Conduct Fined As % of Total Fines, 1973 – 2002

<table>
<thead>
<tr>
<th>Conduct</th>
<th>Commission Fines – US$</th>
<th>Final (S. Court) Fines – US$</th>
</tr>
</thead>
<tbody>
<tr>
<td>Horizontal agreements</td>
<td>25.6 %</td>
<td>31.1 %</td>
</tr>
<tr>
<td>Vertical agreements</td>
<td>2.2 %</td>
<td>3.9 %</td>
</tr>
<tr>
<td>Monopol/Abuse</td>
<td>33.7 %</td>
<td>27.4 %</td>
</tr>
<tr>
<td>Unfair competition</td>
<td>24.5 %</td>
<td>17.9 %</td>
</tr>
<tr>
<td>Merger</td>
<td>0.8 %</td>
<td>0.3 %</td>
</tr>
<tr>
<td>Others</td>
<td>13.2 %</td>
<td>19.3 %</td>
</tr>
<tr>
<td>Totals</td>
<td>100 %</td>
<td>100 %</td>
</tr>
</tbody>
</table>
Annex B

Statistical Overview
of Chilean Competition Law Enforcement

An overview of the competition regime from historical statistical and other information generally confirms the conclusions reached above. Three main sources of such information exist. First, an article by Professor Ricardo D. Paredes-Molina, a former member of the Central Preventative Commission, lists the number, type, and disposition of all the cases handled by the Antitrust Commission and the Central Preventive Commission in the period 1974 – 1993. In addition, in connection with its FTAA activities, Chile prepared a listing and brief summary of all the rulings by the Antitrust Commission and the Central Preventative Commission in 2001. Finally, the Prosecutor’s Office has assembled data on the fines that have been imposed during the entire 1974 – 2002 period. This section briefly examines all three sources.

Antitrust and Central Preventative Commission Decisions, 1974 - 1993

The Antitrust Commission

The Parades article lists 367 matters decided by the Antitrust Commission, of which 278 fall into three major substantive categories: horizontal arrangements, vertical arrangements, and monopolisation. Although there apparently were some merger cases, the lack of a separate category for mergers is a striking illustration of the Prosecutor’s Office’s priorities during this period. After setting aside a few ambiguous subcategories, one can say with relative confidence that the Commission handled 45 horizontal cases, 53 vertical cases, 42 monopolisation cases that involved vertical arrangements, and 114 other monopolisation cases (some of which may have involved vertical arrangements), and 6 unfair competition cases.
Table B1. Resolution of cases by Chile’s Antitrust Commission, 1974 – 1993

<table>
<thead>
<tr>
<th>Conduct</th>
<th>Total</th>
<th>Violation</th>
<th>No Violation</th>
<th>Other</th>
</tr>
</thead>
<tbody>
<tr>
<td>Horizontal arrangements</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Price agreements</td>
<td>45</td>
<td>16</td>
<td>29 (64%)</td>
<td>0</td>
</tr>
<tr>
<td>Territory allocation</td>
<td>5</td>
<td>4</td>
<td>1 (20%)</td>
<td>0</td>
</tr>
<tr>
<td>Production quotas</td>
<td>1</td>
<td>0</td>
<td>0 (0%)</td>
<td>0</td>
</tr>
<tr>
<td>Trade associations</td>
<td>5</td>
<td>5</td>
<td>0 (0%)</td>
<td>0</td>
</tr>
<tr>
<td>Info. Exchange</td>
<td>2</td>
<td>0</td>
<td>2 (100%)</td>
<td>0</td>
</tr>
<tr>
<td>Vertical Arrangements</td>
<td>53</td>
<td>26</td>
<td>24 (45%)</td>
<td>3</td>
</tr>
<tr>
<td>Exclusive distrib.</td>
<td>12</td>
<td>6</td>
<td>5 (41%)</td>
<td>1</td>
</tr>
<tr>
<td>Resale price maint.</td>
<td>18</td>
<td>13</td>
<td>5 (27%)</td>
<td>0</td>
</tr>
<tr>
<td>Discrimination</td>
<td>16</td>
<td>4</td>
<td>10 (63%)</td>
<td>2</td>
</tr>
<tr>
<td>Refusal to deal</td>
<td>7</td>
<td>3</td>
<td>4 (57%)</td>
<td>0</td>
</tr>
<tr>
<td>Vertical Monop/Dominance</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Price discrimination</td>
<td>28</td>
<td>16</td>
<td>9 (32%)</td>
<td>3</td>
</tr>
<tr>
<td>Tie-in sales</td>
<td>7</td>
<td>4</td>
<td>2 (29%)</td>
<td>1</td>
</tr>
<tr>
<td>Other Monop/Dominance</td>
<td>114</td>
<td>58</td>
<td>44 (39%)</td>
<td>12</td>
</tr>
<tr>
<td>Monopolisation</td>
<td>83</td>
<td>39</td>
<td>34 (41%)</td>
<td>10</td>
</tr>
<tr>
<td>Monopsony</td>
<td>8</td>
<td>4</td>
<td>3 (38%)</td>
<td>1</td>
</tr>
<tr>
<td>Barriers to entry</td>
<td>23</td>
<td>15</td>
<td>7 (30%)</td>
<td>1</td>
</tr>
<tr>
<td>Predation</td>
<td>7</td>
<td>1</td>
<td>6 (86%)</td>
<td>0</td>
</tr>
<tr>
<td>Unfair Competition</td>
<td>6</td>
<td>2</td>
<td>4 (67%)</td>
<td>2</td>
</tr>
<tr>
<td>All categorised cases</td>
<td>260</td>
<td>144</td>
<td>118 (45%)</td>
<td>21</td>
</tr>
</tbody>
</table>

This case distribution is what would be expected in Chile’s circumstances. It is normal for a country in transition from a largely state-owned or state-controlled economy to have a large number of cases.
involving dominant firms. And the difficulty of investigating and proving cartels makes it not surprising to see more vertical than horizontal cases. On the other hand, when one considers that at least 42 of the monopolisation cases apparently involved vertical restraints by dominant firms, the great preponderance of vertical over horizontal cases does tend to support the previously noted conclusion that the competition institutions may have tended to challenge intrabrand restrictions that limit a firm’s autonomy but may not harm competition in the market as a whole. The current concern that the institutions may spend too much time on unfair competition cases may note a recent trend, because there were only six during this previous 20 year period.

Viewed with caution, statistics on how the Antitrust Commission decided these cases also raise interesting points or questions. First, the Prosecutor’s Office or private party initiating a complaint won only 55 per cent of the cases. Most challenges to horizontal arrangements and unfair competition were lost, while most vertical and monopolisation cases were won.

There are many possible reasons so many cases were lost, and the data do not permit in depth exploration of this issue. They do not disclose, for example, the cases in which the Prosecutor’s Office was a party. It does, however, seem likely that this record reflects reluctance on the part of the Commission to find violations. An often-cited 1995 analysis of competition enforcement in Chile found that Commission members were indeed very reluctant to apply sanctions, and attributed this to a combination of factors, including (a) a strong belief in Chilean society that economic crimes are not serious, especially when the harm is to the public, (b) a perhaps related laissez faire attitude among some who regard the harm from monopoly as probably less than the harm from unwarranted intervention, (c) lack of resources, and (d) lack of an economic regulatory background or other expertise.\(^{18}\)

Comparing the number of successful and unsuccessful cases in the subcategories raises interesting questions, but the data do not provide a means for further analysis. Challenges to horizontal price agreements had almost the highest percentage of losses. It is unclear what kinds of “discrimination” were involved in the cases labelled as vertical, but it is notable that discrimination by firms without market power was apparently condemned much less frequently than price discrimination by dominant firms.
The Central Preventative Commission

The statistics for the Preventive Commission are even harder to interpret. Of the 227 matters, only 118 fit in defined violation categories, and only 78 of these ended with approval or disapproval of the conduct. Of these 78 matters, only six clearly involved horizontal agreements – three price agreements, one territorial allocation, one association case, and one collusion case – of which five were found illegal. There were 38 cases involving vertical arrangements, and at least 27 of the 57 monopoly cases involved vertical restraints – 65 essentially vertical cases, of which 45 were found illegal. It is striking to see the extent to which vertical cases predominate, the much higher rate of disapproval in vertical cases, and the very small number of times in which horizontal conduct was challenged. There were eight unfair competition cases; the conduct was approved in four cases, and there were no formal findings of illegality.

Antitrust and Preventative Commission Decisions in 2001

Antitrust Commission

According to information submitted by Chile in connection with FTAA discussions, in 2001, the Antitrust Commission made 55 rulings involving 33 docketed matters and one investigation (in which the Commission authorised arrest warrants for representatives of two companies that had refused to provide information relating to an alleged price fixing agreement on inter-province bus service). Overall, there were eight matters involving telecommunications, two involving electricity pricing, and a number of matters involving airline pricing. The more important infrastructure monopoly cases were the following:

- One telecom ruling was part of the case in which the Commission required the telecom regulator to hold an auction. In addition, the Commission declined to accept several complaints relating to telecom on the ground that the matters should appropriately be handled by the telecom regulator.

- In another important case, the Commission rejected a petition asking it to declare that there are competitive conditions in the local urban telephony market, including in its ruling six provisions that aimed at gradually creating a genuinely competitive market.

- The Commission was petitioned to find that some services connected with the supply of electricity are not provided under competitive conditions (and thus are subject to price control). It found that
competitive conditions did not exist in the markets for 25 services, and made several recommendations to the electricity regulator.

Outside the infrastructure sectors, the most substantial matters before the Commission were the following, each of which is discussed in more detail elsewhere in this report.

- The Commission rejected a challenge to Coca Cola’s acquisition of all trademarks and licenses of Cadbury Schweppes.
- In the buyers’ cartel case against milk processors, the Commission issued an interim order suspending the buyers’ price schedules for the period beginning 1 September 2001, ordering them to make payments based on their 1 July schedules.
- The Commission issued the previously described general instruction concerning price discrimination in the marketing and distribution of pharmaceuticals.
- The Commission upheld a decision by the Central Preventative Commission and fined Toyota Chile for fixing minimum resale prices for original replacement parts.

The Commission handled at least five unfair competition cases, at least some of which (e.g., a dispute over a restaurant’s use of the term “express buffet” on its premises) appear to have been disputes without real competitive significance.

It is noteworthy that the Commission’s only contact with horizontal price fixing or other horizontal agreements was its authorisation of arrest warrants stemming from firms’ failure to comply with investigative demands by the Prosecutor’s Office. Outside the infrastructure sectors, the Commission handled only one merger matter (Coca Cola/Cadbury Schweppes).

Central Preventative Commission decisions

The Central Preventative Commission issued rulings in 49 matters in 2001. Two were complaints alleging infringement of the right to work; both were dismissed, in one case with a decision stating the general proposition that such infringements are not cognizable under the competition law unless they involve real restriction of competition in the market as a whole. This is an example of the way in which Preventative Commission decisions have sometimes included the kinds of explanations of their reasoning that helps clarify legal standards.
Eleven cases involved government procurement and licensing, five of which appear to have been a purely formal review of whether requests for bids meet the standards laid out in an earlier Commission order. Four of the cases had some substantive element, which in three cases seems to have essentially amounted to a claim that the government was improperly conferring a monopoly on private parties.

The Commission’s handling of two of the three monopoly cases was very cautious – finding no violation but issuing warning letters. Since the letters seem to warn against essentially the same conduct as that which had been at issue in the cases, they appear to illustrate a continuing reluctance on the Commission’s part to find violations. In one case, it upheld an exclusive contract but warned the Department of Roads that before renewing the contract, it must consider whether other firms might like to bid. In the other, the Commission declined to overturn municipalities’ grant of exclusive rights to sell compulsory auto insurance on the ground that the awarding process was proper, but it nonetheless issued a warning to the municipalities. The Commission did find a violation in a case involving educational establishments that required school uniforms to be bought from firms to which they had granted exclusive contracts without having called for bids. The Commission issued detailed rules to govern this process and ordered that the operative part of its opinion be published in a newspaper with substantial national distribution.

An additional 14 cases involved infrastructure monopolies. The Commission rejected one pricing complaint on the ground that it should be considered by the telecom regulator. Eleven other cases all involved rulings under a special law on requests by the telecom regulator or private parties for a ruling on whether prospective license transfers would be anticompetitive; the Commission did not object to any of them. And in a case involving the electricity market, the Commission advised that the acquisition of shares in an electric company by the parties that had submitted bids would not raise competition issues. Finally, the Commission received a complaint by a consumer organisation that the Santiago subway system was charging excessive prices and thereby abusing its dominant position. The case is still pending (and offered as an example of the slow decision making process; the complaint was in February 2001, and the hearing in March 2002).

The remaining 22 cases involved firms in competitive or potentially competitive markets. Fourteen of these were unfair competition cases involving trademark or other intellectual property issues, and one was a comparative advertising case. Another four involved parallel imports or other import-related issues. This leaves three more conventional competition cases. In one, the Commission issued an advisory opinion stating that a
proposed distribution system would not raise problems if changed in minor ways. In another, it dismissed allegations that Hipermercado Carrefour had engaged in predatory pricing, including in its ruling several specifications on how promotional offers should be handled. The third case was the dog food resale price maintenance that was mentioned above because during 2001 it was appealed to (and affirmed by) the Antitrust Commission.

**Fines Imposed, 1974 - 2002**

Statistics on the number and amount of fines tend to confirm the apparent reluctance of Chile’s competition institutions and legal system to impose sanctions. Table 2 shows that fines were imposed in only 73 cases in the last 28 years. The Supreme Court reduced the Antitrust Commission’s fines by 45 percent, making the average fine about US$ 13,500 and the total less than US$ 1 000 000. The Commission’s highest fines on average were in unfair competition cases, followed by horizontal cases and then “other.” As finally approved by the Court, the highest average fine was for horizontal cases, followed by “other” and then unfair competition. By far the most fines (43) were for monopolisation, but the average fine totalled only slightly more than US$ 6 000. Table A-2 in Annex A shows the total fines for each violation category as a percentage of total fines.

### Table B2: Amount of Fines for Different Violations, 1974 – 2002

<table>
<thead>
<tr>
<th>Conduct</th>
<th>No of Cases</th>
<th>Commission Fines – US$ (avg per case)</th>
<th>Final (S. Court) Fines – US$ (avg per case)</th>
<th>Final as % of Commission</th>
</tr>
</thead>
<tbody>
<tr>
<td>Horizontal agreements</td>
<td>9</td>
<td>455 460 (50 607)</td>
<td>305 986 (33 998)</td>
<td>67.2</td>
</tr>
<tr>
<td>Vertical agreements</td>
<td>4</td>
<td>38 711 (9 678)</td>
<td>38 739 (9 685)</td>
<td>101.1</td>
</tr>
<tr>
<td>Monopoly/Ab use</td>
<td>43</td>
<td>600 156 (14 000)</td>
<td>269 779 (6 273)</td>
<td>45.0</td>
</tr>
<tr>
<td>Merger</td>
<td>1</td>
<td>13 613</td>
<td>3 403</td>
<td>25.0</td>
</tr>
<tr>
<td>Unfair competition</td>
<td>8</td>
<td>436 776 (54 957)</td>
<td>175 544 (21 943)</td>
<td>40.2</td>
</tr>
<tr>
<td>Others</td>
<td>8</td>
<td>235 875 (29 484)</td>
<td>189 808 (23 726)</td>
<td>80.5</td>
</tr>
<tr>
<td><strong>Totals</strong></td>
<td><strong>7.3</strong></td>
<td><strong>1 780 591 (24 389)</strong></td>
<td><strong>983 259 (13 469)</strong></td>
<td><strong>55.2</strong></td>
</tr>
</tbody>
</table>
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COMPETITION LAW AND POLICY IN MEXICO

A Peer Review

2004
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Summary

This report assesses the development and application during the past five years of competition law and policy in Mexico. It updates a report prepared in 1998 as part of a larger OECD regulatory reform study. The 1998 Report concluded that Mexico’s 1993 competition law reflected a well-conceived synthesis of contemporary economic principles. The law created a Federal Competition Commission (the CFC) that possesses both strong enforcement powers and authority to determine whether the absence of effective competition in a market sector warrants regulatory intervention by the government. The previous report noted, however, that there was no clear base of support for competition policy, and that the vigour of the Competition Commission’s enforcement record to that point could be questioned.

Five years later, the strengths identified in the initial Report still pertain, and doubts about the CFC’s willingness to engage powerful economic interests have largely dissipated. Further, the Commission has matured into a credible and well-respected agency that has compiled a remarkable record of achievement given the difficulties of its environment. The agency still confronts an array of challenges and opportunities for improvement. The degree of general support for competition policy is still an open question, and certain deficiencies in statutory authority and judicial review processes constrain the CFC’s ability to address anti-competitive conditions effectively and efficiently. The Commission has also suffered a decline in resources despite an increasing workload, and some features of the CFC’s procedures and methods of interface with other government entities reduce its efficacy as a law enforcement agency and competition advocate.

This Report suggests changes that the Commission can make itself, as well as certain alterations in government authority and procedure that the Commission is urged to seek from other branches of government. In the first category, the Report recommends that the CFC:

- provide respondents in Commission proceedings with better incentives to settle cases by consent and thus reduce the volume of amparo (judicial review) suits filed against the Commission;
SUMMARY (cont.)

- Open a dialog with the Mexican Bar Association to address perceptions among some practitioners that Commission decisions are insufficiently transparent and biased against respondents in CFC complaint cases;
- Establish a program to monitor closely regulatory proposals posted for review by COFEMER and submit appropriate comments on proposals that threaten anti-competitive effects;
- Maintain a much closer relationship with PROFECO, both to obtain assistance in detecting and prosecuting collusive behaviour and, more importantly, to employ the tools offered by PROFECO for communicating the benefits of competition more effectively to the public;
- Assess fines aggressively in cartel cases, refer corporate officers for criminal prosecution, and employ other tools to promote the exposure of collusion;
- Undertake more interaction with national business organizations and business chamber consortia to explain and advocate competition policy;
- Provide a fuller explanation of its fine imposition decisions to avoid reversal in Fiscal Court review proceedings;
- Employ any increase in resources to hire additional professional staff, with particular emphasis on securing expert lawyers;
- Adopt criteria for assessing the significance of failing firm conditions in merger cases;
- Issue appropriate confidentiality regulations to avoid inappropriate disclosure of sensitive commercial information by judges in amparo suits against the CFC;
- Amend the pre-merger notification regulations to clarify the circumstances in which filing is not required for restructuring transactions undertaken by foreign firms with Mexican subsidiaries;
- Encourage the identification of economists with appropriate professional expertise for retention by amparo courts as experts in CFC cases;
In the second category, this Report recommends that the Commission seek action by Congress (or, as appropriate, the judicial branch) to:

- require Senate approval of Commissioner appointments to the CFC and establish the CFC’s budgetary independence from the Executive Branch;
- increase the Commission’s budget allocation;
- empower the CFC to block anticompetitive decisions in trade law proceedings;
- vest the CFC with expanded investigative powers and authority to establish a leniency program for conspirators who voluntarily reveal collusive agreements;
- empower the CFC to remedy structural monopoly problems directly, or at least to vest the Commission with authority to study suspect industries and recommend appropriate remedies to Congress;
- assure that the CFC has an adequate opportunity to participate in all proceedings conducted by federal regulatory agencies, and require that regulatory agencies reply on the public record to the Commission’s comments;
- establish a specialised amparo court with economic expertise to hear cases from the CFC and other agencies that deal with economic issues;
- prevent amparo courts from granting inappropriate stays of CFC orders during judicial review;
- streamline the procedures that apply to the collection of fines after judicial review is completed;
- modify the procedural rules for both amparo and Fiscal Court cases so that parties seeking review of Commission orders imposing fines will be required to post a bond assuring payment if the Commission’s order is sustained;
- eliminate for CFC cases the existing jurisdictional amount required for appellate review of adverse Fiscal Court decisions.
1. Competition Policy in Mexico: Foundations and Context

This report assesses the development and application of competition law and policy in Mexico since 1998. It updates the OECD’s “Background Report on the Role of Competition Policy in Regulatory Reform,” prepared in 1997-98 as part of a larger OECD study of regulatory reform in Mexico (hereafter “1998 Report”). As did the previous Report, this analysis begins with a description of the background of competition policy in Mexico and the context in which it operates.

Mexico’s competition policy was introduced as part of a decade-long reform initiative, begun in the mid-1980s, to end central government control and protection of domestic economic activity and to develop instead a market-based economy. The government ended most domestic price controls and reduced entry constraints. To open the economy to foreign trade and investment, Mexico eliminated most compulsory import licenses, abolished official import prices, reduced tariffs, and adhered to the GATT. Further, in 1994, Mexico entered the North American Free Trade Agreement (NAFTA), followed subsequently by free trade agreements with the European Union and a litany of Latin American countries, so that today virtually all of Mexico’s foreign trade is covered by such accords. Trade with the United States and Canada tripled after the implementation of NAFTA, and in the period from the beginning of the liberalisation process in 1984 until 2002, annual imports increased by more than 1000 per cent, while exports increased by 555 per cent. Import liberalisation, as anticipated, beneficially stimulated domestic competition in Mexico’s tradable goods sectors.

The government also undertook to privatise hundreds of state-owned commercial enterprises. The largest single effort was the 1990 sale of the telephone monopoly for $US 6 billion. Eighteen commercial banks were privatised in 1991 and 1992, for a total of $US 13 billion. Public firms in steel, sugar processing, airlines, TV broadcasting, satellites, airport and seaport facilities, and railroads were sold to private concerns. Licenses and concessions for activities formerly performed by the state, such as seaport services, and the storage, transportation and distribution of natural and liquefied petroleum (LP) gas were auctioned to the private sector, as were licenses for frequency bandwidths covering a variety of broadcast services.

Privatisation sometimes encountered complications, and the process is not yet complete. The peso crisis of the mid-1990s and its associated economic dislocations led to government reacquisition of direct or indirect ownership positions in firms involved in banking, airlines, toll road operation, and sugar processing. Bank workouts in the intervening years have restored private ownership in that sector, but the other three sectors
await resolution. Further, privatisation has made no headway in petroleum. Consequently, the national monopolist Pemex still imposes inefficiencies and distortions on the government and the economy. Nor has much progress been made with respect to electrical energy, although a few licenses have been granted to establish independent power generation facilities.2

Because some of the privatised sectors exhibited natural monopoly characteristics, regulatory regimes were instituted to deal with defects in market operation. Difficulties arose in some sectors where regulatory schemes were not sufficiently well conceived or not implemented at the right time. In telecommunications, the lure of revenue maximisation led the government to sell the existing system to a single entity, and regulatory inadequacies in that sector led to years of quarrelling over how much long distance and cellular competitors should pay the monopoly for network access. In railroads, the government sold off geographic segments of the national system to different buyers, which produced better results than the telephony experience, but disputes have still arisen among the segment operators over access fees to be paid for trackage rights in adjoining regions.

A key element in the government’s economic reform was the adoption of a general competition law. Removing trade barriers could not assure competition if private barriers sprang up instead, and import liberalisation could not ensure rivalry in non-traded sectors. Further, as a party to NAFTA, Mexico was committed to the adoption of measures proscribing anti-competitive business conduct.3 In 1993, Mexico therefore adopted the Federal Law of Economic Competition (LFCE),4 and created the Federal Competition Commission (CFC) to enforce it. The LFCE’s drafters undertook to integrate the best competition policy ideas and practices from around the world. The law treats aggressively the most harmful competitive constraints, and applies an economically sensitive analysis to the more ambiguous forms of conduct by using a market power screen and permitting an efficiency defence. The law’s elegant organisation and clear conceptualisation reveal its origin as a product of technical expertise, rather than populist adventurism or political compromise.

The competition policy objectives set out explicitly in the LFCE are: “to protect the competitive process and free market access by preventing monopolies, monopolistic practices, and other restraints of the efficient functioning of markets for goods and services.”5 Efficiency is the guiding touchstone for the law’s application. Other commonly encountered competition policy concerns are subsumed in the efficiency-based analysis. For example, there are no provisions or doctrines about “fairness” or “fair competition,” nor about protecting the interests of small enterprises or limiting industrial concentration. And although the law is part of a program to develop a more market-oriented economy, the law takes no explicit note
of the goal of promoting economic growth. The law’s underlying rationale contemplates that growth will follow from greater competition and efficiency.6

The larger environment in which the law operates is not wholly congenial. The 1998 Report observed that “The level of support for the new direction of competition policy in the wider public or business communities is uncertain.”7 Five years later, the same can still be said. The development of a constituency for competition policy in Mexico must contend with the fact that concepts of market competition are novel in the Mexican business and government culture. The Mexican Constitution has prohibited monopoly since its ratification in 19178 (and indeed, since the Constitution of 1857). Historically, however, the animus against monopoly was focused on the grant of monopoly patents to private interests by government largesse. The traditional goal of Mexican competition policy was to eliminate the evils of private monopoly by instituting price control and state ownership.

Prior to reform, in business sectors that were not occupied by federally-owned firms, private companies were organised into chambers that fixed prices under the aegis of government authority. Not surprisingly, business chambers exhibited a strong inclination to continue fixing prices even after the government’s participation and approval ended. Also, after reform, government sector regulators sometimes appeared to exercise their authority to accomplish results deemed desirable on non-efficiency grounds, such as to develop national champions.

The LFCE and the market-opening reforms were launched during the administration of President Carlos Salinas, of the Institutional Revolutionary Party (PRI). He was succeeded in 1994 by PRI candidate Ernesto Zedillo, whose administration was confronted almost immediately with the collapse of the peso and an ensuing economic crisis. Although strong exports subsequently helped the Mexican economy to recover, ex-President Salinas was blamed for contributing to the crisis and for his alleged involvement in a range of misdeeds. In the political dynamic of Mexico, competition policy and the CFC are not helped to the extent that they are seen as a product of the Salinas era or as a requirement imposed on Mexico by NAFTA.

In a historic shift after more than 70 years of PRI rule, Vicente Fox, candidate of the National Action Party (PAN), won the 2000 national elections. PRI and PAN each won two fifths of the seats in the lower house Chamber of Deputies, but the PRI secured nearly half of the seats in the upper house Senate. In the 2003 elections for the lower house Chamber of Deputies, the share of seats held by the party of the Fox administration (PAN) dropped to 30 per cent, while the share held by the party of the previous administration (PRI) increased to 44 per cent. The even balance of
power has made it difficult to pass significant legislation. Although the new administration has been in place for more than two years, there is still little basis for determining its stance on competition policy. There is a perception that ministers are now more likely to come from business or politics, rather than from the technocratic school that was typical of the last two PRI administrations. Recently, however, in June 2002, President Fox announced that the government is preparing an economic development program in which competition policy will play a prominent role.

During his tenure thus far, President Fox has appointed one commissioner to the CFC. He will have the opportunity to fill more seats, because the terms of three other commissioners will end before the next presidential election in 2006. Legislation now pending before Congress, offered by Deputies affiliated with the PRI and several smaller parties, would give the legislative branch a role in the appointment process by requiring Senate approval of Presidential appointments to the CFC.

The 1998 Report, besides noting the uncertainty of public support for competition policy, noted a concern about public perception of the CFC that appears to have been resolved in subsequent years. The Report observed that:

A number of factors, including the CFC’s economics-based approach, its observance of careful, and sometimes time-consuming procedures, and the delays from frequent judicial challenges, as well as the public impression that some of its decisions have accommodated non-competition interests, have led to a public perception that the agency is not strong.9

Since 1998, the CFC has repeatedly demonstrated its willingness to confront and aggressively apply the law to powerful economic actors, and there do not appear to be many who still consider the CFC weak on that account. The problem of producing demonstrable results still persists, however, especially because the shower of judicial challenges that the CFC faced in 1998 has grown into a thunderstorm. The CFC has won virtually every case that has risen to the Mexican Supreme Court, which has found numerous portions of the LFCE to be constitutional and has not rendered any definitive decisions finding constitutional defects.10 Nonetheless, the lower courts have not been so supportive, and the CFC is seen as an easy target for litigious delay at the hands of its prosecutorial targets. This problem extends not only to judicial review of the CFC’s procedures and case determinations, but also to the collection of the fines imposed by the CFC for unlawful conduct.

The arrival of the Fox administration is the most significant change since 1998 in the environment faced by competition policy and the CFC.
The Supreme Court has supported the CFC’s statutory scheme. And the legislative branch has not amended the LFCE during the past five years. On the contrary, powerful interests have repeatedly failed in their efforts to evade CFC oversight by having the law changed. In both 2000 and 2001, Congress rejected proposals to amend the LFCE by exempting commercial airline services. The CFC opposed the legislation, which was designed to allow the airline assets held by the government to be consolidated as a single flag carrier. Likewise, in 2001 and 2002, during the development of revised telecommunications legislation by a congressional conference, the CFC successfully resisted attempts to strip the CFC of its authority to declare the existence of substantial market power in that sector. With respect to the Regulations implementing the LFCE, there have been no amendments to their provisions since initial promulgation in March 1998. There is one new piece of legislation that affects the CFC (and the entire federal government). The Federal Law of Transparency and Public Access to Governmental Information was enacted in 2002, but its most significant requirements became effective on June 11, 2003. It requires a higher degree of transparency from government agencies, a topic treated later in this Report with respect to the CFC.

2. Coverage of the Competition Law

The LFCE is designed to give operative force to anti-monopoly provisions set out in Article 28 of the Mexican Constitution, and an exposition of the coverage of Mexico’s competition law properly begins with the constitutional text. Article 28 opens with a broadly couched prohibition of “monopolies, monopolistic practices, [and] State monopolies.” It then provides, however, that the functions exercised exclusively by the State in specified “strategic areas” will not be deemed to constitute monopolies for this purpose (although, of course, they are in fact). The sectors presently listed in Article 28 as strategic areas are postal services, telegraph and radiotelegraphy, petroleum and other hydrocarbons, basic petrochemicals, radioactive minerals, nuclear energy, electric power, and the functions of the central bank in producing coins and paper currency. The list may be contracted only by constitutional amendment, which requires a two-thirds majority of both houses of Congress as well as approval by a majority of the state legislatures. Congress can expand the list simply by enacting legislation, provided that the basis for ascribing “strategic area” status is duly established. Other provisions in Article 28 stipulate that exclusionary privileges accorded to copyright and patent holders also do not constitute monopolies, and the same treatment is likewise accorded to labour associations and export trade associations.
The LFCE reflects and further details the boundaries of the constitutional exemptions. Article 4 restates the strategic area exclusion, but adds the important proviso that State-owned enterprises are subject to the law with respect to monopolistic practices that are not specifically within a strategic area’s scope. LFCE articles 5 and 6 repeat that legally constituted labour associations and export trade associations, respectively, do not constitute monopolies. The latter exception is constrained by several additional requirements, including that association membership must be fully voluntary and that organisation of the association must be in compliance with the law of the association’s domiciliary state.

Save for these exceptions, the LFCE is applicable, by its terms, to “all economic agents,” expressly including government agencies (article 3), and to “all sectors of economic activity” (article 1). Thus, the state, its agencies, and all state-owned commercial enterprises operating outside the strategic areas are covered. When a government agency is acting as a regulatory authority and not as an economic agent, however, the CFC ordinarily has no law enforcement jurisdiction. If the government entity is engaging in regulatory conduct that inappropriately restricts competition, the Commission may issue an opinion to the agency in question, but not an order with binding legal effect. On the other hand, the LFCE provides no exception or protection for anticompetitive conduct by a private party on the grounds that the conduct is authorised by a government agency or official. The CFC rejects such a defence as a matter of principle, although the offender may receive a reduced penalty.

The CFC is authorised to deal with anti-competitive government regulation in one circumstance: where a state or local agency undertakes to restrict interstate or foreign commerce. Article 117, section V of the Mexican Constitution reserves the regulation of such commerce to the federal government and prohibits state interference. LFCE article 14 implements this Constitutional provision by providing that “the acts of state authorities of which the direct or indirect objective is to prevent the entry or exit of domestic or foreign goods or services into or from the state’s territory, shall have no legal force or effect.” Although the Commission cannot order the state to repeal the offending regulation, LFCE article 15 empowers the CFC to declare that the regulation constitutes an interstate trade barrier. This effectively makes the regulation void under Article 117, section V, and private parties can then ignore the regulation with legal impunity. The CFC’s usual practice is first to issue a recommendation urging repeal. If the state entity takes no action, the CFC then issues a public declaration that the regulation constitutes an interstate trade barrier.

Regulatory commissions have been established for several economic sectors, including telecommunications (the Federal Telecommunications
Commission, or COFETEL, which is in the Ministry of Communications and Transportation, electricity and gas (the Energy Regulatory Commission, or CRE), insurance and sureties (the National Insurance and Sureties Commission), and pension funds (the National Pension Funds Commission). The transportation sector, including rail, aviation, road transport, and seaports, is regulated directly by the Ministry of Communications and Transportation without the intermediation of a commission. Various features of the financial sector are controlled by the Ministry of Finance, the National Banking and Securities Commission, and the Mexican central bank. None of these government entities have authority to apply the LFCE, nor are any of their associated market sectors exempt from it. A signal feature of many of these sector regulatory schemes is that they create an explicit role for the CFC. Specifically, the CFC must determine that there is an absence of effective competition in a market (or, uniquely for the telecommunications sector, that an economic agent has substantial market power) before the sector regulator can impose price controls. In addition, in some sectors, economic agents who wish to bid in a sector regulator’s auction, or to apply directly through an administrative proceeding for a concession, license, or permit, must first obtain a favourable CFC opinion. The CFC can disapprove the applicant’s request or, where the auction rules so provide, establish conditions that will apply to the applicant if it should win.

A final form of government market regulation arises from yet another provision in Article 28 of the Mexican Constitution. Besides banning monopolies and creating the “strategic area” and other exemptions discussed previously, Article 28 empowers the federal government to set maximum prices for articles or services deemed “necessary for the national economy or popular consumption.” Article 7 of the LFCE implements this provision. The Federal Executive is authorised to determine which products are eligible and the Ministry of Economics sets the price ceiling after negotiation with interested parties. Article 7 provides that agreements established between the Ministry and producers or distributors to implement such price ceilings are not a violation of the LFCE. In the mid-80’s, about 70 percent of all products were subject to some form of price control. By the time of the 1998 Report, the only products still on the list were tortillas and medicines. Tortillas were subsequently removed, and the Ministry of Economics is presently evaluating the removal of medicines. As discussed later in this report, however, distribution of liquefied petroleum (LP) gas was added to the list in 2001.

One remaining aspect of the LFCE’s coverage that deserves attention here is its extraterritorial applicability. The statute does not make any distinction between foreign and domestic actors and the CFC stated at the
outset that the LFCE “applies to all agents whose actions impact markets in the Mexican territory.”\textsuperscript{15} The CFC recognises, however, that founding enforcement action on an “effects” test is fraught with a range of difficulties, from obtaining personal jurisdiction to dealing with adverse reaction from affected foreign countries. The Commission has avoided a confrontational posture on this issue, obtaining jurisdiction over foreign entities in several instances by voluntary submission of the parties.\textsuperscript{16} It has also addressed transnational enforcement issues through cooperative agreements with foreign antitrust enforcement authorities, and by adopting regulations designed to exempt certain foreign transactions from its pre-merger notification requirements.


The LFCE implements the Constitutional ban on monopolies, not by making monopolies unlawful as such, but by prohibiting and penalising the practices by which monopoly power might be attained or strengthened. The Regulations implementing the LFCE, published in March 1998, develop specific aspects of the law’s provisions, both substantive and procedural. Under the LFCE, practices are classified as either absolute (Article 9) or relative (Article 10). “Absolute” monopolistic practices are prohibited per se and agreements to undertake them are legally void. Such practices cannot be defended by claiming that they are efficient, as their inefficiency is presumed conclusively by the law. In contrast, “relative” monopolistic practices may not be found illegal unless the respondent is found to have “substantial power” in a defined relevant market and fails to prove an efficiency defence.

The LFCE provides administrative sanctions, including corrective conduct orders and fines, for monopolistic practice violations. Maximum fine amounts are indexed, so that they will reflect inflationary (or deflationary) changes in the economy. The reference used is the minimum daily wage (MDW) for the Federal District of Mexico (i.e., Mexico City), set most recently in December 2002 at 43.65 pesos. For absolute practices violations, the maximum fine factor is 375 000 (so the maximum fine is about $1.6 million USD). For unlawful relative practices, the maximum fine factor for most violations is 225 000 ($932 000 USD). The maximum fine factor for violations arising under the “catch-all” provision in Article 10, section VII is set lower, at 100 000 ($414 000). A separate provision in LFCE Article 37 permits the CFC to impose, in egregious cases, an alternate fine equal to the greater of 10 per cent of the violator’s annual sales or 10 per cent of the violator’s assets. The CFC may also refer certain violations
of the LFCE to the Public Prosecutor for consideration of criminal charges against the responsible individuals. This option applies in cases involving (1) monopolistic practices that severely affect the market for necessary goods, (2) the provision of false information to the CFC, and (3) failure to comply with a CFC final resolution as to which all appellate procedures have been exhausted.

3.1 Horizontal agreements: rules to prevent anti-competition co-ordination

The absolute monopolistic practices that are subject to per se prohibition under Article 9 include four categories of hard-core horizontal agreements among competitors: price fixing, output restriction, market division, and bid rigging. Article 9 also specifies as unlawful certain particular kinds of conduct within those categories. For example, the price fixing clause prohibits information exchanges with the purpose or effect of fixing or manipulating price; the output restriction clause prohibits commitments relating to the volume or frequency with which goods and services are produced; the market division clause covers potential as well as existing markets; and the bid rigging clause covers agreements respecting both participation in auctions and establishment of the prices to be bid. One kind of horizontal agreement -- collusive boycotts -- appears in the Article 10's specification of “relative” monopolistic practices, a listing otherwise devoted to vertical practices. Additional horizontal practices may be treated as relative practices under Article 10, section VII, which is a catch-all provision covering any actions “that unduly damage or impair the process of competition and free access to production, processing, distribution and marketing of goods and services.”

The LFCE’s absolute prohibition of hard-core horizontal agreements has been a critical weapon in the elimination of publicly sanctioned, but privately arranged, price constraints. Until the mid-1980s, prices for most goods and services were fixed by law, and the ostensibly regulated price level was often the result of an agreement among industry members. Industries were organised into “business chambers” subject to the supervision of the Ministry of Economy.17 As noted above, the laws relating to business chambers were subsequently revised to limit their power by making membership voluntary rather than compulsory, but their inclination to collude has persisted.

In the CFC’s early years, much of its enforcement work with respect to absolute practices was focussed on rooting out the anti-competitive habits that the system of business chambers and price controls had traditionally encouraged. The March 1998 LFCE Regulations include provisions directed
specifically to this topic. The provisions specify that the CFC will deem that certain circumstances (such as two or more competitors adhering to a price announced by a business chamber) will constitute circumstantial evidence of price fixing. Since 1998, the CFC has continued to bring price-fixing cases involving business chambers, but at a considerably reduced volume compared to the previous five years. Recent cases have pursued business chambers operating in such markets as tourist transportation services, corn tortilla dough, customhouse brokerage services, and blue agave (the main ingredient used to produce tequila). The only instance in which the Commission has made a referral to the Public Prosecutor for criminal prosecution arose in a 2000 price fixing case involving an association of tortilla manufacturers. The Prosecutor declined to proceed because subgroups of the association had agreed on different prices and there was no agreement among the association’s members to fix a single price.

CFC cases against collusion by small firms (not involving a business chamber) were also frequent in the early years of the LFCE. Small businesses were often unaware that price fixing was unlawful and contended that joint action was necessary to compete effectively against larger rivals. Recognition that the Act exists and permits no such defence appears to have spread, as cases against small firms have dwindled to a trickle. Of course, this may be because the firms have decided to compete as the law contemplates or because they have become more sophisticated about disguising collusion. Small firms are permitted to co-ordinate some activities without violating the LFCE by joining together in “integrating companies” created under a program administered by the Economics Ministry. The program is designed to help small and medium sized firms take advantage of scale economies and purchasing efficiencies. Such joint ventures are typically too small to warrant filing under the CFC’s pre-merger notification rules. The CFC considers that the small firms participating as partners or shareholders in such an entity are not acting as competitors. Consequently, the establishment of a single price at which the entity sells its products does not constitute an unlawful monopolistic practice under the LFCE.

Outside the business chamber and small business arenas, the CFC has brought a variety of absolute practice cases since 1997, including bid rigging with respect to medical equipment auctions and sales to medical institutions of radiographic developing chemicals, as well as price-fixing cases involving milk, surgical sutures, beer, and airline ticket distribution. It has also brought follow-on actions against the Mexican subsidiaries of companies involved in the international lysine and citric acid cartels. The CFC continues to monitor recently privatised or deregulated sectors, and recently brought a horizontal collusion case in LP gas distribution market.
The CFC suspects the existence of collusion in various other markets as well, but has not been able to develop sufficient evidence to warrant prosecution. The Commission believes that it needs better tools to expose surreptitious price-fixing conspiracies, including authority to conduct unannounced searches for business records, and explicit statutory authority granting immunity from LFCE penalties to conspirators who reveal collusive agreements.

3.2 Vertical agreements: rules to prevent anti-competitive arrangements in supply and distribution

All varieties of vertical agreements are treated as relative monopolistic practices. Article 10 specifically identifies five types of vertical conduct: (i) vertical market division, (ii) resale price maintenance, (iii) tied sales, (iv) exclusive dealing, and (v) refusals to deal. The sixth and final category specified is the collusive boycott, a species of horizontal behaviour that frequently has a vertical component. Other types of vertical agreements may be reached under the catch-all provision in Article 10, section VII. The catch-all provision is implemented by Regulation 7, which adds five items to the list of relative practices: (i) predatory pricing, (ii) exclusive dealing in exchange for special discounts, (iii) cross-subsidisation, (iv) discrimination in price or conditions of sale, and (v) raising rivals’ costs. Relative monopolistic practices are illegal only if they demonstrably harm competition in the case at issue. In the language of Article 10, the practices must “improperly displace other agents from the market, substantially limit their access, or establish exclusive advantages in favour of certain persons.” More importantly, a relative monopolistic practice is unlawful under the LFCE only if the responsible party has substantial market power in the relevant market.18 The Regulations clarify the criteria applied both for defining the relevant market and for determining the existence of market power,19 and also provide that a respondent may offer a defence on the grounds of efficiency (for which defence the respondent bears the burden of proof).

The cases pursued by the CFC under Article 10 since 1997 reflect a diversity of practices. In the area of exclusive dealing, for example, CFC actions resulted in the termination of (1) a contract between a TV broadcasting company and the Mexican Football Federation that barred any other TV company from broadcasting national soccer team matches, and (2) contacts between a market research firm and retail store chains that excluded other market researchers from access to the chains’ sales data. In an important case involving Pemex, the CFC attacked contracts between Pemex and gasoline station operators that limited the stations to selling automobile
lubricant brands specified by Pemex. Lubricants had been removed from the scope of the petroleum “strategic area” in 1990, and this case therefore involved a striking example of behaviour by a state monopolist that was nonetheless subject to the LFCE.

Exclusive dealing contracts in beverage distribution have been a recurring issue for the CFC. In 2000, responding to a complaint from PepsiCo and two Mexican soft drink companies, the CFC commenced an investigation of contracts between Coke and thousands of small retail outlets under which the stores limited themselves to selling Coke brands in exchange for a free refrigeration unit or store sign. Coke enjoys a 72 per cent market share of the soft drink market in Mexico, and the CFC concluded in 2002 that the contracts were unlawful. In beer retailing, meanwhile, the Commission commenced an investigation in 1999 of major breweries Grupo Modelo (Modelo) and Cervecería Cuauhtémoc Moctezuma (CCM, a subsidiary of Femsa) for entering into contracts with state and local authorities that mandated exclusive local distribution of their brands. The companies settled in 2001 by agreeing to terminate the contracts. That case did not, however, address other exclusive contracts that the brewers had established directly with retailers. Just recently, on May 29, 2003, the Commission determined to open a nationwide investigation of exclusive contracts between beer brewers and retailers. This investigation will provide a forum for the Commission to address complaints that exclusive distribution contracts by Mexican brewers have been treated differently than exclusive contracts by foreign soft drink manufacturers.

Although the LFCE does not mention predatory pricing, the Regulations identify as a relative monopolistic practice the “sustained sale of goods or services at prices below their average total cost or their occasional sale below average variable cost.” In the past five years, the Commission has addressed predatory pricing claims on three occasions. In two matters, one in 1998 and the second in 2002, the CFC rejected complaints alleging predation in inter-city bus fares. The third matter is a long-running case against Warner Lambert for predatory pricing in the chewing gum market. After two rounds of proceedings that began in 1994, the CFC found and affirmed in 1998 that Warner Lambert dominated the chewing gum market with a share between 65 percent and 73 percent, that it had power to control price, that its prices were persistently below average total cost, and that the complaining company had lost measurable market share as a consequence of Warner Lambert’s conduct. The CFC’s 1998 resolution, which imposed a fine and injunction, was later overturned and remanded by a reviewing court. In 2002, the Commission issued and reaffirmed a new resolution, restating its original determinations.
The CFC’s predatory pricing Regulation, while treating predatory pricing as exclusionary device, does not include in the applicable legal standard any consideration of whether the perpetrator will be able to recoup the costs of his predation once the target exits the market. The 1998 Report concluded that the CFC’s predatory pricing test would likely result too often in economically inappropriate determinations of predation and urged the CFC to adopt “a clear recoupment requirement.”21 The CFC took no action on this recommendation until the occasion of the present review, when it agreed to publish criteria under which a predatory pricing determination would require the Commission to find “good probabilities of recoupment.” The Commission stated that it had, in fact, employed that standard in its previous cases. The Commission also noted the dearth of predatory pricing cases on its docket and observed that the concern about finding frequent violations was not substantiated. Finally, the Commission expressed doubt that “a clear recoupment requirement” was practicable if it required finding a certainty of recoupment. The Commission therefore considers its test of probable recoupment to be more appropriate. The subject is now uncertain, though, since the Supreme Court issued a decision in the Warner Lambert case on November 25, 2003, declaring unconstitutional the catch-all provision of the law (article 10, section VII) on which the CFC had based its regulation against predatory pricing.

The CFC has seen very little action with respect to price discrimination. The one conventional price discrimination case considered during the past five years resulted in a 1999 determination that the public agency responsible for airport management at the Cancun airport had acted unlawfully by charging lower airport access fees to taxi fleets than were charged to tourist transportation agencies. In 2002, the CFC commenced an investigation into allegations that Wal-Mart de Mexico (Walmex) was acting as a power buyer by extracting discriminatory prices from suppliers. The CFC examined whether Walmex was demanding that suppliers give it lower prices than those offered to other retail chains. The investigation was closed in early 2003 without a finding of violation. Walmex agreed to advise its purchasing agents that price negotiations with suppliers were required, as a matter of corporate policy, to focus exclusively on prices charged to Walmex without any reference to prices charged to Walmex competitors.

One interesting case under Article 10 involved actions undertaken by a group of LP gas distribution companies to raise a rival’s costs. The target rival had obtained a permit to construct a gas storage plant. The CFC found that the perpetrators had cooperated to delay inauguration of the new plant for twelve months by filing injunction actions in court against the construction of “dangerous buildings” and by organizing street demonstrations outside the offices of local authorities. Two other CFC
actions also involved joint conduct in the nature of a collusive boycott. A case in 2000 involved cooperation between a wheat distributor and an association of agricultural product suppliers whereby a rival of the distributor was denied access to imported supplies of high-protein hard wheat. And a case in 2001 found that tortilla makers and flour mills in Yucatan had agreed that flour would not be sold to new tortilla makers located in the vicinity of incumbent producers.

The CFC has also brought a series of cases charging relative monopolistic practices by Telmex, the dominant telephone services provider. One example in 2000 involved a proceeding in which the CFC found an unlawful refusal to deal. Consumers calling 800 “toll free” numbers operated by long distance companies had to purchase a Telmex pre-paid “Ladatel” card if they wished to make the call using a Telmex public phone. Customers using public phones to call 800 numbers operated by Telmex were not subject to this expense, and Telmex refused to contract with competing operators so that they could absorb directly the cost of public phone access. The competitors, of course, could not effectively market 800 number services to companies because companies did not want callers to pay for public phone access when making a “toll free” call.

### 3.3 Abuse of dominance: rules to remedy monopoly as such

Although monopoly is prohibited both by the LFCE and by the Constitution, no section of the law deals expressly either with monopoly as such or with abuse of dominance. Single-firm practices that may be defined as abuse of dominance or monopolisation in other countries are treated as relative monopolistic practices under Mexico’s law. In particular, the LFCE does not address abusive (high) pricing. Unlawful conduct is defined solely in terms of exclusionary practices at the expense of competitors or other firms in the chain of distribution, and not in terms of exploitative practices at the expense of consumers. Exploitation of market power by charging supra-competitive prices to consumers is expected to be self-correcting, as such conduct will normally attract new entrants. The prospect that new entry may be forestalled by intrinsic market conditions is addressed not by the LFCE, but by provisions in specialised sectoral laws. As noted previously, the regulatory schemes established for the telecommunications sector and for road, air, sea, and rail transportation all contemplate price regulation if the CFC finds an absence of effective competition in the relevant market (or, in telecommunications, the existence an economic agent possessing substantial market power). The involvement of the CFC in these markets is discussed later in this report.
The LFCE’s approach to treating dominance solely in the context of particular practices reflects the precept, drawn from the experience of others, that using legal tools to restructure monopoly is a treacherous enterprise and risks doing more economic harm than good. The 1998 Report observed, however, that problematic circumstances would arise if the CFC faced a highly concentrated industry characterised by high profits and a lack of new entry, but for which no evidence of unlawful monopolistic practices could be found. In the absence of available structural remedies under the LFCE, and outside the sectors subject to specialised regulation, few means would be available to expose such an industry to real competition. The Report noted that the introduction of import trade was one possible approach, but recognised that some concentrated industries are protected from import competition by economic practicalities or legal barriers. The Report’s final recommendations included the following passage:

[I]t is worth considering whether to add provisions to the LFCE to deal more directly with the problem of monopoly as a structural matter. To be sure, relief is difficult to achieve at acceptable costs. But it could be useful to have the tools available, kept in reserve for occasional use in exceptional, but important, cases in which it is difficult to establish clearly illegal monopolising conduct (perhaps because victims are reluctant to come forward), yet structural market power is unacceptably persistent.

The CFC advises that it is presently developing proposed monopolisation legislation of the kind contemplated by the Report. The legislation would amend the LFCE, empowering the Commission to prosecute monopolists who injure consumers by exploiting their market power to raise prices and restrict supply. The CFC considers that such authority could be appropriate for dealing with highly concentrated Mexican industries like cement, where profit margins are high and domestic prices appear to exceed significantly those charged for Mexican cement exported to foreign markets. The CFC has investigated the cement industry on several occasions in the past without detecting any unlawful monopolistic practices.

3.4 Mergers: rules to prevent competition problems arising from corporate amalgamations

Article 16 of the LFCE prohibits mergers whose objective or effect is to reduce, distort or hinder competition. Article 17 requires the CFC, in assessing mergers, to consider whether the merging parties would be enabled to fix prices unilaterally, substantially restrict competitors’ access to the market, or engage in unlawful monopolistic conduct. Article 18 adds the requirement that, in analysing mergers, the Commission must identify the
relevant market and determine market power. The CFC’s March 1998 Regulations include a treatment of relevant market definition and market power determination, as well as language permitting merging parties to defend a merger by proving the existence of efficiencies. The LFCE empowers the Commission to sanction an unlawful merger by ordering partial or full divestiture, as well as other conduct relief and a fine of up to 225 000 MDW ($932 000 USD).

Other guidance about merger analysis is provided in “criteria” statements issued by the CFC. The Commission’s 1993-94 Report included a discussion entitled “General Criteria for Assessing Mergers” that addressed jurisdiction, notification procedures, and deadlines, as well as such substantive matters as the assessment of competitive effects and of covenants not to compete. The text noted that the Commission would apply “concentration indices” to determine if post-merger concentration in the relevant market was significant, but provided no further information about the indices or analysis employed. In June 1998, the Commission responded to business community concerns that the agency’s standards for analysing mergers were not transparent or comprehensible by issuing a statement on concentration indices. The statement, designed to supplement the treatment of market definition that had appeared in the March 1998 Regulations, describes two concentration indices employed by the CFC. One is the familiar Herfindahl index (HHI); that is, the sum of the squared market shares of all the firms in the market. The statement establishes a non-binding “safe harbour” for combinations that increase the relevant market’s HHI by less than 75 points, or that result in an HHI below 2000. The second is an “index of dominance,” which is calculated as the sum of the squares of each firm’s share of the HHI. A transaction is considered unlikely to affect competition adversely if it does not cause the index of dominance to increase, or if the resulting value of that index is less than 2500. The statement notes that these concentration-based indicators are not determinative, and that the CFC will also examine other factors that are relevant in determining whether the merged entity may obtain power to control price or substantially restrict competitors’ access to the market.

LFCE Article 20 establishes pre-merger notification requirements that, like fines for violations, are indexed to the minimum daily wage (MDW). Notification is required if a transaction exceeds 12 million times MDW (about $49 million USD), or if it results in holding more than 35 percent of the shares or assets of a firm with sales or assets exceeding that amount. Notification is also required if the parties’ assets or annual sales total more than 48 million times MDW ($199 million USD) and the transaction involves an additional accumulation of assets or shares of over 4.8 million times MDW ($19.9 million USD). Regulation 20 provides for filing a short
form notification if the parties certify that the transaction’s lack of anticompetitive potential is “plainly manifest.” Regulation 21, section II permits an even shorter notification to be filed within five days following consummation of restructuring transactions, provided that the parent entity has held or controlled at least 98 per cent of the merging subsidiaries’ shares for the preceding three years.

Foreign mergers must in principle be notified to the CFC if they produce effects within Mexico, but Regulation 21, section I waives notification for transactions involving shares of foreign entities in which the acquirer obtains no new Mexican assets or shares. The prime situation covered by this exemption is the acquisition by one foreign firm of another foreign firm that sells products in Mexico through independent distributors. The exemption applies even if the acquirer has a Mexican subsidiary that competes with the target firm, because the transaction involves only foreign shares and the acquirer obtains no new Mexican assets. The CFC’s merger office has recently been interpreting this exemption to cover certain restructuring transactions involving foreign firms with Mexican subsidiaries. For example, a foreign parent with one subsidiary in Mexico and another subsidiary elsewhere may wish to merge the two. If the foreign subsidiary is the acquirer, the transaction is ostensibly outside Regulation 21, section I, because the transaction involves Mexican shares that the acquirer did not previously possess. The CFC is nonetheless willing to waive filing in this situation because the acquisition has no competitive implications and because the parent entity obtains no new Mexican assets even though the acquiring subsidiary does.26

All notified transactions are subject to CFC examination, a process for which the statute establishes strict deadlines. The CFC has done an admirable job in meeting its obligations during the years from 1993 to 2003, completing non-complex cases in an average of 27 days against the statutory limit of 45 days. Cases in which the CFC requested additional information were resolved in an average of 60 days against the statutory 80 day limit. And high complexity cases, for which the statute allots 200 days, were resolved in an average of 109 days. Failure to file notification of a reportable merger is subject to a fine of up to 100,000 times MDW ($414,000 USD). The LFCE does not, by its terms, prohibit consummation of a notified merger during the period of the Commission’s examination. The CFC, however, invokes LFCE article 19 to order that suspect transactions be held in abeyance until the Commission reaches a final resolution. Notified transactions that receive CFC clearance cannot thereafter be attacked (unless the clearance was based on false information), and although the CFC may contest a merger for which notification was not required, it may do so only within one year after the transaction is consummated.
Between its establishment in mid-1993 and the end of 1997, the CFC concluded 544 merger reviews. The number of concluded reviews for the period from 1998 to 2002 was 1287, for a total of 1831. Only a relatively few transactions (40) were subjected to conditions during the last five years, and even fewer (11) were rejected outright. The remaining transactions were either authorised (1094) or treated as withdrawn, dismissed or non-filed cases (142). Thus, of the 1145 transactions subjected to review on the merits, 51 (or 4.5 per cent) were blocked or conditioned. Among the significant transactions that the CFC has rejected since 1997 are (1) Coke-Cadbury (acquirer’s share of soft drink market would increase seven points to 71 per cent); (2) Televisa-Radio Acir (acquisition would impair competition for broadcast advertising by creating a firm with dominant channel holdings in both television and radio), (3) Ferromex-Ferrosur (transaction would combine railways in two of the three adjoining geographic segments into which the Mexican railway system had previously been divided for privatisation), and (4) Bestfoods-Kraft (acquisition by dominant firm of its principal rival in soup and soup stock market).

On the other hand, the Commission has not sought to block transactions that were not fundamentally anti-competitive, even if they involved large entities or foreign acquirers. Most prominently, the Commission cleared the merger between Citicorp and Banamex, Mexico’s second largest bank, subject only to certain divestitures in ancillary banking service markets. Other cases in which the CFC permitted transactions but imposed conditions include (1) Guinness-Grand Metropolitan (merger of alcoholic beverage manufacturers would create a firm with a 65 per cent share in the whiskey market, requiring divestiture of Metropolitan’s “J&B” brand), (2) Sara Lee-Canon (acquisition would produce a firm with a 56 per cent share of the hosiery market, requiring divestiture of certain brands and productive capacity), (3) Monsanto-Cargill (acquisition of Cargill’s assets would produce a firm with a 60 per cent share in the corn hybrid seed market and a 56 per cent share in sorghum hybrid seeds; Monsanto required to divest a hybrid seed production plant in Mexico, cease using Cargill’s trademark, and grant a five year license for the production of seeds under the Cargill name), and Assa Abloy-Phillips (acquisition of four Phillips brand lines would give Assa Abloy a dominant position in market for padlocks and similar products, requiring divestiture of two brands).

One 2002 merger case involving an acquisition of bandwidth licenses for wireless “pcs” telephony services offers an example of the CFC’s efforts to promote competition in a regulated sector of the economy. Bandwidth licenses for wireless cellular telephony were originally granted by the Mexican government in 1990. The country was divided into nine geographic regions and two licenses were granted in each – one to Telmex and one to an
independent operator. In 1997, the government offered additional bandwidth licenses for personal communication service (“pcs”) telephony, a digitised technology that competes with cellular but uses different frequencies. The CFC participated in developing bandwidth caps that limited the number of cellular and pcs frequencies that any one operator could obtain. The caps were designed to encourage the entry of four to five wireless operators (cellular and pcs) for each geographic region. In 2002, Telefónica Moviles, a Spanish firm operating wireless cellular services in four of Mexico’s nine regions, sought to acquire Pegaso Telecomunicaciones, a Mexican firm that held pcs licenses for all nine regions. After assessing existing conditions in the wireless telephony market, and recognising in particular the difficulty of competing with Telmex in that market, the CFC decided to permit the transaction. It reached that conclusion even though the practical effect was to vest Telefónica Moviles with more bandwidth than was permitted under the caps applied in the 1997 allocation proceedings.

A final case of importance from the last five years arose as a request for a CFC opinion, rather than from a merger notification. In late 1994, Mexico’s two major domestic air carriers, Aeroméxico and Mexicana, failed and both were taken over by creditor banks. In 1995, the banks sought to create a holding company, with the acronym CINTRA, that would operate the two airlines and undertake to improve their financial situation. The consolidation required clearance from the CFC, which permitted the creation of the holding company but imposed conditions designed to maintain competition between the two airlines: separate accounts, independent management, and performance monitoring by a CFC consultant. Subsequent changes in the creditor banks’ capitalisation and ownership during Mexico’s peso crisis led to the government holding a controlling interest in CINTRA through the IPAB (Institute for the Protection of Bank Savings). In 2000, the IPAB and several creditor banks that still held shares in CINTRA requested the CFC’s views on their plans to divest ownership of the airlines to a single purchaser.

The CFC’s response observed that the two airlines typically served 80 per cent of Mexico’s domestic airline passengers, and that an analysis of 41 major city-pair routes showed numerous markets in which the concentration indices would increase far in excess of permissible levels. The Commission concluded that entry barriers constrained market contestability and that economies of scale did not dictate a conclusion that only one company could be viable in the Mexican domestic air service market. The CFC therefore determined that the two airlines would have to be sold separately to independent owners, or else the resulting entity would constitute an unlawful concentration subject to attack under the LFCE. Dissolution of
CINTRA is still pending at present due to adverse economic conditions in the airline industry associated with the events of September 11 and in Iraq.

Neither the LFCE nor the Commission’s Regulations establish an explicit “failing firm” defence. The 1998 Report noted that a merging party’s financial weakness “may count in the [CFC’s] assessment of likely competitive effects, but beyond that there are no principles describing how it is to count, and what presumptions, if any, are applied.” The Report concluded with the comment that “in merger review, more transparency in the treatment of the competitive effect of poor financial health would be welcome.” The CFC confirms that failing firm considerations are taken into account in evaluating potential harm to competition. Indeed, the Commission notes that this was one of the factors leading to the acceptance of CINTRA’s formation in 1995 and of the more recent formation of a government holding company to operate several failed sugar processing firms. Until recently, however, the Commission had not taken any action to issue criteria or other formal guidance respecting application of the failing firm defence. On June 26, 2003, the Commission announced that it expected to issue merger guidelines by June 2004 and that the guidelines would include provisions dealing with failing and bankrupt firms.

Similar to the Commission’s responsibilities for merger review under the LFCE is its role in determining which economic agents may participate in privatisation proceedings and in auctions for concessions, licenses, and permits issued by the federal government. The Inter-ministerial Privatisation Commission (CID) has provided by rule that a favourable Commission opinion is a necessary condition for prospective participants in every public auction to divest government owned companies. Also, the Federal Telecommunication Law, the Natural Gas Regulations, the Railroad Services Law, and the Satellite Services Regulation all require a favourable CFC opinion as a condition for economic agents who are interested in obtaining concessions or licenses issued by sector regulators through a public auction or directly through an administrative proceeding. The procedures for assessing prospective participants in privatisation and auction proceedings differ from those for mergers, and vary from program to program. There are no asset thresholds like those applicable to pre-merger notification, and deadlines for Commission action depend on specific auction rules. In assessing prospective auction participants, the CFC considers the implications of supply conditions and the participants’ market power. As for mergers, relatively few applicants have been opposed or subjected to conditional approval.

Between its establishment in mid-1993 and the end of 1997, the CFC resolved 322 privatisation and auction matters. The number concluded for the period from 1998 to 2002 was 1242, for a total of 1564. The total for the
more recent period is skewed due to the filing in 2002 of 738 notices of intent to seek LP gas distribution permits. The regulations applicable to such permits require only that the party notify the CFC in advance of the intended application. The CFC has the option to bar the party’s participation by filing an objection, but an affirmative clearance from the CFC is not required as it is under other regulatory schemes. The CFC did not object to any of the LP gas applicants, and subtracting those notifications produces a new total of 504 matters for the most recent five year period. Of those 504 matters, 404 were approved, 12 were rejected, 16 were subjected to conditions, and the remaining 72 were withdrawn, dismissed, or otherwise discharged. Thus, of the 432 applications reviewed on the merits, 28 (or 6.5 per cent) were blocked or conditioned, compared to 4.5 per cent for regular mergers.

The volume of privatisation proceedings has diminished in recent years as the process has played out across the Mexican economy. Significant matters in which the CFC participated during the last five years include the sale of railway system assets, and airport and seaport facilities. In a 1998 proceeding involving an inland grain storage facility, the CFC determined that a company affiliated with a railroad would be required to sell a seaport grain terminal if it won the bid. Also in 1998, the CFC considered the privatisation of Grupo PIPSA, Mexico’s only newsprint manufacturing company. The Commission concluded that the availability of imported newsprint made disaggregation of PIPSA’s manufacturing plants unnecessary, but recommended that any sale of PIPSA to a publishing company should require the purchaser to guarantee non-discriminatory availability of newsprint to competing publishers. In 2000, the CFC rejected the participation of Gas Natural de México (GNM) in auctions for natural gas distribution permits for the Guadalajara region. The Commission noted that GNM already held six of twenty available permits for the region and that acquiring a seventh would establish GNM as a dominant actor in the market.

The provision of fixed satellite services through Mexico’s three existing satellites was privatised to a single firm, SatMex, in 1997. In 2000, the CFC raised no objection to any of the applicants that had requested direct allocation of concessions to employ frequency bands associated with foreign satellites. The Commission took this position although one of the applicants was Enlaces Integrales, a SatMex subsidiary. There were numerous additional opportunities for Satmex competitors to obtain frequency bands associated with foreign satellites, and the CFC emphasised the desirability of opening the satellite services market by employing foreign satellites. SatMex has subsequently complained that market competition is impaired because the price it paid for the Mexican satellite system exceeds the price at which its rivals can purchase access to foreign satellite services. The
Ministry for Communications and Transportion (SCT) and the CFC are presently examining this contention.

In 2001, Radio Móvil Dipsa (Telcel), the wireless telephony affiliate of Telmex, sought authority from SCT to broaden its existing concession to operate a telecommunications network. The application requested permission to offer long distance cellular service as well as the previously authorised local cellular service. Under the applicable regulations, a favourable opinion from the Federal Telecommunications Commission (COFETEL) was a necessary condition for SCT approval of the application. COFETEL, in turn, sought an opinion from the CFC, although the CFC’s participation was not required. The CFC, noting its previous determination that Telmex held a dominant position in the market for long distance services, concluded that permitting affiliate Telcel to expand into that market could only worsen the situation. Further, COFETEL has authority to regulate long distance service rates and the CFC observed that granting Telcel’s application might enable Telmex to evade rate regulation by offering its customers long distance services through Telcel. COFETEL decided to recommend approval of Telcel’s application, but imposed conditions apparently designed (albeit with doubtful efficacy) to address the CFC’s concerns. Thus, the permit provides that (1) during the first two years, Telcel may provide long distance services only to customers for whom it also provides local service, (2) the tariffs for Telcel’s long distance services must be approved by COFETEL, and (3) Telcel is expressly prohibited from undertaking any anticompetitive practices.

In 2002, the CFC reviewed bid applicants for the award of a contract to supply electric power generation capacity in the state of Tamaulipas. The contract was offered under Mexico’s Independent Power Producer (IPP) program. Electric power in Mexico is a “strategic area” reserved to the federal government under Article 28 of the Constitution, and two state-owned firms are responsible for providing electricity to the public. The largest, the Federal Electricity Commission (CFE) is responsible for all of the national territory except for the Federal District and certain adjoining areas, which are served by the second company, Luz y Fuerza del Centro (LFC). Private investment is allowed in electrical generation capacity only for self-supply, small-scale production, cogeneration, and the IPP program. Participants in the first three schemes are required to sell all excess production to the CFE, while IPP participants sell all the power they produce to the CFE under a long term contract. The IPP program is considered lawful under Article 28 because the private generators are not deemed to be engaging in the provision of electricity as “public service” utilities. In the Tamaulipas proceeding, the CFC defined the market as the generation and sale of electricity in the northeast area of the national electric
system, and evaluated the prospective bidders to assess whether any of them would possess substantial market power in the event that the electricity market was subsequently opened to competition. Finding no such prospect, and observing that the price for sale of electricity to CFE is controlled by tariff, the Commission determined to pose no objections.

3.5 Market power determinations: rules that trigger price regulation to remedy market power

Most of Mexico’s sector regulatory schemes authorise the regulator to impose price regulation, access controls, and other requirements on sector participants if the CFC finds an absence of effective competition in the relevant market (or, in telecommunications, the existence an economic agent possessing substantial market power). The Commission may also make a subsequent determination that, due to market changes, effective competition has been restored, so that regulatory controls must be terminated. When various airports and associated service facilities were privatised during the period from 1998 to 2000, the CFC concluded that effective competition did not exist and that price regulation was therefore appropriate both for the operation of the airports themselves and for the provision of all ancillary airport services. In Mexico City, the airport is still operated by the government, but ancillary services to that facility are provided by private companies and are not subject to price regulation absent a CFC determination. In 2000, the CFC concluded that effective competition did not exist at Mexico City in the provision of internal passenger transportation services (such as telescoping passageways and mobile lounges). With respect to the airline transportation sector, the 1998 Report noted (p. 183) that the CFC was investigating whether airline fare levels showed the exercise of market power in some city-pair markets. The CFC ultimately concluded in October 1998 that effective competition did not exist in 26 city-pair markets. As to seaports, the CFC considered that competitive conditions did not exist in that sector and so concurred with the 1993 privatisation law vesting the Ministry of Communications and Transportation with industry-wide tariff authority. In 1998, three years after the ports were sold, the port operating company in Veracruz requested the CFC to determine whether effective competition had developed in that market, but the Commission found that it had not.

In 2001, the Commission examined competitive conditions in LP gas distribution. Mexico is the world’s largest consumer of LP gas for domestic use, and the private distribution companies that obtained authority in the mid-1990s to deliver LP gas from Pemex pipeline terminals initially negotiated agreements with the government to establish the prices charged
to consumers. Those agreements terminated in 2000, and prices immediately increased in an apparently coordinated manner. The CFC commenced two investigations, one to determine whether distributors were engaged in horizontal collusion and the other to determine whether effective competition existed. In late 2001, the Commission found collusion in 19 states and a lack of effective competition in 20 of 35 relevant markets. The latter determination would have authorised the Ministry of Energy to impose price regulation in those 20 markets, but the Federal Executive had already determined to regulate prices nationwide under LFCE Article 7 and the “necessary services” provision in Article 28 of the Constitution. In the collusion case, the LP distributors settled by agreeing to participate in a competition policy training program and to cooperate with an economic study of the LP distribution market.

Also in 2001, the CFC reaffirmed its determination, originally reached in early 1998, that Telmex possesses substantial market power in five telephony markets: local service, national long distance, international long distance, access to local networks, and “interurban transport services” for calls originating from other operators. Telmex had sought judicial review of the Commission’s original determination, resulting in the suspension of the CFC’s finding to await regulatory action by COFETEL. The regulations issued by COFETEL in 2000 were likewise suspended as a result of court proceedings initiated by Telmex. The CFC subsequently withdrew its 1998 resolution, conducted a new market power determination proceeding to correct the deficiencies found by the reviewing court, and issued a new resolution. Telmex, as expected, has challenged the CFC’s new resolution in court. COFETEL has not yet reinstituted its proceedings or issued new regulations.

The 1998 Report expressed some dissatisfaction with the division of authority in regulated sectors, concluding that the CFC should have a stronger role to play once its determination of ineffective competition had been made. The Report suggested that one option would be to require CFC approval of the sector regulations issued in the wake of the CFC’s finding. A second suggested option was for the CFC to accompany its market power determination with performance-based standards for inclusion in the regulations. A final suggestion was that the CFC should have authority to intervene in proceedings applying and enforcing the regulations, so that the CFC could promote effective responses from the sector regulator. No proposals for legislative action to implement these ideas have been developed by the CFC or considered by Congress.

Over the past five years, the CFC has a mixed record of participation in proceedings to establish price regulation for inadequately competitive market sectors. In the airlines transportation sector, although the CFC’s 1998
finding of ineffective competition in 26 city-pair markets was communicated to the Ministry of Communications and Transportation, the Ministry never acted on that finding. No rate regulation has been imposed in the airlines sector during the past five years. With respect to airports, the CFC was not involved in the development of price control regulations, either for the operation of the airports themselves or for the provision of ancillary airport services. The same is true for the development of price control regulations for seaport operations and LP gas distribution. On the other hand, the Commission cooperated closely, at COFETEL’s invitation, in the development of the regulations issued in 2000 for controlling the five telephony markets in which the CFC had found Telmex to possess substantial market power.

### 3.6 State trade barriers: rules to prevent the impairment of interstate trade

As noted before, LFCE Article 14 authorises the CFC to determine whether a market restriction imposed by a Mexican state constitutes an interstate trade barrier, and thus is void. The Commission has resolved 11 cases of this kind during the past five years, issuing recommendations in 7 cases and making 4 public declarations that an interstate trade barrier existed. Often, the interstate trade restrictions that the CFC encounters are sanitary requirements imposed by states on the importation from adjoining states of perishable foodstuffs, such as meat, poultry, milk, and eggs. Arguments asserting that such local restrictions are not anticompetitive barriers, but rather reasonable public health requirements, are generally rejected because the restrictions effectively obstruct interstate commerce rather than fairly implement federal sanitation rules. A 1999 CFC case involving amendments to the Federal District’s local transportation ordinance examined a provision that barred foreign ownership in companies providing freight transport services in the Federal District. The CFC determined that this restriction was an improper restraint on the interstate flow of investment capital, noting also that an applicable federal statute permitted foreign owners to hold up to a 49 per share in Mexican freight transport companies.

### 3.7 Consumer protection: consistency with competition law and policy

In the Mexican legal system, the competition and consumer protection laws are enforced separately by two different agencies. The Federal Consumer Protection Law is enforced by the Federal Prosecutor for Consumers (PROFECO). This office is located in the Ministry of Economy,
the same ministry to which the CFC is assigned for administrative purposes. The stated objectives of the consumer law are to promote and protect consumer rights and to procure equity and legal security in relationships between suppliers and consumers. PROFECO also enforces price controls established under the “necessary articles” provision in Article 28 of the Constitution, as well as the rules respecting weights and measures. The CFC considers that there are relatively few overlaps between the conception of consumer policy administered by PROFECO and the issues that arise under competition policy, and consequently there has not been a great deal of communication between the two agencies. The 1998 Report suggested that the CFC develop closer relations with PROFECO as a vehicle for communicating the benefits of competition to the consuming public. The Report also recommended that the CFC consider, as another means for winning recognition among consumers, pursuing deceptive advertising cases that entail anti-competitive effects. The relationship between the CFC and PROFECO has not changed materially since 1998. The Commission reports that it has examined several deceptive advertising cases under the LFCE but has not encountered any involving the requisite exercise of market power. The CFC also observes that it has asked PROFECO for assistance in investigating several monopolistic practices cases and expresses hope that such cooperation will increase in the future.

4. Institutional Tools: Implementation of Competition Policy

4.1 Competition policy institutions: the Federal Competition Commission

The CFC, which has sole responsibility for applying the LFCE, is established as an independent agency. LFCE Article 23 provides that it “shall be technically and operatively autonomous.” The Commission is attached to the Economics Ministry for purposes of budgetary administration. This means that the CFC negotiates its budget requests with that Ministry, and the Ministry thereafter transmits the request to the Finance Ministry for presentation to Congress as part of the budget package for the executive branch. Any fines collected in connection with CFC proceedings are remitted to a general treasury fund and not to the CFC. Further, the executive branch may make adjustments to approved budgets during the course of a fiscal year if financial conditions require, and such changes can affect the CFC. The legislation pending before Congress to require Senate approval of Presidential appointments to the Commission also has a budgetary provision. If the legislation is enacted, the CFC would be converted from a “deconcentrated” agency to a “decentralised” agency.
The CFC would then present its budget requests directly to the Economics Ministry, and any fines collected would be credited to the agency’s account.

The CFC’s decisional independence is protected in part by the duration of the Commissioners’ tenure. The Commission’s Chairman and four commissioners are appointed for staggered ten year terms by the President of Mexico, and are removable only for cause. The Commissioners are thus insulated from the usual practice of virtually complete personnel turnover after presidential elections every six years. Further, in contrast to some sectoral agencies, the basis for the CFC’s autonomy is established by statute, not by ministerial regulation; and the Commissioners are appointed by the president, not by ministers.

The Chairman and four commissioners constitute the Plenum, in which the LFCE vests the CFC’s decision-making authority. The Plenum makes determinations by majority vote. If a tie vote arises because of a vacant seat, the Chairman has authority to break the tie by casting an additional vote. The Chairman presides at the Plenum’s meetings, directs the CFC’s work, represents the CFC publicly, and can appoint and remove personnel. The Executive Secretary, appointed by the Chairman, is responsible for operational and administrative co-ordination. The CFC’s work is accomplished by six operative directorates (legal affairs, economic studies, mergers, investigations, privatisation & bidding, and regional coordination), assisted by five supporting directorates (international, economic norms, control & follow-up, administration, and information media).

The CFC’s offices are located in Mexico City. It presently has no regional offices. The Commission has an agreement with the Economics Ministry by which agents in Ministry offices throughout Mexico are authorised to receive complaints, requests, and notifications relating to the LFCE and otherwise to serve as points of contact in the regions. The CFC has also signed cooperation agreements with most state governments.

4.2 Competition law enforcement by the CFC

Under LFCE Article 30, law enforcement or other proceedings before the CFC begin either in response to a complaint or “ex officio” at the Commission’s own initiative. Complaints about absolute monopolistic practices may be filed by any person, while complaints about relative monopolistic practices and completed mergers are accepted only from an affected party.32 If the complaint meets the conditions for standing and content set out in the statute and Regulations, the CFC must deal with the case; it does not have the discretion to reject a complaint without reaching some decision. Authority to reject legally deficient complaints has been delegated to the Chairman and Executive Secretary, acting jointly (and
subject to review by the Plenum). Acceptance of a complaint qualifies the complainant as a participant in the ensuing Commission proceeding. Regulation 26, section IV provides, however, that a complaint about a pending merger will be rejected if a notification respecting the transaction has been filed with the Commission. The regulation states that the Commission will take the complainant’s assertions into account in analysing the merger, but will not accord the complainant status as a participant.33

The overall course of Commission proceedings is subject to a series of deadlines and time limits, set either by the statute or the Regulations. The scheme contemplates that, in regular law enforcement matters, the CFC will reach a final decision within about 90 to 150 days after receiving a complaint. Merger matters are subject to different deadlines, discussed previously. If a party petitions for reconsideration (which it may do within 30 days after a CFC decision), the CFC will act on that petition within 60 days.

Once an investigation is commenced, the Commission publishes in the Diario Oficial (the federal government’s official daily register), a notice announcing, in general terms, the unlawful practices at issue and identifying the market involved, but not naming the specific corporate target. The announcement serves to solicit relevant information from interested persons. During the investigation, the Commission may require the production of documents, issue written interrogatories, and take oral declarations from “all persons who have any relation to the facts” under inquiry. In complaint cases, the Commission routinely serves a discovery request on the target firm, but does not disclose at that time either the identity of the complainant or the evidence that the complainant has submitted. LFCE Article 34, section II authorises the Commission to assess a fine of up to 1500 MDW ($6200 USD) for failure to respond to discovery requests, and LFCE 35, section III provides authority for imposing a fine of up to 7500 MDW ($31 000) USD) for submitting false declarations or information. The statute requires the Commission to hold “strictly confidential” any information filed with or obtained by the agency during its proceedings.

At the conclusion of the investigation, the Commission makes a determination whether “sufficient elements exist to bear out the existence of monopoly practices or prohibited concentrations.”34 If not, the Commission closes the proceeding and so notifies the complainant. If so, the target is served with a writ of alleged responsibility (or OPR, for “oficio de presunta responsabilidad”), which includes a statement of the violation alleged and the facts cited in support. The identity of the complainant is disclosed to the respondent at that time. The respondent then has thirty days to file an answer and make an evidentiary proffer. Both the complainant and the respondent may request the Commission to undertake further discovery on their behalf.
using its discovery authority. After the Commission rules on the respondent’s evidentiary proffer and all discovery requests, a hearing is held, if needed, to take testimony from witnesses. The General Director of Legal Affairs presides at the hearing and both the complainant and respondent may attend. The Commission may order a further round of evidentiary proceedings if necessary for full elucidation of the issues in controversy. The Commission then calls for the submission of briefs and, upon their receipt, closes the record.

Commission Regulation 35 contemplates that expert witness may testify in CFC proceedings, but the Commission takes the position that evidentiary proffers of expert testimony must be limited to technical issues, such as the details of a manufacturing process relevant to making cost determinations in a predatory pricing case. The Commission refuses to accept expert testimony by economists on the grounds that the Commission is itself an economic expert, and should no more accept testimony from an economist than a court would accept testimony from a legal expert. Participants are free, however, to submit written analyses from economists for consideration by the CFC, although the agency is not obliged to address such submissions in the formal manner that would be required for testimony. The CFC’s position on economic expert testimony has been attacked in court, but the Commission has prevailed by relying on a judicial precedent in which a trademark tribunal was permitted to refuse testimony from an expert on trademark theory.

Under Regulation 41, the respondent may, at any time during the proceeding but before the Commission renders its resolution, present a written offer to settle the case by terminating the unlawful practices at issue and undertaking any appropriate preventive. The Commission may accept the offer and close the case, but the regulation specifies that any settlement will not prejudice the Commission’s authority to impose a fine or impair the complainant’s ability to seek damages.

One Commission practice that is not explicitly reflected in the LFCE or the Regulations is the use of preliminary injunctions. Commission Regulation 1 states that, in Commission proceedings, Mexico’s Federal Code of Civil Procedure shall apply to any matter not otherwise addressed. The Code of Civil Procedure includes provisions for temporary injunctions, and the CFC has invoked those provisions on a few occasions by accompanying an OPR with an order requiring the respondent to terminate the challenged monopolistic practice during the pendency of the Commission’s proceeding. Most dramatically, the Commission took this approach in the Coke exclusive distribution case. As might be expected, the use of this tool is quite controversial, and parties subject to such injunctions have sought judicial relief. The Supreme Court has established as binding
jurisprudence that a reviewing court may not suspend a CFC preliminary injunction during the course of a judicial proceeding brought to challenge it. The underlying question of whether the Commission may invoke the Federal Civil Procedures Code to issue an injunction in the first place, however, remains unresolved. The appellate courts have split on the issue and the matter is now pending before the Supreme Court. The CFC is developing an amendment to the LFCE designed to vest the agency with express injunctive authority. The Commission expects to propose the amendment regardless of which way the Supreme Court rules, because it prefers that all available enforcement tools be specified in the LFCE itself.

After the record closes in a proceeding, the Commission must, within the sixty day period provided by the statute, issue its resolution and order disposing of the case. Any of the participants may then petition for Commission reconsideration. LFCE 39 provides that filing a petition automatically stays enforcement of the Commission’s order until the petition is resolved. The Commission closed 452 petitions for reconsideration in the past five years, 40 in 1998, 41 in 1999, 49 in 2000, 75 in 2001, and then jumping to 247 in 2002. Of the 247 cases last year, 116 were filed by distributors in the LP gas “no effective competition” case and 47 by bottlers in the Coke exclusive distribution case. Subtracting those matters yields a total of 84 reconsideration cases in 2002. The Commission confirms its decision about 55 per cent of the time, adopts modifications in a tenth of the cases, and revokes its determination in another tenth. The remaining 25 percent represent petitions that are withdrawn, dismissed for procedural deficiencies, or considered as not filed. Virtually all of the cases in which the Commission revokes or revises its decision involve the introduction of new evidence by the petitioner.

The following table shows the dispositions of Commission cases relating to monopolistic practices and other restraints on competition that were “concluded” from 1993 through 2002 (that is, cases for which all legal proceedings before the Commission have been completed). During the past five years, the Commission has resolved 219 complaints and 67 ex officio investigations. Of those complaints, 45 (20.5 per cent) resulted in sanctions or recommendations, and an additional nine (4.1 per cent) were settled under Regulation 41. If attention is focused solely on the 54 complaint cases that involved either a Commission finding that the LFCE had been violated or in a settlement under Regulation 41, the portion settled rises to 16.7 per cent. Of the 67 ex officio matters, 25 (37.3 per cent) resulted in sanctions or recommendations, and seven (10.4 per cent) were settled. Focusing on the 32 ex officio cases that involved either a Commission finding that the LFCE had been violated or a settlement, the portion settled rises to 21.9 per cent.
Table 1. Monopolistic Practices and Other Restrictions on Competition
Commission Case Outcomes: 1993-2002

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* Includes cases withdrawn, dismissed and considered as not filed.

To publicize its resolutions, the CFC issues a press release, publishes a short summary of the decision in the Diario Oficial, and posts a longer summary on its website. The full text of the resolution appears in the following edition of the Commission’s quarterly gazette, which is also posted on the website.

Practitioners before the Commission raise several concerns about Commission practices and procedures (in addition to expressing some chagrin about the expert testimony issue described above). These concerns warrant attention although not universally held, and may be classified into the following categories: (1) transparency and consistency of agency decisions, (2) appearance of bias, and (3) confidentiality. The central concern respecting transparency and consistency is that the Commission retains too much discretionary freedom because it fails to disclose enough of its reasoning processes in resolving cases. Participants in CFC cases who believe that the Commission’s resolutions are insufficiently
detailed can (and do) seek judicial review, so there is a legal constraint on
the Commission’s ability to retain undue discretion. Some practitioners
nonetheless express discontent with the burden of seeking judicial review,
and argue that, regardless of judicial review standards, the agency should
describe its analysis more fully and explain how the rationale employed
relates to that of similar previous cases. The newly effective Transparency
Law does not itself resolve this controversy. The CFC already releases the
full text of its initial resolutions and resolutions issued on reconsideration.
Minor redactions of confidential information are sometimes made, but those
redactions do not materially affect exposition of the Commission’s
analysis. The new law expands the Commission’s disclosure obligations to
cover the votes cast by Commissioners in individual matters, and any
separate or dissenting statement that a commissioner may submit to the
Plenum. The law does not, however, require the CFC to issue longer
opinions.

The 1998 Report noted that the CFC’s June 1998 statement on
concentration indices was issued, in part, as a response to business
community concerns that the agency’s standards for analysing mergers
“were not transparent or comprehensible.” Although practitioners
consider the 1998 statement to have been a step in the right direction, the
Commission has issued no other substantive criteria, guidelines, or formal
guidance since that time. As previously noted, however, on June 26, 2003,
the Commission announced that it expected to issue merger guidelines by
June 2004 and was preparing draft provisions to be published for public
comment. This development promises to address private sector concerns
about the CFC’s merger enforcement policies. The guidelines may also have
the effect of promoting transparency with respect to market definition and
market power issues in non-merger cases.

Concerns about bias spring from perceptions held by some practitioners
about the Commission’s approach to investigations, particularly
investigations arising from a complaint filed by an outside party. The target
of a CFC investigation first learns of the Commission’s inquiry when it
receives a discovery request from the agency. The document, although not
couched as a demand, may appear to the target as a fishing expedition
because the specific allegation under investigation is not described, nor is
there any disclosure of the complainant’s identity or of the evidence that the
complainant has submitted. In some quarters, there is a view that the
Commission should not investigate a complaint to determine whether there
is a sufficient basis to believe that an unlawful practice exists, but should
simply issue an OPR whenever it receives a complaint valid on its face. In
any event, once the OPR is issued and the Commission assumes an
adjudicative role, there are no restrictions on contacts between the
 Commissioners and the participants, or between the Commissioners and the CFC’s prosecuting staff. Nor is there any requirement that the substance of such discussions be entered in the record of the case. The fact that individual Commissioners discuss pending cases with the staff and the participants in separate meetings can likewise fuel doubts that targets may have about the Plenum’s impartiality. The net effect of these practices is that the Commission is sometimes viewed as having converted itself into a stalking horse for the complainant.

The CFC notes that the Supreme Court has upheld the constitutionality of the Commission’s investigative process. The Commission also observes that the practice of unrestricted communications between and among the Commissioners, the agency staff, and the participants in a pending case is standard in Mexican legal practice, and occurs during proceedings before all adjudicative bodies, including the Supreme Court. Further, although a participant in a CFC case who has evidence that a Commission agent is biased may file an administrative complaint alleging bias, no such complaint has ever been initiated in a CFC proceeding.

With respect to confidentiality, there is no complaint that the Commission is inadequately protective of the sensitive commercial data that it receives. Rather, the concern is that there are no Commission Regulations addressed to confidentiality issues. This deficiency is believed to have undesirable results when Commission actions are subjected to judicial review. Reviewing courts are inclined to order broad disclosure of Commission case files, with the result that commercial data may fall into the hands of a party’s competitors.

Participants (including complainants) involved in Commission cases have abundant opportunities to seek judicial relief if they are dissatisfied with the Commission’s actions. Two forms of proceeding are potentially available: an “amparo” action in a federal district court and an appellate action in the Court of Fiscal and Administrative Justice (“Fiscal” or “Tax” Court). The amparo is a proceeding established in Articles 103 and 107 of the Mexican Constitution to provide all persons with protection against unconstitutional acts by the government. An amparo is available to any party who can raise a claim that he is being subjected to an unconstitutional statute or that his due process rights are being infringed. Due process, in this context, has a broad sweep and is not limited to “procedural” issues. Participants can, and do, attack the merits of agency decisions in an amparo because the due process clause in Article 16 of the Mexican Constitution requires that agency orders articulate the “legal basis and justification for the action taken.” This language has been construed by the Supreme Court to permit judicial abrogation of agency action that is arbitrary or capricious, unsupported by substantial evidence, or founded on reasoning that is
illogical or contrary to general principles of law. In CFC actions, amparos have been filed to attack (1) information demands issued at all phases of preliminary investigations and formal proceedings, (2) issuance of the OPR, (3) decisions to admit or reject evidentiary submissions, (4) preliminary injunctions and other interlocutory orders, (4) fines imposed for failure to comply with discovery orders, and (5) final agency determinations and orders. Some amparo actions allege that the LFCE is unconstitutional on its face, while others allege that the statute has been applied unconstitutionally in the particular case, and still others allege error in the CFC’s final decision.

The volume of amparo actions has increased significantly over the years. In 1997, 15 cases were filed. The annual numbers since then are 33 in 1998, 63 in 1999, 83 in 2000, 124 in 2001, and 117 in 2002. This yields a total of 420 cases from 1998 to 2002 (compared to 122 through the end of 1997). Of the 420 cases, 239 (57 per cent) were filed during the pendency of Commission proceedings, while the other 181 (43 per cent) were filed as challenges to final Commission determinations. The procedural interface between amparo cases and the underlying Commission proceeding can become exceedingly complex. Respondents may file a sequence of amparos as the CFC case progresses, and Commission cases involving several respondents can result in multiple amparos filed in different district courts. When interlocutory procedural amparos are decided in the respondent’s favour, the Commission ordinarily commences a new proceeding, which is itself subject to new amparo challenges. And district court determinations in amparo cases can be appealed by either side to a higher court. If the district court has issued a ruling on the constitutionality of the LFCE, the appeal of that determination lies directly to the Supreme Court. Appeals on other issues are resolved by three-judge appellate tribunals, from which no further appeal is ordinarily permitted. The Supreme Court, however, besides resolving claims of statutory constitutionality, also considers matters involving conflicts between appellate court decisions. Thus, procedural issues under the LFCE that divide the appellate tribunals may eventually receive the Supreme Court’s attention.

The amparo process, of course, delays resolution of Commission proceedings. Further, when Commission orders are at issue, respondents routinely request, and the district courts ordinarily grant, motions to stay the CFC’s order during the court’s review. While the Commission has been almost completely successful in amparos that have reached the Supreme Court, district courts have ruled against the CFC on numerous occasions, typically on points of procedure. There is perhaps a particular bias toward such adverse decisions whenever an amparo case involves both procedural issues and a challenge to the merits of a final CFC decision. The district
courts are unfamiliar with, and probably uncomfortable about, substantive antitrust issues. Further, Mexico employs a civil law system that has traditionally involved detailed legislative enactments, and courts are unused to dealing with a statute as short and non-specific as the LFCE. By ruling adversely on a procedural point, the court can send the case back to the CFC and avoids resolving the antitrust question.

In a few Commission amparo cases, parties challenging the Commission’s action have proffered testimony by economic experts. The district courts have no rule barring economic experts, but the applicable rules of procedure in amparo cases require that the court retain its own expert if the court determines to admit testimony by a party’s expert. This poses yet another problem, because the judiciary’s budget for services of this kind is limited, and the pool of capable antitrust economists is quite small. Thus, the expert ultimately retained by the judge may not have expertise suitable for a CFC case. Nonetheless, the procedural rules require that the judge, in deciding the merits of the case, must rely on the expert retained by the court in preference to the expert retained by a party.

The problems presented by the amparo process are difficult to resolve. The passage of time may ultimately produce a decrease in case volume as issues reach the Supreme Court for resolution. In the meantime, the right to judicial review can be constrained only by amending the constitution, and altering the constitutional scheme of checks and balances is rightly disfavoured. There has sometimes been mention of establishing a specialised amparo court with economic expertise to hear cases from the CFC and the other agencies that deal with economic issues, but no action to advance such a proposal has been undertaken.

The second form of judicial review available to aggrieved parties is an action in the Federal Court of Fiscal & Administrative Justice. The prime function of this court is to consider tax cases, but it asserts jurisdiction to review any agency action that involves the imposition of a monetary payment obligation on a private party. Thus, any Commission interlocutory order or final resolution that imposes a fine is exposed to attack before this court. Moreover, if a CFC final resolution is at issue, the private party can request Fiscal Court review of the injunctive portion of the resolution as well. The CFC has argued, sometimes successfully, that the Fiscal Court has jurisdiction only to review regular tax assessments and thus has no authority at all in CFC cases. The CFC also takes the position that, even if the Fiscal Court can lawfully examine CFC monetary assessments, no other part of the Commission’s order is subject to review. The appellate courts are split on whether the Commission is correct on all counts or whether the Fiscal Court has jurisdiction to review some or all of a CFC order. The Supreme Court has not yet spoken on these issues.
A private party who is dissatisfied with a Fiscal Court decision may file an amparo to challenge it before a three-judge appellate tribunal. Subsequent review of tribunal decisions before the Supreme Court is available only for rulings on statutory constitutionality or on issues involving conflicts between appellate court decisions. The CFC, although it can appeal adverse amparo decisions, cannot commence an amparo in the first instance. Thus, if the CFC is dissatisfied with a Fiscal Court decision, its only recourse is through an appellate review process established by statute. The statute, however, extends appellate jurisdiction only in cases where the monetary amount in controversy exceeds a minimum limit, and the fines imposed in CFC cases typically do not meet the threshold.

Like amparo actions, the volume of Fiscal Court actions has increased over the years, but in a considerably lower range. Only three cases were filed from 1993 through 1997. The annual numbers since then are six in 1998, 9 in 1999, 14 in 2000, 13 in 2001, and 43 in 2002. This yields a total of 85 cases in the past five years. The spike in cases that occurred in 2002 arose from two Commission proceedings that entailed fines against multiple parties for failure to comply with discovery orders. Twenty of the cases related to the Coke exclusive distribution proceeding and the other eight to an investigation of monopolistic practices in the cellular telephony market. The Commission has lost a number of cases before the Fiscal Court on the grounds that its orders imposing fines were not adequately justified.

CFC orders that impose fines are not self-executing, even if they survive all amparo and Fiscal Court review proceedings. Once a fine has become final and payable, it must still be collected, a duty that falls to the fiscal department of the municipality in which the fined party resides. If payment is not made voluntarily, the municipal treasurer must commence an administrative proceeding to issue an order of execution against the debtor’s assets, and this proceeding is itself subject to amparo review. The result of these judicial and procedural intricacies is that only a small portion of the fines ordered by the Commission has been collected. Through 2002, the Commission imposed 493 fines amounting to 329 million pesos (about $31.2 million USD). Of that amount, it has collected 9.5 per cent (slightly less than $3 million USD) and revoked or lost on judicial review another 18.5 percent, leaving uncollected the remaining 72 per cent ($22.5 million USD).

4.3 Other enforcement methods and techniques

The CFC controls application of the LFCE. There is no other source of substantive law about competition policy issues, either at the state or federal level. Under Article 38 of the LFCE, private parties that are proven in a Commission proceeding to have suffered injury from an unlawful monopolistic
practice or merger may sue the responsible parties in court to recover damages. The court in such a proceeding may take account of the CFC’s estimate of the plaintiff’s damages. Commission Regulation 48 provides that, subsequent to entry of the Commission’s final resolution, an injured party may petition the CFC for an ancillary proceeding to estimate damages. To the end of 2002, no petitions have been filed under regulation 48, and no private damage actions have been commenced in court under LFCE 38.

The 1998 Report suggested that, given the CFC’s resource constraints, private parties should have an independent right to pursue antitrust violations in court. The Report noted that federal (rather than state) courts would be the preferred forum for such cases, but noted that the jurisdiction of federal courts in Mexico does not now extend to commercial disputes between private parties.44 The CFC has not proposed legislation on this point and the Commission’s experience in federal district courts thus far does not augur well for expecting sophisticated treatment of antitrust issues by federal judges. The absence of any action by private parties under LFCE Article 38 suggests that further maturation of Mexico’s antitrust environment, especially in the courts, is necessary before private actions can become a significant feature of competition policy enforcement.

An enforcement technique that can be useful, or even essential, to the CFC in cases involving international firms or transactions is to seek assistance from, or otherwise cooperate with, antitrust agencies in other countries. The 1998 Report noted that, although the CFC adhered to the general co-operation principles established in NAFTA and other existing trade agreements, and complied with the cooperation principles promoted by international organisations such as the OECD, it had no formal co-operation agreements with any other antitrust agencies.45 The Report recommended that the CFC enter such agreements to improve its capacity to deal with enforcement matters having international dimensions.46 The Commission has been very active on this front in recent years. It has signed antitrust cooperation agreements with the United States (effective July 2000), the European Union (effective July 2000), and Canada (effective March 2003). During 2002, the CFC notified about 52 cases to the United States and about 23 to the EU, and undertook consultations with those authorities with respect to pending investigations in 26 matters. Two new free trade agreements with provisions relating to competition policy have been signed by Mexico since 1998: Israel (effective June 2000) and EFTA (Iceland, Liechtenstein, Norway, and Switzerland; effective July 2001). The Commission is currently negotiating antitrust cooperation agreements with competition authorities in Brazil and Chile and is also participating in the competition working groups related to Mexico’s ongoing trade agreement negotiations with Japan, Argentina and Uruguay. Finally, the CFC is an
active participant in a host of multinational groups and projects that address competition policy, including the ICN (International Competition Network), FTAA (Free Trade Agreement of the Americas), APEC (Asian-Pacific Economic Cooperation), UNCTAD (United Nations Council for Trade and Development), and the WTO (World Trade Organisation).

4.4 Agency output, priorities, resources, and management

The following table shows the Commission’s output in terms of matters “concluded” from 1993 to 2002 (that is, cases for which all legal proceedings before the Commission have been completed). This Table, unlike Table 1, is not limited to law enforcement proceedings, and thus includes merger notification reviews, auctions, consultations, and other forms of activity by which the Commission exercises its statutory powers. As described elsewhere, the 784 concession matters listed for 2002 include 738 notices of applications for LP gas distribution permits. If those matters are subtracted, the number of matters concluded for 2002 changes to 661, and the number of all matters concluded from 1993 through 2002 comes to 4041. The distribution of cases among the categories is stable from year to year and shows a commendable dispersion of activity.

Table 2. Matters concluded by the CFC1993-2000

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Detail about the Commission’s law enforcement cases dealing with monopolistic practices and other restrictions on competition appears in the following table. This Table covers the same class of proceedings covered by Table 1. Table 1, however, focused on the outcomes of monopolistic practices, whereas this table shows the distribution of proceedings according to the type of unlawful conduct at issue. It should also be noted that Table 1 (and Table 2 as well) display data for cases as to which all legal proceedings before the Commission were completed in the specified year. The table below, in contrast, covers all proceedings in which the Commission rendered an initial resolution in the specified year, and therefore includes recent decisions for which petitions seeking Commission reconsideration under LFCE 39 may be filed or resolved in a subsequent year.

**Table 3. Monopolistic Practices and Other Restrictions on Competition Commission Cases by Type of Practice: 1993-2002**

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One feature revealed by Table 3 is the allocation of Commission ex officio cases between absolute and relative monopoly cases. For the period 1993 through 1997, the Commission concluded 15 ex officio absolute cases versus 96 relative cases, yielding a ratio of 6.4 relative cases for each absolute case. For the period from 1998 to 2002, 18 ex officio absolute cases were concluded versus 22 relative cases, for a much lower ratio of 1.2 relative cases for each absolute case. As might be expected, the situation is quite different for proceedings initiated in response to complaints. There, the period from 1998 to 2002 saw 18 absolute cases versus 178 relative cases, for a ratio of nearly ten relative cases to one absolute case. A criticism sometimes heard is that the Commission initiates too many vertical cases and too few horizontal cases, but that assertion does not appear to be
supported by the Commission’s ex officio activities. The pattern of complaints received is, of course, beyond the Commission’s control.

With respect to the agency’s financial resources, the CFC’s budget increased from 52 million pesos in 1997 ($6.8 million USD) to 152.6 million pesos in 2002 ($15.8 million USD), an increase of 132 per cent in dollar terms. The agency share of Mexican government non-defence expenditures increased by approximately a fifth from 1998 to 2001 (from 0.0239 per cent to 0.0284 per cent), but declined somewhat (to 0.0255 per cent) in 2002. In terms of human resources, the Commission had 208 employees in 1997, up 26 per cent from the 165 people it employed in 1996 and previous years. Employment held steady at 208 for the years 1997 through 2000, then dropped slightly, to 198 in 2001 and then to 192 in 2002. CFC output, as measured by matters concluded, increased from 529 in 2000 to 661 in 2002 (net of the 738 LP gas applications). This implies an increase in staff productivity from 2.54 matters per employee in 2000 to 3.44 in 2002.

Among the five commissioners, there are three economists and two lawyers. The CFC as a whole has 39 economists, 41 lawyers, 10 accountants, and about 50 other professionals and technicians. The remainder are clerical and support staff. Approximately 30 professional staff members from the directorates of Investigations and Legal Affairs are occupied with the investigation and prosecution of monopolistic practice cases. Nine staffers from the Mergers directorate are devoted to merger review while an equal number from the Privatisations directorate focus on privatisation and auction proceedings. And approximately 14 personnel from across the Commission are involved in regulatory matters such as assessing proposals for new regulations, or evaluating changes in trade policy and other government programs and actions. The CFC’s annual staff turnover rate averaged 14.5 per cent for the five years from 1998 to 2002. The CFC does not consider that, as an agency, it has serious difficulty retaining qualified staff at the salary levels it can afford to offer, and believes that the turnover rate for its professional staff is considerably lower than that for the federal government at large. The General Director for Mergers, however, expressed some concern about the agency’s ability to hire and retain economists with sufficiently high academic credentials to conduct effective merger case reviews.

The Legal Affairs Directorate has 17 lawyers who devote about 40 per cent of their time to monopolistic practice cases and petitions for Commission reconsideration, 40 per cent to amparo and Fiscal Court cases, and 20 per cent to requests for legal advice from the Commission’s officers and staff. There is some belief in the private sector that the Commission is simply outgunned in amparo cases and cannot match the legal resources arrayed against it. At least at the Supreme Court level, however, the record
of amparo case outcomes appears to show that the Commission is holding its own. On the other hand, handling the nearly 180 amparo actions that were pending during 2002 with only seven attorney work-years must surely have been a daunting challenge. Another office that is stretched thin is the General Directorate of Economic Studies, with a staff that is considerably smaller than it possessed in earlier years. The General Director for Investigations believes that interviews conducted in the field (as opposed to the examination of documents delivered to the Commission’s offices) would be a fruitful and effective investigative technique, but such an approach is not possible with existing staff resources. These circumstances, and the fact that the Commission’s overall workload has been increasing, suggest that the agency’s staffing levels should be increasing, not decreasing, and that its budget needs appropriate supplementation. If the proposed legislation establishing the CFC as a decentralised agency with independent budget authority is enacted, the Commission will be in a better position to seek additional resources.

To enhance its internal management systems, the Commission in 2000 sought and obtained certification under ISO standard 9002 (1994) for its processes relating to pre-merger notification filings, case investigations, petitions for Commission reconsideration, requests for consultations, and evaluations of auction participants. The ISO standards establish quality assurance requirements relating to mission performance, covering such elements as timeliness, responsiveness to customers, transparency, and systematic self-evaluation. In March, 2003, the Commission received certification under ISO standard 9001 (2000), which required the extension of quality assurance mechanisms to all areas of Commission operation.

In 2001, the Commission retained an external auditor to evaluate the quality of agency functions that entail interaction with private parties. The auditor surveyed forty randomly-selected economic agents who had been involved in some type of Commission proceeding. The results showed that 93 per cent of those surveyed considered CFC employees to be both highly professional and highly honest, 82 per cent thought that the CFC made independent decisions, and 78 per cent believed that the CFC could improve competition in Mexico. On the other hand, 62 per cent thought that the CFC could be politically influenced, and 22 per cent evaluated the CFC case resolution process as being unduly slow.

Although the CFC has not adopted explicit enforcement priorities, the Commission states that it pays particular attention to (1) allegations arising under LFCE Article 14 with respect to interstate trade barriers imposed by state governments, and (2) privatised sectors, especially those that involve regulatory regimes. The 1998 Report urged the Commission to maintain emphasis on regulated and privatising sectors, and undertake competition
advocacy and law enforcement actions in those sectors to promote pro-
competitive outcomes.49 The Commission believes that it has satisfied that
recommendation, citing its frequent involvement in the development of
regulatory sector rules, its role in assessing auction and privatisation
candidates, and such CFC law enforcement actions as the Pemex lubricants
case, the proceeding against price fixing by LP gas distributors, and the
numerous cases involving Telmex.

5. Competition Advocacy

Competition advocacy, for purposes of this discussion, covers all the
activities of the CFC designed to promote the understanding and
implementation of sound competition policy, but excluding Commission
actions that have independent legal effect. Thus, treated here are the
Commission’s functions as a consultant to other government agencies, as an
advisor to private parties seeking guidance, and as an advocate at large for
public recognition and acceptance of competition principles.

The LFCE explicitly vests the CFC with authority to engage in certain
forms of competition advocacy. The agency is empowered to address the
competitive effects of proposed changes to federal programs and policies
and, at the request of the Federal Executive, to comment on the competitive
implications of new laws proposed by the executive branch to Congress.50
The Commission also has discretionary authority under the LFCE to issue,
on its own initiative, non-binding opinions addressing questions of
competition policy with respect to laws, regulations, agreements, and other
governmental acts.51 Regulation 49 provides for the issuance of similar
non-binding opinions in response to a request from any private party or
governmental agency.52 (The CFC refers to opinions of the latter two kinds
as “consultations.”) Traditionally, Commission opinions issued under these
provisions were not routinely placed on the public record, because the CFC
considered that the recipient was the proper party to control disclosure.
Under the new Transparency Law, however, the Commission treats all such
opinions as matters of public record.

Several Commission functions that have legal effect, and that therefore
do not constitute competition advocacy as defined here, have an ancillary
competition advocacy component. For example, the Commission’s
affirmative approval is required for prospective participants in most auctions
conducted in regulated sectors, and therefore the CFC’s decisions in
assessing bidders have independent legal consequences. But the
Commission also participates with sector regulators to design the auctions
themselves and to formulate rules that apply to all bidders equally.
Similarly, while the Commission has authority under LFCE 14 to declare
that a state regulation constitutes an interstate barrier to commerce, it can also exercise its discretion to make recommendations to state and local governments respecting regulations affecting only intra-state commerce. For example, as discussed in section 3.6 of this Report, the CFC in 1999 determined that an amendment to the Federal District’s transportation ordinance constituted an interstate barrier to commerce in investment capital by limiting foreign ownership of local freight transport companies. In deciding the case, however, the CFC also noted that the amendment replaced the previous permit system with a certificate of need requirement and established a rate regulation scheme. The Commission recommended that the former permit system be retained and that any rate regulation be conditioned on a finding of ineffective competition by the CFC. The Commission has made non-binding recommendations of this kind to state and local governments in about twenty cases over the past five years, in matters relating to the sale of pharmaceutical products, taxi service, beer, funeral services, and tortillas, among others.

The CFC has an active program to consult with sector regulators in projects to develop, review, or revise sector regulations. In 1998, the CFC assessed a proposed mechanism for long distance telephone rate registration designed to prevent predatory pricing. The Commission advised that such mechanisms could restrain competition if applied universally and so were appropriate only with respect to economic agents that possessed market power. From 1998 to 2000, the CFC was involved in developing the regulations for pay TV and audio services. It successfully urged that pay TV broadcasters be able to access, on equitable and non-discriminatory terms, free TV channel programming that the pay broadcasters wished to re-transmit. It also secured a rule modification to require that the transfer of spectrum concession rights, either by sale or as a consequence of abandonment, be subject to prior CFC approval. The Commission, however, did not succeed in removing infrastructure development deadlines that the regulations made applicable to concession holders. The Commission argued that such requirements could distort investment decisions best left to market forces. Other regulatory development projects in which the CFC was involved during the past five years related to civil aviation, parcel delivery services, electricity generation, and both natural and LP gas.

The CFC also participates in a number of inter-ministerial commissions to advocate competitive principles in the design and implementation of governmental policies and programs. These commissions include:

- the Inter-ministerial Privatisation Commission (CID), which establishes the framework for industry privatisation proceedings;
• the Inter-ministerial Public Expenditure and Financing Commission (CIGF), which deals with the administration of large public construction projects;

• the National Standards Advisory Commission, which manages a system of National Standards Advisory Committees. The Committees are responsible for developing product content standards, accreditation systems, and similar norms that, when promulgated by the government, can have anti-competitive exclusionary effects;

• the Foreign Trade Commission (COCEX), which reviews proposals by the Economics Ministry to establish tariffs and impose trade law sanctions such as countervailing duties and anti-dumping penalties;

• The Federal Regulatory Reform Commission (COFEMER), which plays a critical role in reviewing all regulations proposed by federal government agencies.

The Privatisation Commission’s organic statute provides that the CFC shall be a permanent guest, and the Commission has participated in all of the CID’s privatisation planning activities since mid-1993. In 2000, for example, the CFC objected to a government plan to privatise Aseguradora Hidalgo (AHISA), an insurance company that held the exclusive right to sell policies to government employees through payroll deductions. The Commission concluded that the exclusivity provision was anti-competitive. The privatisation plan was thereafter revised by limiting the exclusivity provision to a two-year transitional period. The CFC raised no objection to the revised plan or to the participation by any of the four prospective bidders in the subsequent 2002 auction for AHISA. The Commission was also closely involved in the planning for privatising 34 federally-operated airports, which were aggregated into three regional groups for purposes of sale.

At the Inter-ministerial Public Expenditure and Financing Commission (CIGF), the Commission participated in a 2001 matter involving construction of a gas pipeline by Pemex. Authorisation was granted subject to the condition that Pemex divest control of the pipeline to a private company after a specified number of years. Recent CFC activities relating to the work of the National Standards Commission include opinions about technical standards for trackage and haulage rights in railroad transportation, edible oil content, and weight restrictions imposed on freight vehicles to reduce highway deterioration.

The antidumping and countervailing duty mechanisms adopted by Mexico under the GATT are administered by the Unfair Trade Practices Unit (UPCI) in the Economics Ministry. By law, UPCI must submit its
proposed resolutions for review by the inter-ministerial Foreign Trade Commission (COCEX), of which the CFC is a statutory member. The authority of COCEX is limited to commenting on UPCI’s proposals, although the final resolution issued by the latter agency is supposed to recite and respond to any COCEX comments. The CFC’s concern, of course, is that enforcement of fair trade laws against imports can distort competition in domestic markets. Antidumping duties imposed by the UPCI have sometimes protected national producers with a dominant position in the domestic market. In other cases, the duties simply delay an effective market clearing process by protecting inefficient local firms. The CFC does not consider that alleged dumping practices threaten healthy competition, except in the unlikely circumstance that the exporter has sufficient power to monopolise a market in Mexico.

The 1998 Report recommended that the Commission play a forceful role respecting trade law matters. The Report suggested that, if the LFCE is not amended to vest the CFC with authority to cure structural monopoly through divestiture, then the Commission should be given more power in the trade law process to prevent anti-competitive outcomes. At the least, the Report concluded, the CFC should exercise its advocacy function to assure that the competitive implications of trade issues are well publicised.54 In the past five years, the Commission has diligently discharged its duties as a member of COCEX. As a single voice on a multi-member panel, however, the CFC cannot control outcomes. Moreover, arguments founded on competition principles that are inconsistent with the underlying objectives of the fair trade laws do not carry much weight with UPCI. As noted in section 2.3 of this Report, the CFC is developing a legislative proposal to address structural monopoly. There has been no action, however, with respect to enhancing the Commission’s authority in the trade process, nor any special advocacy effort directed to trade law issues.

The Regulatory Reform Commission (COFEMER) is the present manifestation of the Economic Deregulation Unit (EDU), an office that previously existed as part of SECOFI, the predecessor of the present Economics Ministry. The EDU developed the draft legislation ultimately enacted in 1993 as the LFCE, and was responsible for promoting a wide range of deregulatory activities. In May 2000, the EDU was converted to an independent commission, although still located in the Economics Ministry. While denominated a commission, COFEMER is not headed by a plenum, but by a Director General appointed by the President of Mexico.

During its life, the Economic Deregulation Unit was assisted by an advisory group called the Economic Deregulation Council (CDE), a committee of government officials and private sector representatives that met periodically to discuss pending issues of deregulation policy. The
present form of the CDE is the Regulatory Improvement Council, which serves as an advisory body to COFEMER. The 1998 Report recommended that the CFC be made a member of the Economic Deregulation Council to “ensure that competition policy issues are regularly considered at the highest levels in regulatory reform efforts.” That recommendation has been satisfied, at least technically, because the Chairman of the CFC is a permanent member of the present Regulatory Improvement Council. The significance of the advisory Council to COFEMER’s business, however, is not as prominent as it was with respect to the EDU. In 1998, there was no formal procedural mechanism through which the CFC could identify and comment upon proposed regulations. That situation changed dramatically in May 2000 with COFEMER’s establishment.

Federal agencies in Mexico are now required by statute to submit all of their proposed regulations to COFEMER, accompanied by a regulatory impact statement. COFEMER posts the regulations and the impact statement for comment by interested parties, and thereafter issues an assessment of the proposal to the originating agency. The agency then files a response to the assessment, and COFEMER issues a final opinion either approving the proposal or stating COFEMER’s remaining objections. All of the comments exchanged between the agency and COFEMER appear on the public record and are considered by the President’s Legal Counsel, who must approve the regulations before they are promulgated.

The striking feature of the interface between the CFC and COFEMER is that the CFC has apparently filed only one unsolicited public comment in a COFEMER regulatory review proceeding since May 2000. That matter involved a proposed change to the natural gas distribution rules under which entities engaged in operating self-supply gas pipelines would have been prevented from serving any customers but themselves. The CFC’s comment concluded that the proposal would have an anti-competitive effect by protecting incumbent gas distributors. On a few occasions, the CFC has also filed comments at the express invitation of COFEMER. Examples include regulations involving bi-directional data transmission by pay television broadcasters, social security administration, and export coffee marketing. COFEMER, however, does not routinely issue notices or invitations to the CFC or anyone else, because all pending actions are posted on COFEMER’s website and COFEMER assumes that an interested party will file a public comment on any matter it finds significant.

The CFC asserts that “CFC-COFEMER collaboration is not rare,” citing the Chairman’s participation in the Regulatory Improvement Council and the four comments that the Commission filed in COFEMER proceedings, described in the previous paragraph. The CFC notes also that it frequently participates with the originating agency in developing proposals that are
later vetted by COFEMER, and that there is no need to participate at the COFEMER stage in such situations because the regulatory proposal already reflects the Commission’s input.

Another important form of competition advocacy undertaken by the Commission is in identifying and opposing anti-competitive features of proposed legislation. The Commission is routinely invited to participate in reviewing proposals that originate both in Congress and in the executive branch agencies, although there is no statutory requirement for such consultations. As described in section 1 of this Report, several anti-competitive attempts to amend the LFCE itself were successfully resisted by the Commission during the last five years. With respect to proposals involving subjects other than the LFCE, the Commission has engaged a variety of topics since 1997. In 1999, the CFC advised that legislation to privatise electricity generation should include provisions assuring non-discriminatory access to transmission networks at regulated prices, allocating concessions through public auctions in which applicants would be vetted by the CFC, and requiring cost-based pricing of services to residential, commercial, and industrial customers to avoid distorting cross-subsidisation. Other legislation that has drawn the CFC’s attention include proposals affecting ocean shipping (restraining entry through high warranty bond requirements and restrictions on foreign vessels), truck transportation (tariff regulation and constraints on vertical integration of inter-modal carriers), and broadcasting (flawed mechanisms for allocating new concessions, including eligibility limits based on existing market shares measured by audience ratings).

Besides participating in legislative processes, the Commission has recently organised conferences to examine pending issues in regulated sectors. The conferences, funded through an APEC Program to Promote Economic Competition in Regulated Sectors, are two-day events targeted to regulators, government officials, legislators, and academics. Two conferences, dealing with electricity and transportation, have been held thus far. In May 2002, at a conference sponsored jointly by the CFC and the Energy Regulatory Commission, 150 attendees considered possible alternatives for the efficient development of the Mexican electricity sector. At a September 2002 conference sponsored jointly by the CFC and the Ministry of Communications and Transportation, 200 attendees addressed the requirements for effectively-functioning markets in aviation, railways, shipping and ports, and multi-modal transportation. Two more conferences, dealing with the telecommunications and financial services industries, are planned for late 2003 and early 2004.

A final feature of competition advocacy is the persuasive communication to society of competition’s advantages. The 1998 Report
observed that the CFC “had no program to explain the benefits of competition and competition law enforcement to consumers.” The Report recommended that the Commission seek to broaden its base of support by publicising agency actions beyond the business press, particularly with respect to cases involving demonstrable consumer benefits.

At the time of the 1998 report, the Commission communicated with the public principally through the agency’s website. The site provides access to a wide range of Commission-related material, including the complete texts of the LFCE, the Commission’s Regulations and organisational By-Laws, annual reports, press releases, and selected speeches and public statements. The website also includes the CFC’s Economic Competition Gazette, a quarterly journal containing the full text of all resolutions in CFC cases, the Plenum’s criteria respecting application of the LFCE, and other documents explicating the CFC’s approach to competition policy.

Today, the website retains its expansive coverage, and the Commission also undertakes a variety of additional diffusion activities. Its media relations office, for example, now issues non-technical press releases in cases of particular interest to consumers. The principal responsibility for outreach is assigned to the General Directorate of Regional Coordination. In 2001, staff of that Directorate made approximately 40 visits to various locations in Mexico to publicise and promote competition policy and the CFC’s mission. The audiences for these presentations included local business chambers, professional associations, academicians, and state and local government officers. The Commission reports that 172 such visits were made from late 1998 to 2002, for an average of 43 per year. The Chairman and Commissioners also make speeches and presentations on competition policy to Mexican audiences, such as at the electricity and transportation conferences described above.

6. Conclusions and Recommendations

6.1 Current strengths and weaknesses

The 1998 Report concluded that, with respect to Mexico’s competition policy, the analytic quality of the LFCE and its implementing Regulations was a significant strength. A second strength was the consolidation in the CFC of authority to make the market power determinations that trigger government intervention in market operations. The Commission’s authority to make such determinations applies not only to its own merger and monopolistic conduct law cases, but to sectoral licensing and natural monopoly regulation as well. The major weakness identified by the 1998
Report was the lack of a clear base of support for competition policy, either in the government or in society at large. The Report suggested that the lack of such support might account for what appeared to be temporising in some early CFC decisions, and might also underlie the assessment by others in the government and the private sector that the Commission was weak. On the other hand, the Report recognised that the CFC had taken some visible and vigorous actions against prominent economic interests.

Five years later, the strengths identified in the initial Report still merit that characterisation, and the perception of an institutional reluctance by the CFC to engage powerful opponents has largely dissipated. Other strengths have come to the fore as well. The Commission has matured into a credible organisation, viewed with respect both domestically and internationally. It pursues its mission according to best principles of management and the highest standards of public service, and has mobilised its limited resources effectively to focus on the matters most relevant to promoting competition policy in Mexico. The CFC’s accomplishments are remarkable given the difficult environment in which it operates.

Some CFC strengths have evolved in areas that were the focus of recommendations in the 1998 Report, and it is appropriate to mention them here. The CFC has, as urged, maintained a focus on regulated and privatised sectors, sought to broaden its base of support by publicising its actions to a wider audience and conducting outreach activities, established important international antitrust co-op agreements, and agreed to adopt policy criteria respecting recoupment in predatory pricing cases and failing firms in merger cases. These actions, and others undertaken by the CFC, have contributed significantly to enhancing its reputation.

On the other side of the ledger, the degree of general support for competition policy is still an open question and remains a potential vulnerability. There are indications that the CFC will enjoy an increase in support from the executive branch, but this should not deflect the Commission from continued efforts to expand its base of popular support. Additional weaknesses arise from certain statutes and judicial processes that constrain the CFC’s ability to remedy anti-competitive conduct and market conditions, and from a decline in the Commission’s budget and staffing levels. Finally, there are some deficiencies in the Commission’s own case litigation procedures, and in its interface with other government entities, that reduce the CFC’s efficacy as a law enforcement agency and competition advocate.
6.2 Recommendations

6.2.1 CFC’s Relation to the Executive and Legislative Branches

The proposed legislation providing for Senate approval of Presidential appointments to the CFC should be adopted. In its day-to-day operations, the Commission is an independent agency free from direction by either the executive or legislative branches. The agency is not, however, nor should it be, completely insulated from the political dynamic of Mexico. Its independence is mediated through a variety of interactions with those two branches of government, including the budgetary process and congressional hearings. An important point of political modulation occurs when a vacant commission seat is filled for a ten year term. Providing the legislative branch with a role in the appointment process will bolster the Commission’s legitimacy as an agency entitled to exercise significant federal power.

The proposed legislation establishing the CFC as a “decentralized” agency should be expanded to provide the CFC with full budgetary independence. This would enable the Commission to present its budget directly to Congress rather than to the Finance or Economics Ministries. If the executive branch considered the CFC’s request to be excessive, it would be obliged to make that argument to Congress rather than cutting the Commission’s request unilaterally. This change, in conjunction with the provision requiring Senate approval of Commission appointments, will balance legislative and executive branch authority more evenly with respect to the CFC and enhance the agency’s stature.

6.2.2 CFC Resources

The Commission employed 8 per cent fewer people in 2002 than it did in 2000, despite a 25 per cent increase in workload (measured by output) during the same period. The Commission’s ability to address all of its responsibilities in an effective manner is compromised by resource constraints, and its budget should be increased appropriately. The primary use of additional resources allocated to the Commission should be to hire additional professional staff, with particular emphasis on securing lawyers of the highest competence. The exposure of the Commission to critical judicial review with respect to nearly every important act it undertakes demands meticulous legal craftsmanship in the preparation and defence of its decisions and procedures.
6.2.3 **CFC Enforcement Authority**

- Tools to detect and attack collusion

The Commission’s interest in obtaining authority to conduct unannounced searches for business records faces a significant obstacle in the Mexican Constitution, which limits the government’s search and seizure powers to criminal investigations. The Commission could request, and legitimately expect to obtain, statutory authority permitting CFC agents to search business premises after providing notice to the target company. Advance notice, however, would both eliminate the element of surprise and enable the target to seek judicial review. The Commission anticipates that the prime use of search and seizure authority would be to detect surreptitious collusion, but the kind of authority that the Commission is likely to obtain will not be particularly efficacious for that purpose. CFC efforts to acquire more investigative power are unobjectionable, but the Commission should pursue other means to increase its prospects of detecting collusion. One avenue, already identified by the Commission itself, and discussed in the next paragraph, is through the establishment of a leniency program.

The CFC seeks express language in the LFCE so that conspirators who voluntarily reveal collusive agreements to the Commission would receive immunity from (or significant reductions in) monetary penalties. LFCE 36 presently provides that, in assessing fines, the Commission “must consider the seriousness of the violation, the damage caused, the degree of intentionality, the violator’s market share, the size of the market affected, the length of the practice or concentration, and the violator’s recidivism or background, as well as its financial capacity.” While the statute does not forbid the consideration of additional factors (such as cooperation with the CFC), the Commission believes that penalty orders treating co-conspirators differently would be vulnerable to judicial reversal if founded on grounds not specified in Article 36. The Commission should pursue this initiative, but should also recognise that the appeal of any leniency program is materially affected by the seriousness of the penalties assessed against the non-cooperating parties. Therefore, in hard-core collusion cases involving large companies, the Commission should not only consider imposing fines up to the maximum permitted under LFCE 35 IV (about $1.6 million USD), but also consider invoking LFCE 37 to order an alternate fine equal to the greater of 10 per cent of the violator’s annual sales or 10 per cent of the violator’s assets. Further, the Commission should aggressively employ its authority under LFCE 24 III to refer corporate officers to the Public Prosecutor for criminal prosecution and engage the Prosecutor in a project to develop criteria for the filing of criminal complaints in Commission cases.
Additional tools to promote the exposure of collusion should also be considered, such as (1) obtaining authority to offer monetary rewards to lower-level corporate employees who reveal conspiratorial agreements to the CFC; (2) sending investigators into the field to interview customers in suspect markets; (3) scrutinising auctions involving public construction, commodity supply to government installations, and other matters particularly vulnerable to bid-rigging; (4) closely following (and participating at an early stage in) international cartel investigations; and (5) examining domestic industries protected from import competition by anti-dumping duties. Finally, the Commission should explore the possibility that analyzing price information and related data available from other government agencies could help target price-fixing investigations. Particular attention should be directed to the price data maintained by PROFECO.

- Authority to attack and dismantle structural monopoly

As discussed in section 3.3, the 1998 Report suggested that it might be appropriate to vest the CFC with authority to attack structural monopolies. Such authority would apply in circumstances where no unlawful monopolistic practices under the present provisions of the LFCE could be established. The CFC would thus be able to prosecute a dominant firm that exhibited the persistent ability to injure consumers by restricting supply and raising prices.

The most prominent difficulty involved in prosecuting structural monopolies is the development of an adequate remedy. Typically, either divestiture or some form of price control is imposed. Both are problematic measures to implement in an efficient manner, and both ordinarily injure the affected company’s shareholders by diminishing asset value. Concerns of this kind underlie the 1998 Report’s observation that any such remedial power given to the CFC should be “kept in reserve for occasional use in exceptional, but important, cases.”

Structural monopoly legislation being developed by the CFC will likely provoke high controversy once it reaches Congress. The Commission might consider presenting a second less controversial alternative that could ease the way for ultimate passage of full authority. At present, the CFC can employ its investigative powers only to determine the existence of practices that are unlawful under the LFCE. Thus, it cannot investigate merely to ascertain whether a market is hobbled by structural monopoly power. The CFC should unquestionably have, and should therefore request, statutory authority to conduct investigations for the purpose of examining the practical and economic features of an industry’s operation. Using such authority, it could establish whether a structural monopoly existed in a given market and submit a report to Congress with proposed solutions. By
demonstrating the existence of an actual structural monopoly, and proposing effective and practicable case-specific remedies, the CFC would be in a stronger position to obtain the necessary remedial authority.

6.2.4 **CFC Enforcement Policies & Regulations**

The CFC confirms that it takes failing firm considerations into account when analyzing merger cases, and advises that it is developing merger guidelines that will include provisions dealing with failing and bankrupt firms. A reasonable starting point for developing appropriate criteria would be the discussion of the failing firm defence prepared by the drafters of the LFCE. They suggested that an otherwise anti-competitive acquisition should be permitted only if the allegedly failing firm (1) is incapable either of meeting its financial obligations or of reorganizing in bankruptcy, (2) has made a good faith effort to be acquired by an alternate purchaser that would maintain the assets in the relevant market, and (3) would abandon the relevant market if the pending acquisition were rejected.64

The Commission should amend its Regulation 21 I to clarify the circumstances in which no pre-merger notification filing is required for restructuring transactions undertaken by foreign firms with Mexican subsidiaries.

6.2.5 **Commission Case Procedures**

It is in the CFC’s self-interest to address practitioner concerns about transparency and bias in Commission proceedings. These two issues are closely intertwined, because an agency decision that is perceived as lacking a fully-articulated basis is also a decision that can easily be seen as reflecting a preconceived agency opinion. The question is not whether CFC resolutions are indeed too cryptic, or whether the Commission does in truth ally itself too closely with complainants in conducting investigations. The fact that some practitioners perceive these things to be so has consequences that seriously impede the Commission’s ability to accomplish its mission. First and foremost, the immediate reaction of a party that perceives itself to be unfairly treated is to seek judicial review. An antitrust enforcement agency cannot operate effectively, however, if every investigation it initiates is challenged in court. Second, a party convinced that the Commission has found liability before the case even begins will be more interested in conducting trench warfare than in exploring the possibility of settlement. Antitrust enforcement agencies will ordinarily generate more economic benefits if a substantial proportion of cases are settled by consent. As the CFC itself has found, litigation is not only expensive and exhausting, but it
also generally results in continuation of the anticompetitive practice while the litigation proceeds. A signal benefit of settlement is prompt termination of the offensive practice.

As discussed previously in conjunction with Table 1, during the past five years the Commission obtained settlements in about 17 per cent of the 54 complaint cases that involved either a Commission finding that the LFCE had been violated or in a settlement under Regulation 41. The comparable figure for the CFC’s 32 ex officio cases was about 22 per cent. While these percentages are not trivial, the CFC should seek to settle at significantly higher rates.

Perceptions of non-transparency and bias are not the only reasons for the relatively low volume of settlements. Some of the Commission’s own case procedures also constrain the settlement rate. For example, a company subject to Commission investigation might be willing to adjust its practices voluntarily to satisfy the Commission’s concerns but, under current practice, the investigative target does not even learn the Commission’s specific concerns until the preliminary investigation is completed and the Commission issues an OPR commencing formal proceedings.

Another factor influencing the attractiveness of settlement is whether the CFC is able to reduce, or eliminate, fines assessed against a participant that agrees to settle under Regulation 41. This question, which bears most significantly in vertical restraint cases involving a single respondent, differs from the issues associated with granting immunity to a cooperative respondent in a horizontal collusion case. Where the Commission has a cooperating respondent in a horizontal case, it should be seeking much heavier fines than previously against the remaining conspirators, whether or not those parties express willingness to settle under regulation 41. In contrast, for a vertical case, the Commission should be willing to accept a lower fine in order to induce settlement. If the Commission considers that it cannot offer an explicit fine reduction to a settling respondent, it should seek to obtain such authority in conjunction with its legislative initiative respecting leniency.

The complete array of incentives influencing whether a participant in a CFC proceeding will seek to settle the case, pursue immediate judicial relief, or await the outcome of the Commission’s process is more complicated than can be fully analyzed here. The point is that the Commission should arrange those incentives to advance competition policy objectives. To accomplish this, the Commission should open a dialog with the Mexican Bar Association to assess agency practices and procedures. The Bar Association is supportive of competition policy and is interested in cooperating to
develop an effective and efficient system for the fair investigation and adjudication of CFC cases.

Practitioners’ concerns about the disclosure during amparo proceedings of confidential data in CFC case files should be addressed by adopting appropriate confidentiality regulations. The regulations could be modelled on those issued under Mexico’s trade law for application in GATT proceedings. The existence of such regulations would provide a ready-made reference for use in judicial disclosure orders affecting CFC files.

6.2.6 Implementation of Commission Orders

The establishment of a specialised amparo court with economic expertise to hear cases from the CFC (and other agencies that deal with economic issues) should be pursued. The CFC is not the only agency that finds its decisions under review by courts unfamiliar with economic analysis, and it should therefore be able to find allies in seeking legislative action on this point. The existence of such a court may also lead to outcomes more congruent with Supreme Court and appellate tribunal precedents when procedural issues are at stake. Consolidation of all CFC cases in a single court will, at least, avoid the problems posed when multiple amparo cases are filed in different federal courts. Further, whether or not a specialised court is created, action should be taken (by amending the amparo law or otherwise) to prevent amparo courts from granting inappropriate stays of CFC orders during judicial review.

An ancillary feature of amparo cases that warrants mention is the obligation of amparo courts to retain an expert if testimony by a party’s expert is admitted. Mexico’s Federal Judicial Council establishes (and revises yearly after a public process) a list of experts that federal courts may utilise to identify suitable candidates for employment in judicial proceedings. The current list specifies only one economist. The CFC should encourage universities to list faculty members suitable for retention as court experts in cases arising under the LFCE.

In Fiscal Court cases, the Commission should provide a fuller explanation of its fine imposition decisions, to avoid reversal on that ground. The procedural rules for Fiscal Court cases should be modified so that, in CFC matters, parties seeking review of Commission fine orders will have to post a bond assuring payment if the Commission’s decision is sustained. This would avoid any subsequent fine collection issues in such cases. The procedural rules controlling the review of Fiscal Court decisions by appellate tribunals should be amended to eliminate the existing jurisdictional amount requirement in CFC cases, so that the Commission may obtain appellate review of adverse Fiscal Court decisions. Finally, the Commission
should join with other agencies in an initiative to streamline the procedures that apply to the collection of fines once judicial review is completed.

6.2.7 CFC Authority in Regulatory Proceedings

The concerns expressed by the 1998 Report that the CFC might not have an adequate opportunity to participate (or to participate forcefully enough) in sector regulatory proceedings subsequent to a Commission finding of ineffective competition have been borne out, in part, by subsequent events. The Commission played no role in the development of tariff regulations for airports and seaports, and no tariff regulation was ever imposed in the airline transportation sector. The CFC was, however, effectively involved in the establishment of the LP gas distribution price caps and the COFETEL regulations for the five markets in which Telmex was found to possess substantial market power. The 1998 Report’s suggestion that CFC approval be a condition for the issuance of sector regulations subsequent to a CFC finding of ineffective market competition is still an attractive option worthy of consideration. It is appropriate to note, however, that COFEMER was created subsequent to 1998, and that any sector regulations issued in the future pursuant to a CFC finding would have to undergo COFEMER’s approval after a proceeding in which the CFC could file comments. This process may be sufficient to assure adequate CFC participation.

It would be desirable in any event, however, to implement the 1998 Report’s separate suggestion that the CFC be vested with explicit authority to participate in sector proceedings that apply and enforce regulations subsequent to a Commission finding of ineffective competition. Indeed, the CFC’s intervention authority should be extended even further to include all proceedings conducted by sector regulators. This is because there are regulatory circumstances (other than those following a CFC finding of ineffective competition) in which CFC involvement is important but in which the Commission now has no formal role. One example, discussed in section 3.4 of this Report, involved Telcel’s 2001 application to expand the uses permitted for its existing spectrum concession. The CFC was able to express an opinion in that proceeding only because COFETEL decided to seek the Commission’s views as a matter of discretion. And although COFETEL imposed some conditions on the expansion of Telcel’s concession, ostensibly to address the competitive concerns articulated by the CFC, no explanation was provided for COFETEL’s treatment of the CFC’s opinion. No such explanation was required because the CFC was not a party. To assure adequate treatment of competition policy issues, the CFC should have a formal right to participate in all regulatory agency proceedings, either through a generally available public comment period or through a procedural regulation tailored specifically for the CFC. Further,
the regulatory agency responsible for resolving the proceeding should be obliged to reply on the public record to the CFC’s comments.

The Commission’s project to develop structural monopoly legislation responds, in part, to the recommendations in the 1998 Report respecting Commission involvement in trade law proceedings. Regardless of that project’s outcome, the economic development program being prepared by the executive branch should include provisions vesting the Commission with authority to block anti-competitive decisions in the application of the trade laws. If the executive branch adheres to its position that competition policy will play a stronger role in Mexico’s economic program, the CFC should be well positioned to recommend modification of Mexico’s trade law system. In the meantime, the Commission should seek opportunities to publicise the economic costs that trade law proceedings impose on the Mexican economy.

6.2.8 Competition Advocacy

COFEMER advises that its regulatory review process addresses numerous proposed rules not previously vetted by the CFC. The CFC should not limit its involvement in COFEMER activities to participation in the advisory council and submission of comments upon specific request. The Commission should immediately establish a program to monitor COFEMER’s regulatory postings, identify proposals that warrant comment, and submit appropriate statements on the record by the applicable deadline. COFEMER’S public review proceedings provide an excellent opportunity for the Commission to enhance both its visibility and its impact on the day-to-day operations of Mexico’s regulatory processes.

6.2.9 Developing a Base of Support for Competition Policy

The CFC should establish a much closer relationship with PROFECO. As noted above, PROFECO is a source of market data that could be useful in detecting collusive behaviour. Beyond that, and more critically, PROFECO has an unmatched capacity to communicate with the consuming public, and is willing to employ that capacity to aid the CFC. This is an opportunity that the Commission should embrace, especially given that Mexico has no national, private-sector consumer organisation. PROFECO is a highly visible agency, publishing an attractive and popular consumer magazine, presenting radio and TV programs, and cooperating with the Education Ministry to develop consumer educational materials for use in schools. The CFC could employ the tools offered by PROFECO to implement a more effective program for communicating the benefits of competition to the public. The CFC as an agency, and competition policy
generally, would both benefit from consumer magazine articles about Commission actions that have a practical impact on everyday life. The CFC’s cases involving price-fixing of consumer commodities are prime candidates for coverage, but other kinds of cases (like those involving beverage exclusivity arrangements) may qualify as well. And competition issues in more complicated markets, such as telephone services and LP gas distribution, could also be explained in a consumer-friendly way.

Finally, the CFC should attempt to communicate more directly with major business organisations not involved in the regulated sectors of the economy. The APEC conferences constitute a model vehicle for discussing competition policy principles as they apply to actual business operations, and the CFC should employ some version of that model to arrange and facilitate interaction with national business organisations and the national consortia of business chambers.

Notes


2. Although the Mexico City airport is designated for privatization, it remains a government facility at present. The situation may change when (and if) the site for a new airport is selected. The government also manages 23 other airports that operate at a loss and for which privatization is not contemplated. Several short railway routes likewise remain in government hands.

3. North American Free Trade Agreement, Art. 1501(1). The competition law was being prepared during the same period that Mexico was negotiating NAFTA, although the law was adopted before NAFTA came into force.


6. See Fernando Sanchez Ugarte, CFC Chairman, “Competition Policy in Economic Development” (2002). This address, presented in conjunction with the Ninth Anniversary of the CFC, is available on the CFC’s website at www.cfc.gob.mx.

7. p. 185.


9. p. 185.
10. One chamber of the Supreme Court has held that the Commission’s authority to impose fines under LFCE article 34, section II is unconstitutional because the statute contains no standards for determining the size of the fine. This decision, however, conflicts with a thesis established by another chamber of the Supreme Court, holding that statutory fine provisions are constitutional if they limit the imposing agency’s discretion by establishing a maximum.

11. Pemex, for example, has been subject to several actions by the CFC for practices outside the sector in which it enjoys constitutional protection.

12. Besides these legal requirements affecting the organisation of export associations, LFCE 6 also specifies that the product exported by the trade association must be the exporting region’s prime source of wealth, must not be an essential commodity, and must not be traded within Mexico.

13. The status of this power is now in question. On January 6, 2004, the Supreme Court declared articles 14 and 15 of the LFCE to be unconstitutional.

14. The role of CRE in natural and LP gas is more prominent than in electricity because the latter sector is still largely state-owned.


16. An example is the Commission’s action, settled by consent in 2002, against price fixing in the vitamins market (File IO-09-99).

17. Until 2001, the Ministry of Economy was designated as the Ministry of Trade and Industrial Promotion, or SECOFI.

18. Thus, unlike in most other OECD countries, resale price maintenance is not subject to a per se prohibition.

19. Regulations 9 through 13. The discussion in these provisions is also applicable to the relevant market and market power issues involved in analyzing mergers. It is worth noting that the treatment of market definition in Regulation 9 expressly states that the Commission will seek to identify all substitute products “whether domestic or foreign.” Although the Commission often defines markets as national because of consumer preferences, product distribution conditions, and other factors affecting supply and demand, it routinely considers the implications of actual and potential imports and foreign investment in assessing the market power of firms operating in Mexico.

20. The predatory pricing standard set out in the 1998 Regulations was developed in deciding this case.


22. p. 190.

23. p. 208.


26. The transaction might qualify for the post-consummation notification provision applicable to restructuring transactions under Regulation 21, section II, but only if the parent had held the controlling shares for the preceding three years. The CFC,
however, does not consider that even a post-transaction notification requirement is necessary in the circumstances described.

27. While most merger cases arise from pre-merger notification filings, these totals also reflect cases following from complaints filed with the CFC and from ex officio investigations initiated by the Commission itself.


29. p. 205.

30. pp. 208. In an extension of that discussion, the 1998 Report also suggested creation of a single agency to administer sector regulations for all controlled markets. Id.


32. LFCE 32. Both domestic and foreign firms have the same right to file complaints under the applicable procedures.

33. Two appellate courts have ruled that the Commission has no statutory basis for denying participant status to complainants in pending merger cases. The Supreme Court has not spoken on this issue, but the Commission may be obliged either to extend participant status by amending Regulation 26 IV, or seek an amendment to LFCE 32.

34. Regulation 30.

35. LFCE 33, section IV.

36. The CFC estimates that redactions are made in only 15 percent of the resolutions that it issues, and that the amount of text deleted from any given resolution is tiny (less than 2 per cent).

37. The Commission did not previously place those items on the public record, and they were not otherwise disclosed unless the case file was released during judicial review.

38. p. 191.

39. This approach, which would effectively constitute the CFC as a tribunal to hear private antitrust cases, appears to be legally permissible under the bare-bones procedural framework in LFCE 33.

40. Richard D. Baker, Judicial Review in Mexico: A Study of the Amparo Suit (1971) at 128. See also id. at 268, concluding that, with respect to reviewing agency action, the constitutional jurisdiction of Mexico’s judiciary is comparable to that federal judiciary in the United States.

41. An *amparo* challenging a final resolution of the CFC may not be filed until the party has sought and received Commission reconsideration under LFCE 39.

42. The *amparo* procedural rules provide a mechanism for consolidating before one court all of the *amparo* actions relating to a given agency proceeding. Any consolidation ordered, however, is at the discretion of the judges involved, not a matter of right.
43. In this respect, the district courts have been ignoring a series of appellate tribunal decisions holding that *amparo* courts cannot stay CFC orders during judicial review.

44. p. 208.

45. p. 197.

46. p. 208.

47. The ratios of relative to absolute cases are not exactly congruent with the ratios of vertical to horizontal cases because, under the LFCE, all absolute cases are horizontal but not all relative cases are vertical. This means that the actual ratios of vertical to horizontal cases are lower than the ratios cited in the text.

48. The raw data respecting fines ordered by the Commission appear to show a stronger emphasis on relative cases compared to absolute cases. The average fine imposed as a sanction by the CFC in the period 1998 through 2002 for relative monopoly cases was $4.20 million pesos (or $399 000 USD). The average fine imposed for absolute monopoly cases was only 44 percent of the relative cases figure, standing at $1.84 million pesos (or $175 000 USD). In fact, however, most of the fines ordered for relative monopoly practices in that period were assessed against Telmex or its affiliate Telcel: 15 fines totalling $151.2 million pesos (or $14.3 million USD), representing 86 percent of all relative practice fines imposed as a sanction from 1998 through 2002. If the fines against Telmex are removed from the data, the average fine in relative practice cases drops significantly to $930,431 pesos (about $88,300 USD).

49. p. 207.

50. LFCE Article 24, sections IV and V. Under the Commission’s internal regulations, authority to issue commentary under section IV is delegated to the Chairman, while the Plenum reserves to itself the exercise of authority under section V.

51. LFCE Article 24, section VI. This authority is also reserved exclusively to the Plenum.

52. The Executive Secretary, acting with the Chairman’s agreement, is authorized to issue opinions of this kind. The Plenum, however, may choose to resolve such requests itself, as it did in the consultations respecting CINTRA and Radio Móvil Dipsa (Telcel), discussed in section 3.4 of this Report.

53. The CFC considers proceedings under Article 14 to constitute competition advocacy rather than law enforcement, because a Commission determination that an interstate trade barrier exists entails no mandatory effect.

54. p. 207.

55. p. 207.

56. The CFC considers proceedings under Article 14 to constitute competition advocacy rather than law enforcement, because the Commission’s determination that an interstate trade barrier exists entails no mandatory effect.

57. p. 208.
58. At www.cfc.gob.mx.

59. A significant portion of the website material is also available in English.

60. p. 205.

61. pp. 205-06.

62. The Commission’s stated intention to frame its recoupment criteria in terms of “good probabilities” of predation cost recovery appears unobjectionable. When the Commission formally acts on recoupment, it should also consider including in its predatory pricing criteria the cost determination principles articulated in the June 6, 1996, Warner-Lambert resolution.

63. Some relatively inconspicuous but nonetheless praiseworthy examples are the CFC’s actions in maintaining an excellent website, obtaining ISO certification, and organizing the APEC-sponsored sectoral conferences.


65. By comparison, during the period 1998 to 2002, the United States Federal Trade Commission resolved 86 per cent of its non-merger antitrust cases by settlement.

66. Both the leniency program and Regulation 41 settlements also raise issues respecting the exposure of cooperating participants to private damage claims under LFCE 38. The CFC should consider whether it needs additional statutory authority to address concerns of that kind.

67. See Title 8, Chapters III and IV, of the trade law regulations published in the Diario Oficial on December 30, 1993.

68. Diario Oficial, Dec. 13, 2002, p.56. It is also worth suggesting that faculty members who are listed as experts consider adjusting their professional fees to accommodate the judiciary’s budget.

69. In amparo cases that involve review of CFC decisions imposing a fine, the applicable procedural rules already permit the Commission to request that the appellant post a bond assuring payment if the Commission’s decision is sustained. Requiring a bond is, however, within the court’s discretion, and this procedure should be revised to so that such a bond is required in every CFC fine assessment case.
COMPETITION LAW AND POLICY IN PERU

A Peer Review

-- 2004 --
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Summary

Peru is a developing country with a history of protectionism, “import substitution,” and substantial governmental involvement in the economy. These precluded sustained economic growth by cutting off foreign investment while wasting its own resources by subsidising inefficiency. By the late 1980s, Peru had a rapidly declining GDP and a four-digit inflation rate.

Competition law and policy was formally introduced to Peru in 1991 as part of a broad economic liberalisation programme, but the real beginning came in 1993 with the opening of a new “autonomous” government agency, the Institute for the Defence of Competition and Intellectual Property, Indecopi, as it is known, became responsible for the “free competition law”; a “market access law” against government rules that impose unwarranted barriers to entry; and a wide range of other laws with some relation to market reform. With strong Presidential support, Indecopi soon became a powerful force for reform within Peru and one of developing world’s most articulate competition advocates.

Peru’s free competition and market access laws represent the core of competition law and policy – the banning of anticompetitive conduct by enterprises and the key principle that governments should not restrict economic activity more than is necessary to achieve other social goals. The breadth of Indecopi’s mandate has helped the agency as a promoter of competitive markets in a broad sense, but many of its activities – particularly those concerning bankruptcy, the standardisation and accreditation process, and intellectual property protection – are much less closely related to core competition policy issues than many other government activities, such as creating interconnection rules or privatising state assets, over which Indecopi has no authority. Thus, even Indecopi’s broad mandate fails to include some important competition policy matters, and some of Indecopi’s functional areas contribute little to the agency’s policymaking or its operational efficiency.

During the 1990s, Indecopi’s competition-related activities consisted primarily of education, advocacy, and both voluntary and quasi-judicial resolution of disputes between firms or between one or more consumers and a firm. The agency brought a number of significant cases, but was criticised by some for not engaging in more law enforcement. Today, there appears to be increasing consensus (within and outside Indecopi) in favour of a more proactive law enforcement approach, and some view Indecopi as having already moved in this direction. Although education and advocacy continue to be vital, Indecopi should indeed be seeking to bring more ex officio free competition and market access cases that can demonstrate the value of its work in concrete terms.
Reform to strengthen Indecopi is also necessary, however. During the 2000-2001 transition government and the current government, several events have confirmed what some have warned for years – that the agency has insufficient safeguards of its autonomy. As a result, Indecopi’s stature as an autonomous, neutral arbiter has been undermined. It is important, therefore, for Peru to revise the law governing Indecopi to increase the actual and perceived independence of both Indecopi’s first instance decision-makers, such as the Free Competition Commission, and its second instance decision-maker, the Tribunal for the Defence of Competition and Intellectual Property.

Moreover, Indecopi no longer receives any funding from the Treasury. The agency has always been largely self-financing, and the profound incentive problems inherent in this system became more obvious and more serious when public funding stopped completely in 2003. Indecopi can now conduct its core competition work (and other non-remunerative activities) only by overcharging for its registration and other services and/or setting the level of its fines so as to cover its own costs rather than to punish and deter illegal conduct. This approach will not permit Indecopi to revive or maintain the confidence of Peruvians or the international community.

Despite the many important demands for public funds, Peru should provide at least enough funding for the Free Competition and Market Access Commissions to handle their “denunciation” cases and devote additional resources to ex officio cases. Funding this casework can more than pay for itself and benefit all Peruvians by both increasing efficiency and reducing the size of Peru’s informal economy, which is 60 percent of GDP (and apparently growing). Both Commissions should continue to ground their decisions in economic efficiency while considering that some previous decisions may have relied too much on “Chicago School” concepts.

A Working Group at Indecopi is currently considering a variety of possible amendments to the Free Competition Law. There is a particular need for the introduction of some sort of merger control system and for a legislative clarification of the legal standard applicable to hard core cartels. Other amendments may also be appropriate.

In addition, in continuing the competition advocacy for which it is justifiably famous, Indecopi should place separate and increased emphasis on its Free Competition and Market Access functions, and should explain as clearly as possible how these functions can and do benefit the entire Peruvian economy, not merely the “formal complainant or other direct “victims” of particular violations. The public must learn that these cases involve important economic policy matters in which they have a stake, rather than being essentially private disputes (as may be the case in unfair competition cases).

The challenge before Indecopi and Peru is great. The official Individual Action Plan (IAP) Peru recently submitted to APEC states as follows:
“Competition and market oriented policies in Peru and the Andean Region are facing opposition from the majority of the impoverished population who do not have a clear perception of the benefits of a market economy.... The increasing opposition has stopped any attempt to implement necessary reforms and improve competition environment.”

Reform activity has not completely stopped, of course, and the IAP offers the optimistic conclusion that “there is an opportunity to change the population’s negative perception of competition and market-oriented policies.” But the IAP’s description makes it clear that market reform requires not merely a strengthened Indecopi, but increased, visible support from the government and its ministries for what the government continues to describe as its market liberalisation programme. Government officials should seek to explain the benefits of a market economy, and should strongly reject, rather than repeat, populist criticism that contributes to the public’s fears and misperceptions.

Among other possible strategies, the government should stress that market reform is improving the standard of living of most Peruvians by, for example, reducing the cost and improving the extent and quality of telephone service and of electricity. IDB-funded research showing the benefits of Indecopi’s competition work should also be publicised. Moreover, the recently proposed judicial reform programme should be explained in part as a means of improving the ability of the market to provide real benefits to the public. Both Indecopi and the rest of Peru’s government should seek every available opportunity to show that despite transitional difficulties that sometimes need separate attention, Peru’s citizens will be better off when the market – rather than opportunists, monopolists and bureaucrats – determines the price and quality of the goods and services they seek.

1. Context for and History of Competition Policy

Competition policy was introduced to Peru in the early 1990’s as part of a general programme of economic liberalisation. Decades of protectionism and government involvement in the economy had led to economic collapse, but the newly elected President who introduced these policies had campaigned against such a programme. Moreover, the free competition law and other aspects of this reform programme were adopted by Presidential decrees, many of which were issued during a period when Congress had been dissolved. One result of this situation is that the laws reflect a clearer commitment to economic efficiency than those of most countries, and throughout the 1990’s Peru’s competition officials received strong Presidential support. On the other
hand, although the reforms were successful and sometimes popular, the laws and policies did not reflect a broad consensus within the public or even among government officials. In the last few years, an obvious fall-off in Presidential support and a number of events have undermined competition policy and other aspects of economic reform.

1.1 Economic and cultural context

Analysis of the challenges involved in introducing competition law and policy to Peru must begin with the country’s recent political and economic history, which in turn must be understood in terms of Peru’s size and its striking diversity in matters such as topography, ethnicity, language, wealth, and custom.

Located on the west coast of South America, Peru is in geographic terms the third largest country in South America and the 20th largest country in the world. (By way of comparison, it is slightly larger than South Africa; almost twice as large as Chile; and slightly smaller than France, Germany, and Spain combined.) Peru’s northernmost point sits on the equator, bordering Ecuador and Columbia. From that point Peru extends southwest to include mild coastal plains and southeast to include part of the largely impenetrable Amazon basin. These two areas are divided by the Andes mountain range, whose tropical foothills give way to frigid peaks of up to nearly 7,000 meters.

Peru’s population of almost 30 million is the 5th largest in South America and the 39th largest in the world. Mestizos (with mixed Native American and European ancestry) have become the predominant group and now comprise almost 50 percent of the population. Native Americans comprise 35 percent of the population, but this group is very diverse. For example, the Amerindians of the Andes are ethnically and linguistically distinct from the diverse indigenous groups that live on the eastern side of the mountains and in tropical lowlands around the Amazon basin. The Caucasian population, which lives mainly in Lima and elsewhere on the coast, has fallen to about 10 percent of the population and has been losing its position as the political and economic elite. The ancestry of the remaining 5 percent of the population is mostly African and Asian.

In economic terms, Peru is considered by the OECD’s Development Assistance Committee to be a Lower Middle-Income Country (“LMIC”). For comparison purposes, other LMIC countries from Central and South America and the Caribbean include Belize, Ecuador, El Salvador, Guatemala, Guyana, Honduras, Jamaica, Paraguay, and Surinam. Six Central and South American countries – Argentina, Brazil, Chile, Costa Rica, Panama, Uruguay, and Venezuela – are considered Upper Middle-Income Countries. In more concrete terms, Peru’s GDP ranks fifth in
Central and South America, and 47th in the world, but its per capita GDP ranks significantly lower – ninth in Central and South America, and 120th in the world. Approximately ten percent of Peru’s GDP comes from agriculture, while industry makes up about 27 percent and services the remaining 63 percent. At least 60 percent of economic activity in Peru takes place within the informal economy, which among other things creates health and safety problems and deprives the government of tax revenue.

1.2 Background for Peru’s market reform

Peru’s political system and economic policies have also witnessed striking variations. Although a decentralisation programme is underway, Peru’s government has always been highly centralised, and like many countries in the area, Peru has a strong tradition of state participation in or control of economic activity. Beginning in 1963, Peru focused particularly on an “import substitution” model of economic development that included trade and exchange rate manipulation as well as extensive regulation of price and entry. In the 1970’s, Peru’s military government strengthened ties to the communist world, becoming the Soviet Union’s largest military client in Latin America.

A new Constitution was adopted in 1979, and in 1980 the new, democratically elected government began to seek closer relationships with its neighbours and other Western countries. After Alan Garcia was elected President in 1985, however, Peru reverted to nonalignment, economic populism, and “anti-imperialist” policies. Together with the growing violence of the Maoist-oriented “Communist Party of Peru – Shining Path” and a serious cholera epidemic, these economic policies contributed to the virtual disintegration of the economy, the political party system, and the state. The result was a presidential election in 1990 between two political novices, Alberto Fujimori and the novelist Mario Vargas Llosa – an election that Fujimori won in part because Vargas Llosa compromised his image as an outsider by joining an established political party.

1.3 Establishing the legal framework for a market economy

With no obligations to any traditional party, Fujimori was able to pursue a pragmatic approach to governing. During the campaign, he had opposed the “neo-liberal” economic reforms being advocated by Vargas Llosa, but the need to control inflation soon led Fujimori to undertake just such reforms. He eliminated most subsidies, renegotiated the payment of debts that Garcia had renounced, and succeeded in getting Congress to enact a new foreign investment law that eliminated most discrimination against
foreigners. In addition, all direct quantitative restrictions on imports were lifted, and tariff rates were lowered substantially. These reforms led to substantial price increases, and Fujimori’s popularity plummeted for a while, but by the end of 1991 annual inflation had fallen to “only” 139 percent and Peru had begun a period of sustained economic growth.

Despite his ability to obtain Congress’ approval of some reforms and to enact others by Presidential decree, Fujimori regarded Congress as an obstacle both to economic reform and to effective action against the increasing intensity of Shining Path terrorism. Moreover, he regarded the 1979 Constitution as containing some undemocratic elements and providing for continued economic planning and government participation in the marketplace. Therefore, with the support of the Armed Forces, Fujimori engaged in a “self-coup” on April 5, 1992, suspending the 1979 Constitution and dissolving Congress. Although a matter of major concern to the international community, the self-coup was apparently popular with many in Peru, particularly the military, the business community, and the urban middle and lower classes. The revised Constitution, approved in December 1993, contains a variety of democratic reforms and also introduces a provision relating to competition policy. Article 61, Section 61 states:

“The state facilitates and oversees free competition. [It must] fight every practice that limits free competition and any abuse of dominant market or monopolistic positions. No laws can be enacted to authorise or establish monopolies.”

The Constitution also provides that the State may engage in economic activity only if (a) it is expressly authorized by law, (b) the private sector is unable to satisfy demand, and (c) the activity will serve the public interest and "national convenience." (This third requirement apparently means that the State should concentrate on essential functions such as national security and justice.)

Most of Peru’s legal provisions regarding competition law and policy are “decree laws” (decreto ley) that Fujimori issued in 1991-92 as part of his initial push to lay the basis for a market economy. One of those decrees created a new agency, Indecopi (Institute for the Defence of Competition and Intellectual Property), to serve as an arbiter and promoter of market activity. He gave the agency a strikingly broad mandate that included dispute resolution and law enforcement in the following fields: (a) the competition law; (b) a “market access law” that bans government rules that impose unauthorised and unwarranted barriers to entry; (c) an “advertising and unfair competition law” to protect firms from "dishonest" practices; (d) a consumer protection law that governs not only unfair or deceptive practices, but almost all aspects of consumer activity; (e) antidumping and
safeguard proceedings; (f) laws protecting copyrights, trademarks, and patents; (g) the establishment of voluntary and mandatory product standards and accreditation bodies; and (h) a “market exit law” that provides a quasi-judicial procedure for handling bankruptcies.

Although it reported for some purposes to the Ministry of Industry, Indecopi was created as an autonomous agency in order to limit interference from the traditional Ministries. Moreover, because the government wanted to provide an alternative to Peru’s judiciary, which was (and is) considered slow, unpredictable, and corrupt, Indecopi was created at least as much to resolve private disputes as to engage in real law enforcement. These problems with Peru’s judiciary (and more generally with accepting the rule of law) were and are significant impediments to Peru’s economic development.

1.4 Economic reform and Indecopi’s rise in the 1990s

Indecopi opened its doors in March 1993, and it quickly developed a reputation for transparency, efficiency, and predictability that is unusual in Peru. President Fujimori supported the agency’s mission, respected its autonomy, and pushed the entire government to pursue market reform. Indecopi and Peru both experienced considerable success during the 1990s. Moreover, at least until 1998, when Peru’s economy was hurt by international economic crises and “el Niño,” the percentage of Peruvians living in extreme poverty fell considerably. The popular discontent that followed these setbacks indicated a lack of widespread understanding of, or support for, these reforms, however.

With respect to competition law and policy, unfair competition, and consumer protection, Indecopi’s activities consisted primarily of advocacy, education, and both voluntary and quasi-judicial resolution of disputes between firms, or between one or more consumers and a firm. The agency was much less active in actual law enforcement, though it took a strict approach to hard core cartels (e.g., the famous “Chicken Case”) and in assessing whether government regulations were warranted (e.g., striking down a municipal requirement that taxicabs be painted yellow). In the intellectual property area, Indecopi was again much more active in its promotional role than as a law enforcer. To some extent, Indecopi’s preference for promotion over coercive action (except in striking down anticompetitive government regulations) manifested the generally accepted approach to introducing competition law and policy, but it also reflected what may sometimes have been excessive reliance on “Chicago School” theories, and some experts argued for a more proactive, law enforcement approach.

In other areas, the Antidumping Commission showed unusual respect for competition considerations. The Market Exit Commission is said to have
been created and assigned to Indecopi for two reasons: (i) the courts were inefficient and had no process for dealing with bankruptcy other than liquidation; and (ii) liquidations and reorganisations can affect concentration levels. Since the competition law showed no interest in the effect of mergers or acquisitions on concentration levels, however, the latter explanation sounds dubious.

There has been a good deal written about Indecopi’s activities in the 1990s; a willingness to sponsor and engage in policy debate was apparently one of its hallmarks. In reviewing such materials from a competition law and policy perspective, however, some have come away with an exaggerated view of Indecopi’s “core” competition matters – the activities of the Free Competition and Market Access Commission. The problem is that many materials refer to all Indecopi proceedings except for those relating to intellectual property as “competition” cases simply because their appeals are heard by the Competition Tribunal. Thus, one report states that during 1993-1997 Indecopi completed 8,648 “competition” proceedings, but 51 percent were bankruptcy and 45 percent were consumer protection and unfair advertising and competition. Even combined with standards and antidumping cases, core competition matters were only 4 percent of the so-called competition proceedings.

Despite the relatively small number of core competition proceedings, by the end of the 1990s, Indecopi had developed into an institution that was respected both in Peru and internationally for its transparency, integrity, and competence with respect to core competition matters. There were already concerns, however, about what one observer call Indecopi’s “institutional fragility” and its ability to maintain its autonomy and effectiveness, particularly since some ministries continued to resist market reform, and the courts had the power to stall Indecopi’s work.

1.5 2000-2004 – Reform loses momentum and Indecopi loses power – The new challenges

Although Fujimori was re-elected to the presidency in 2000, corruption scandals (relating primarily to Fujimori’s now-jailed spy chief, Vladimiro Montesinos) led him to seek sanctuary in Japan, where he remains. A transition government then operated from November 2000 until July 2001, when Alejandro Toledo took over as the democratically elected President. Both these governments have in principle continued to seek market reform, but they have been unable or unwilling to explain and successfully push for market reform agenda in the face of growing opposition. For example, electricity privatisation has brought widespread benefits, increasing the availability of electricity and thereby improving standards of living.
However, the government in July 2002 found it necessary to call off two electricity privatisations because it was unable to persuade the local populace concerning these benefits and to address substantive objections, such as a lack of transparency in awarding concessions and allegedly improper tariff regulation.

The situation is serious. According to the Individual Action Plan (IAP) Peru recently submitted to APEC:

“Competition and market oriented policies in Peru and the Andean Region are facing opposition from the majority of the impoverished population who do not have a clear perception of the benefits of a market economy…. The increasing opposition has stopped any attempt to implement necessary reforms and improve competition environment.”

The IAP goes on to conclude that “there is an opportunity to change the population’s negative perception of competition and market-oriented policies.” But the IAP’s description makes it clear that market reform requires not merely a strengthened Indecopi, but increased, visible support from the government and its ministries for what the government continues to describe as its market liberalisation programme. At present, however, it is clear that high-level government officials are not uniform in support of such reform and are not contributing to public education concerning its benefits. For example, at a recent UNCTAD conference in Lima, Peru’s Second Vice President made an introductory speech criticising market liberalisation and privatisation, complaining about abusively high telecomm rates without mentioning that they are lower as a result of economic reforms, condemning the WTO and multinational enterprises for destroying Peru’s companies, and accusing Indecopi of not doing anything to halt dumping by foreign firms.

Moreover, a number of steps taken during or by the current government have significantly undermined Indecopi’s authority. About two months into the current government, all of the members of Indecopi’s Antidumping Commission resigned on the same day and were replaced four days later by Commissioners whose President was an oil executive and an official in Peru’s National Industries Society. Shortly thereafter, the Commission’s Technical Secretariat resigned. These events are important because it is widely believed that a government ministry orchestrated the changes at the commission level, and that the Secretariat resigned rather than implement the Commission’s new, allegedly more protectionist policies. As a result of a recent division of the Ministry of Industry into a Ministry of Production and a Ministry of Trade and Tourism, Indecopi now reports to the President of the Council of Ministers rather than the Ministry of Industry, but concerns about the autonomy of Indecopi’s first and second instance decision-makers remains.
In addition, whereas Indecopi’s first three Presidents had all possessed relevant training and experience, the current government appointed a (then) little-known presidential advisor, César Almeyda. The appointment itself fuelled speculation that the government intended to control Indecopi, perhaps to thwart rather than encourage competition. Thereafter, Almeyda himself created controversy by making public pronouncements about the merits of cases that were still pending in Indecopi’s “independent” quasi-judicial units. Also, Almeyda brought about considerable turnover in the Tribunal and the Commissions during the February 2002 – February 2003 period of his presidency. One result of this turnover is that of the four sitting members of the Competition Tribunal, only its President is widely seen as having substantial knowledge about competition law and policy. The other members are said to be respected academics, but there is some concern about their relative lack of expertise on competition issues and about whether this is an indication that Indecopi is not independent from the government. The impact of all these events remains unclear, since Almeyda has been jailed on corruption charges (having nothing to do with Indecopi), and Indecopi’s former general manager, Fernando Arrunátegui Martinez, has been Acting President of Indecopi for well over a year. [Subsequent to the 14 June 2004 discussion of this report, Tribunal member Santiago Roco was appointed President of Indecopi.]

Due at least in part to concerns about Indecopi’s autonomy, competition policy is a matter of some controversy in Lima today. For example, the Competition Tribunal and Indecopi are now widely seen as taking a more “hard line” approach to antidumping than either the Ministry of Economy and Finance, or the Ministry of Trade. Moreover, some recent Tribunal decisions created controversy by reversing its previous position that gave per se treatment to hard core cartels, reversing its previous position on subjective comparative advertising, and appearing to imply (for the first time) that excessive pricing violates the competition law. Even the business community and defence bar that are the apparent beneficiaries of these rulings find them confusing and express concern that unpredictable rulings may reflect behind the scenes government influence. Supporters of economic reform advocate new legal protections for Indecopi’s autonomy, and in the meantime its leadership faces the challenge of regaining actual and perceived independence.

Indecopi also faces serious budget issues. In 2003, the government stopped providing any public funding to Indecopi. The Treasury has never provided more than about 30 percent of Indecopi’s budget. The remainder once came mostly from the fees it charges for intellectual property registrations and bankruptcy work, plus the very few premerger filings it has received in connection with acquisitions in the electricity field (the only area
in which Peru has any form of merger control). At present, however, the fines Indecopi imposes make up 58 percent of its budget.

In the past, some have viewed Indecopi’s self-financing as a benefit in that it could make Indecopi financially independent of the government, but it is now apparent that this system gives Indecopi an incentive to focus on (and overcharge for) its fee-based services and to impose heavy fines. There is no evidence that Indecopi has imposed or increased fines in order to finance its activities, but Indecopi’s administrators of necessity seek to anticipate whether and when cases will result in fines. It is symbolic of both Indecopi’s precarious financial status and the problem of self-financing from fines that the agency faces new and substantial problems because of new law that automatically suspends all fines throughout the judicial review process, which can easily last up to eight or so years.

This resource problem is exacerbated by the fact that Indecopi’s Commissions were created in large part to provide an alternative to Peru’s courts. Any individual or firm can begin a formal proceeding by submitting a “denunciation” and a fee. Thus, whatever resources Indecopi can find to subsidise core competition activities must be used first on cases that may have little public importance. Despite an apparent desire to engage in more ex officio competition law enforcement, Indecopi’s dispute resolution mandate and its shortage of resources make such enforcement a very substantial challenge.

Despite the challenges it has faced in the last few years, Indecopi has had some significant successes in bringing some core competition cases; making the market more trustworthy through dispute resolution in advertising, unfair competition, and consumer protection cases; and engaging in competition advocacy. The issue today is whether Indecopi – through its own work and through increased government support for its mission – can regain the actual and perceived independence and competence it needs to carry out a programme that will demonstrate the value of competition law and policy and of market reform generally.

2. Substantive Issues: Scope and Content of Peru’s Competition Laws

Peru has two laws that deal with the two core competition matters – the prevention of anticompetitive conduct by enterprises, and the elimination of anticompetitive restrictions by government entities. The Free Competition Law is Peru’s more conventional competition law, applicable to all individuals and entities that undertake economic activities, as well as to all individuals who direct or represent entities that engage in illegal activity. The law has no exemptions, but by its terms it does not apply to entities that
do not undertaking economic activities. This excludes governmental entities acting in a purely regulatory manner. Moreover, the law does not apply to access/interconnection issues in infrastructure monopoly markets that are under the jurisdiction of sectoral regulators. There is no special treatment for small businesses and no *de minimis* rule.

In addition, like a growing number of countries, Peru does not make competition advocacy the only means of eliminating anticompetitive regulation. Peru’s Market Access Law provides a means of challenging anticompetitive executive regulations when they are unauthorised by law and lack a reasonable relationship to an authorised objective.

Indecopi also enforces a variety of other laws that relate in one way or another to market reform. Since it is often claimed that Indecopi’s multiple functions improve its ability to promote competition policy and market reform, this section also addresses those laws, with the amount of discussion depending on how closely they relate to core competition matters.

**Box 1. The Competition Law Toolkit**

General competition laws usually address the problems of monopoly power in three formal settings: relationships and agreements among otherwise independent firms, actions by a single firm, and structural combinations of independent firms. The first category, agreements, is often subdivided for analytic purposes into two groups: “horizontal” agreements among firms that do the same things, and “vertical” agreements among firms at different stages of production or distribution. The second category is termed “monopolisation” in some laws, and “abuse of dominant position” in others; the legal systems that use different labels have developed somewhat different approaches to the problem of single-firm economic power. The third category, often called “mergers” or “concentrations,” usually includes other kinds of structural combination, such as share or asset acquisitions, joint ventures, cross-shareholdings and interlocking directorates.

Agreements may permit the group of firms acting together to achieve some of the attributes of monopoly, of raising prices, limiting output, and preventing entry or innovation. The most troublesome horizontal agreements are those that prevent rivalry about the fundamental dynamics of market competition, price and output. Most contemporary competition laws treat naked agreements to fix prices, limit output, rig bids, or divide markets very harshly. To enforce such agreements, competitors may also agree on tactics to prevent new competition or to discipline firms that do not go along; thus, the laws also try to prevent and punish boycotts. Horizontal co-operation on other issues, such as product standards, research, and quality, may also affect competition, but whether the effect is positive or negative can depend on market conditions. Thus, most laws deal with these other kinds of agreement by assessing a larger range of possible benefits and harms, or by trying to design more detailed rules to identify and exempt beneficial conduct.
Vertical agreements try to control aspects of supply and distribution. The reasons for concern are the same—that the agreements might lead to increased prices, lower quantity (or poorer quality), or prevention of entry and innovation. Because the competitive effects of vertical agreements can be more complex than those of horizontal agreements, the legal treatment of different kinds of vertical agreements varies even more than for horizontal agreements. One basic type of agreement is resale price maintenance: vertical agreements can control minimum, or maximum, prices. In some settings, the result can be to curb market abuses by distributors. In others, though, it can be to duplicate or enforce a horizontal cartel. Agreements granting exclusive dealing rights or territories can encourage greater effort to sell the supplier’s product, or they can protect distributors from competition or prevent entry by other suppliers. Depending on the circumstances, agreements about product combinations, such as requiring distributors to carry full lines or tying different products together, can either facilitate or discourage introduction of new products. Franchising often involves a complex of vertical agreements with potential competitive significance: a franchise agreement may contain provisions about competition within geographic territories, about exclusive dealing for supplies, and about rights to intellectual property such as trademarks.

Abuse of dominance (or monopolisation) is concerned principally with the conduct and circumstances of individual firms. A true monopoly, which faces no competition or threat of competition, will charge higher prices and produce less or lower quality output; it may also be less likely to introduce more efficient methods or innovative products. Laws against monopolisation are typically aimed at exclusionary tactics by which firms might try to obtain or protect monopoly positions. Laws against abuse of dominance address the same issues, and may also try to address the actual exercise of market power. For example under some abuse of dominance systems, charging unreasonably high prices can be a violation of the law.

Merger control tries to prevent the creation, through acquisitions or other structural combinations, of undertakings that will have the incentive and ability to exercise market power. In some cases, the test of legality is derived from the laws about dominance or restraints; in others, there is a separate test phrased in terms of likely effect on competition generally. The analytic process applied typically calls for characterising the products that compete, the firms that might offer competition, and the relative shares and strategic importance of those firms with respect to the product markets. An important factor is the likelihood of new entry and the existence of effective barriers to new entry. Most systems apply some form of market share test, either to guide further investigation or as a presumption about legality. Mergers in unusually concentrated markets, or that create firms with unusually high market shares, are thought more likely to affect competition. And most systems specify procedures for pre-notification to enforcement authorities in advance of larger, more important transactions, and special processes for expedited investigation, so problems can be identified before the restructuring is actually undertaken.
2.1 The Free Competition Law

The goal of the Free Competition Law is stated in Article 1 as being to “eliminate monopolistic practices, controls, and restrictions of free competition in the production and marketing of goods and services, so that free private enterprise can flourish for the greatest benefit of users and consumers.” The Article’s references to free competition and consumer benefits, together with the absence of any non-efficiency goals, make this provision a remarkably clear statement of intent to promote economic efficiency. This unusual lack of ambiguity may result from the law’s being a Presidential decree rather than the product of the kind of compromise that legislators often find necessary.

As noted above, the law applies to all economic sectors. Indecopi enforces the law in all sectors except telecommunications, where it is enforced by the sectoral regulator, Osiptel (Organismo Supervisor de la Inversion Privada en Telecommunicaciones). Osiptel’s competition enforcement and regulatory roles are discussed in Part 4, below.

Article 3 of the law bans all conduct related to economic activity that constitutes an abuse of dominance or that restrains free competition in a manner that injures the general economic welfare. Article 4 defines dominance, Article 5 describes practices that “are” an abuse of dominance, and Article 6 describes the agreements and other practices that do or may restrain free competition. Article 3 is apparently based on Argentinean law. Indecopi describes Articles 5 and 6 as equivalent to Articles 82 and 83 of the Treaty of Rome, but despite the obvious “European” flavour of Articles 5 and 6, there are potentially significant differences between these two sets of provisions. For example, the Peruvian abuse of dominance provision contains no mention of “imposing unfair purchase or selling prices or other unfair trading provisions” or to “limiting production, markets, or technical development to the detriment of consumers.” Also, the Peruvian “restrictive practices” provision does not contain Article 81(1)’s important reference to practices that have as their object the restriction of competition, and it has a somewhat different list of restrictive practices.

The law does not require advance notification of mergers or acquisitions, nor does it ban mergers or acquisitions that are or are likely to be anticompetitive. A separate law, also enforced by the Free Competition Commission, establishes a merger control regime solely for the electricity sector.
2.1.1 Horizontal agreements

Indecopi’s only ex officio cases under the Free Competition Law have involved hard core cartels, and for a new competition agency, it has been unusually successful in such cases. Article 6 of the Free Competition Law contains a fairly conventional list of horizontal agreements, including collusion to fix prices or other terms of trade, limit production, divide markets, or rig bids. Originally, Article 7 contained an exemption provision comparable to Article 81(3) of the Treaty of Rome, but the only way to obtain such an exemption was through prior clearance by the Free Competition Commission. In 1994, as part of what is described as an attempt to shift from a European to a United States model, Article 7 was repealed.

Indecopi’s first important cartel case was the 1996 “Bread Case” against wheat flour producers and their association. The association settled the case by agreeing not to make any more suggestions about the price of bread, and it therefore was not fined. However, eleven producers were found to have ended a price war through a price fixing agreement, and each was fined about USD 50,000. Private and public opponents of economic reform sought to have Indecopi abandon the case, even appealing to Fujimori, but the case went forward and helped establish Indecopi’s reputation of independence.

Indecopi’s most impressive case is the well-known 1997 Chicken Case, which found that Peruvian poultry firms and their association engaged in what amounted to price fixing by agreeing to prevent new entry, exclude some existing competitors, and limit the availability of live poultry for sale in order to raise or maintain prices. Total fines were initially set at slightly over USD 5 million, but were later reduced to slightly over USD 2 million.

Unfortunately, the Chicken Case is also a good example of the serious deficiencies in Peru’s judicial system. The case was appealed to the courts in 1997, and there still has been no decision. The slow nature of judicial review is not a substantial problem with respect to most of Indecopi’s functions because relatively few cases are appealed, but 90 percent of the competition law enforcement cases are appealed.

Indecopi’s general approach to horizontal cases

1997 was also the year in which the Competition Tribunal explained Article 6’s application to horizontal restraints in a number of “precedents of mandatory compliance” (decisions that are specifically declared to be binding precedents and are published as de facto rules). Relying exclusively on the writings of United States Judge Robert Bork, the Tribunal held that price fixing is “per se” illegal when it is “naked,” but should be judged by the “rule
of reason” when it is reasonably related to a potentially procompetitive integration.\textsuperscript{15} It also said that agreements in the per se category are condemned without regard to whether (i) they have, or are even capable of having, an actual harmful effect, or (ii) may in some sense be reasonable. This approach was broadly consistent with international practice, which increasingly condemns hard core cartels as illegal or a per se or absolute basis.

In a 2003 “Automobile Insurance” case, however, the Tribunal concluded that this approach was not legally correct under the Free Competition Law.\textsuperscript{16} The case involved price fixing in the automobile insurance industry, and the Tribunal held that although cartel agreements are presumed by law to harm the general economic welfare, defendants must be given an opportunity to prove that their agreement did not have that effect. This decision is said to be compelled by Article 3 and to reconnect Peruvian practice with its European origins by giving cartel members the same opportunity they have under Article 81(3) and European Regulation 1/2003.

This decision has caused controversy in Lima’s growing community of competition experts. Unless the decision portends some further change, however, it seems unlikely to have any real effect on Indecopi’s cartel cases. The terminology may be more European, but the European Commission has for some time treated hard core cartel agreements as essentially “per se unexemptable.” Therefore, if the Tribunal follows the European Commission’s approach, the law’s opportunity to provide a defence may be largely theoretical. Indeed, it’s only apparent application would be in the very rare case when parties agree to fix prices but then abandon the agreement before taking any steps to implement it. Although Indecopi describes the Tribunal’s decision as requiring a case-by-case, “rule-of-reason” analysis, it applied at most a “truncated” rule of reason, condemning the agreement after rejecting any justification but without enquiring into market power or the other elements of “full-blown” rule-of-reason analysis.\textsuperscript{17}

Thus, it appears that cartels will continue to be condemned on a summary basis. Indeed, the Tribunal’s new approach did not help the defendants in the Automobile Insurance case, who had argued in favour of this change and contended that it required reversal of the Free Competition Commission’s decision. Despite its reversal of precedent, the Tribunal affirmed the Free Competition Commission’s finding of illegality and fined the eight cartel members a total of approximately USD 235 000.

Some regard this sanction as low, given that the cartel consisted primarily of large firms (many affiliated with banks) that were selling to captive consumers (in the sense that the insurance is mandatory). On the other hand, the Tribunal noted that very little of the insurance whose price was being fixed had actually been sold to consumers.
As a general matter, the Tribunal has a tradition of reducing the Free Competition Commission’s fines, apparently because it disagrees with the Commission’s deterrence-based approach. In this connection, it is noteworthy that there is considerable consensus in the international community that fines in cartel cases should be large enough to deter such conduct, and that this implies that fines should be 2-3 times as large as the cartel’s harm or the cartel members’ illegal gain.

The “Pilots” case

Less controversial, but more clearly problematic, was Indecopi’s handling of a case involving anticompetitive conduct engaged in by the 36 individuals who are licensed to pilot ships in Lima’s Callao harbour – the most important harbour in Peru. The pilots had traditionally operated as individual competitors or 1-2 person firms, but market reform introduced real competition and dramatically reduced the fees pilots could charge. In January 2001, in order to increase their fees, the pilots created three corporations (fearing that a single corporation might be considered a monopoly), and decided that one firm would “hire” all 36 pilots and the others would hire one or two pilots each. All 36 pilots held themselves out as working for the first corporation, but there was no real integration of their operations; they merely charged the same price. The other two corporations existed only on paper. A few months later, a new firm decided to enter the market, and persuaded two of the pilots join its firm. The other 34 pilots and their association sought to prevent this by engaging in various forms of harassment, including making a criminal charge of inducing a breach of contract.

In February 2001, the Free Competition Commission began investigating the pilots’ association and the three companies on a price fixing theory, and shortly thereafter Maersk Peru, S.A., a firm that purchases pilots’ services, denounced their conduct as illegal price fixing and abuse of dominance. The Commission declined to open the case on the abuse of dominance theory, and Maersk appealed. The Tribunal initially reversed the Commission, stating that it had not adequately explained its reasoning, but in December 2001, after the Commission had clarified and reaffirmed its decision, the Competition Tribunal ruled that the Commission had been correct in rejecting the abuse of dominance theory. In June 2002, the Commission held that the pilots and their association had engaged in price fixing, and their creation of the corporations could not camouflage their illegal conduct. This ruling relied in part on the Chicken Case, in which the Tribunal had rejected the poultry firms’ argument that their pricing had merely been a step towards merger. This approach to the case focuses on the conduct of the pilots when they were competitors and decided to eliminate
price competition among themselves by creating the firms; it could also focus on the conduct of the three corporations.

In April 2003, however, the Tribunal overruled its previous decision and reversed the Commission. The Tribunal’s new reasoning was that since the pilots had formed a corporation and were now part of a single enterprise, their conduct could not be considered price fixing. This approach does not consider the conduct that occurred while the pilots were competitors (or the conduct of the three corporations), but rather focuses on the pricing decision made by the largest corporation. In the Tribunal’s view, the case should be treated as an abuse of dominance, and it had to be dismissed because the Tribunal’s previous ruling had rejected the abuse of dominance approach. Currently, there is a new Free Competition Commission proceeding that is going forward on the abuse of dominance theory.

Whether the conduct of the pilots is better characterised as a cartel or an abuse of dominance is beyond the scope of this report, but the case does raise a number of questions. Why has an apparently simple case taken so long? Even if the parties were not “pushing” the case, the delay hurt Indecopi’s reputation. Moreover, the Tribunal’s quick change of mind concerning the proper legal theory also undercut its reputation with the business community and others who value predictable decision-making. Respectable arguments can be made under each theory, and they might even have been alternative grounds for a quick decision. Instead, two years of litigation reached the conclusion that a whole new case will be necessary to reach a decision concerning the pilots’ plainly anticompetitive conduct.

A recent, successful, and important price fixing case – involving road transport – was handled under the Market Access Law rather than the Free Competition Law because the price fixing had been compelled by the Ministry of Transport. (See Part 2.2, below.) Indecopi is currently considering a major case involving alleged price fixing by the four firms that manage the retirement funds of Peruvian workers. This conduct was also denounced as an abuse of dominance, and that allegation is considered below.

2.1.2 Vertical agreements

Article 6’s list of “restrictive practices that affect free competition” contains only three obviously vertical practices – price discrimination, tying arrangements, and refusals to buy or sell. The list includes agreements relating to market division, quotas, and product quality, but it is unclear the Article is intended to include vertical agreements in these categories. The list also refers to “other similar practices,” but the meaning of this provision is also unclear, particularly since the list does not include the most commonly banned vertical restraint – resale price maintenance.
Box 2. Other Horizontal Restraint Cases

In a 2000 case, three construction firms were found to have engaged in bid-rigging. They were ordered to cease and desist such conduct and fined USD 2,000 apiece. Resolution No. 017-00. The case exemplifies a reluctance to impose serious sanctions that has reportedly been diminishing since 2002.

Operators of urban public transportation systems agreed to stop providing services due to an increase in the price of fuel and the introduction of new motor vehicle emissions standards. The complaint against them was dismissed on the ground that the conduct was merely an expression of the operators’ liberty of expression. Resolution No. 016-00. If the agreement to stop providing service was for only a short, pre-defined period (such as a day or a few days), the Commission’s decision to treat it as “expression” is not remarkable. However, if the agreement was to use the operators’ economic power to disrupt transportation until the city responded to their demands, the agreement would be illegal in at least some jurisdictions.20

Taxi firms and their association were found to have agreed to increase their fares. Resolution No. 003-00. All but one firm signed an agreement to cease and desist. The firm that did not sign was fined USD 1,000.

In a 2003 case, the association of public notaries in Lima was found to have engaged in illegal price fixing by negotiating an agreement with the Urban Estate Registry that it would pay notaries a specified fee. Resolution No. 002-03. The Commission condemned the agreement on a per se basis, and the Tribunal – applying the approach announced in the Automobile Insurance case – condemned it using a truncated rule of reason.

Interpretation of these provisions is further complicated, but also rendered less important, by the fact that Indecopi has never applied Article 6 to a vertical restraint. Until this year, the Free Competition Commission has apparently taken the position that vertical restraints never harm competition unless one of the parties has a dominant position, and it had an unwritten but recognised policy of refusing to scrutinise vertical restraints under Article 6.21 Earlier this year, the Commission opened its first such case, apparently signalling a policy shift, but there has been no decision and thus no indication of what the Commission’s approach will be.

The Commission regularly considers vertical restraints in abuse of dominance cases, however. For example, in one of the abuse of dominance cases summarised in Box 3, the alleged abuse included resale price maintenance. The Commission found that the firm had a dominant position but that the practices were not abuses.
2.1.3 Abuse of Dominance

Most of the complaints the Free Competition Commission receives relate to abuse of dominance, and the majority of these are resolved without a final decision by the Commission on whether the conduct was illegal. In the last five years, for example, the Commission has opened 18 formal proceedings and found violations in five of them. Given the small number of cases, it is difficult to present a nuanced description of Indecopi’s approach to routine abuse of dominance cases.

The Free Competition Commission and the Tribunal both seem to take an approach to market definition that is consistent with that taken, e.g., by the European Union and the United States. However, unlike Osiptel, the regulator that enforces the competition law in the telecom sector, Indecopi has no guidelines or mandatory precedents concerning how it defines markets and assess market dominance.

One early and very popular case involved Lima’s airport, which configured its access road in such a way that people needed to pay a parking fee even if they were going to the airport merely to make a quick drop-off or pick-up.

Another early case charged the administrator of a harbour with abusing its dominant position by forbidding other undertakings to offer towing services. The conduct was found to be an abuse.22

A more recent case also involved charges that the public undertaking in charge of a harbour refused a firm access to the harbour’s facilities and otherwise discriminated against it. The Commission declined to accept the complaint on the ground that under the Law on Access to Public Infrastructure, sectoral regulators have exclusive jurisdiction over access issues that arise within there sector.23 The precise scope and importance of this exemption from the Free Competition Act are unclear.

Two recent abuse of dominance cases have been highly controversial. One of the controversies concerns whether the Free Competition Law bans “excessive” (or “monopolistic”) pricing. One difference between Article 5 of the Competition Law and Article 82 of the Treaty of Rome is that the former does not list excessive pricing as an abuse. The omission is clearly deliberate, and although a 1996 amendment to the Article added a reference to “other similar cases,” it seems to have been generally accepted that the law did not ban excessive pricing.

When a Congressman denounced Peru’s pension funds for engaging in price fixing and excessive pricing, the Commission accepted the price fixing claim but did not admit (or explicitly reject) the excessive pricing charge. Rather, it apparently treated the complaint as if it alleged price fixing and a tying arrangement, and it rejected the tying claim that had never been made.
On appeal, the Tribunal reversed the Commission’s decision and sent the case back using language that most competition experts, the business community, and the public regarded as implying that the law does ban excessive pricing. The language caused a firestorm because it was seen as a reversal of precedent, a hint of the possible price controls through Indecopi, and a signal that Indecopi was being controlled by the government. The Tribunal eventually issued a clarification, stating that it merely intended to reject the Commission’s failure to rule on the excessive pricing claim, but controversy continues because some see the clarification as a pretext for backing away from an unexpectedly controversial decision. Even those who are less suspicious of the Tribune’s intent are troubled by what they see as decisions that are unpredictable and not well reasoned.

On the merits, another abuse of dominance case is more questionable. The case involves a dispute between Peru’s only airline and the branch of a bank located in Puerto Maldonado, an isolated town in Peru’s jungle area. After concerns were expressed that the airline was involved in illegal drug trafficking, the bank asked the airline for information on the sources of its funds. Instead of complying, the airline closed its account, but two years later it produced the relevant paperwork and asked to open a new account. The bank refused; the airline filed a complaint alleging abuse of dominance; the Free Competition Commission refused to accept the complaint; and the Tribunal reversed the Commission’s decision. The Tribunal referred to the bank branch as an “essential facility” and ruled that it could not simply refuse to open an account without examining the proffered documentation.

The bank responded by opening an account, and the economic impact of the case is minor, but many have questioned how the bank branch could be considered an essential facility (or in any way dominant). In the first place, there is another bank in town (albeit a branch of the National Bank, which had much higher charges). Even if the other bank was not a realistic alternative, there was no showing that the airline needed an account at a bank branch in that town and no explanation of the refusal’s competitive effects. The decision seems to many to have more of a regulatory flavour (a ban on refusals to deal by banks) than a grounding in competition principles.

Two important abuse of dominance cases are currently pending, one at the Commission and one at the Tribunal. The case that is pending at the Tribunal involves the claim that a firm that sells construction materials has abused its dominant position by selling price discriminating between affiliated and unaffiliated firms, and by tying the sale of cement to the sale of construction materials. The Commission found that the firm has a dominant position but rejected the claim of abuse, finding that the price discrimination was justified in light of the services provided by affiliated firms and that there was no tying arrangement.
Box 3. Other Abuse of Dominance Cases

A state-owned enterprise with the legal monopoly for selling coca leaves was found to have abused its dominant position by refusing to sell leaves to firms that wanted to sell ground coca leaves in infusion filter bags (“tea bags”). Resolution No. 16-94.

A more conventional case involved a complaint by the National Association of Industries alleging that Centromin Peru abused its dominant position in the market for refined lead used in preparing lead oxides. The alleged abuse was price discrimination. The Commission found that Centromin had a dominant position but that the practices were not abuses. Resolution No. 001-98.

In another case involving the same firm (but a different product), the Commission rejected a claim that Centromin had abused its dominant position when it decided to stop selling refined zinc and instead use all its zinc to manufacture refined zinc products. The Commission held that Centromin did not have a dominant position. Resolution No. 013-97.

Another case in which the alleged abuse was a refusal to sell was rejected on similar grounds. The Commission held that Minsur, a mining enterprise that was Peru’s only producer of concentrated and refined tin, did not have a dominant position since it faced considerable international competition. Resolution No. 007-98.

Peru’s Official Gazette, which publishes official legal documents, was denounced for refusing to publicise notices a claimant’s trademarks and patents. The Commission found the refusal an abuse, but the Tribunal reversed the Commission on the ground that the refusal was reasonable. Resolution No. 007-2002.

The only rail transport operator from Cuzco to Machu Piccu and another town was denounced for abusing its dominance by providing services different from those it offered. The Commission found the claim inadmissible because it did not affect competition, but noted that the conduct could be condemned under the Consumer Protection Law. Resolution No. 046-2003.

The Commission is currently considering a case involving Backus, a brewer of beer (and soft drink firm) whose acquisitions over the last few years have made it the only Peruvian brewer. One of the world’s largest brewers has filed a complaint alleging that Backus’ “bottle exchange programme” – under which buyers receive a credit when they return bottles and buy more – is an abuse that prevents it from being able to enter the market through investment rather than imports.

2.1.4 Mergers and acquisitions, including prenotification

As noted above, the Free Competition Law does not even apply to mergers or acquisitions, making Peru one of a diminishing number of countries with no merger control. However, Indecopi is considering a proposal to make the law apply to such transactions and create a premerger...
notification system. This section first reviews the debate in Peru on the desirability of such a proposal and then discusses Indecopi’s experience in the one area in which Peru does subject mergers to competition law analysis and premerger notification.

Debate over merger control in general.

Although Indecopi has in the past opposed the creation of a merger control system in Peru, many experts inside and outside Indecopi now regard merger control as necessary. There appear to be two reasons for this increased interest in merger control.

First, the old arguments against merger control are now more widely understood to be either incorrect or exaggerated.

- One old argument was that merger control might be harmful in small, open economies in which domestic firms may need to engage in mergers in order to achieve economies of scale and compete effectively against foreign firms. This argument has been discredited, and it is generally recognised that merger control does not prevent such mergers.\(^{27}\)

- It was also argued that premerger notification systems impose high costs on governments and firms. In fact, such systems can be costly, but the cost can be minimised by setting high reporting thresholds. Moreover, some countries reduce costs even further by banning anticompetitive mergers but not establishing a premerger notification system.

- The third traditional argument against merger control in Peru was that since merger analysis is particularly complex, there is an undue risk that competition enforcers will make incorrect decisions. The premise of this argument is questionable, and the argument has lost some of the force it may have had now that Indecopi has been operating for more than ten years and has some experience in merger analysis.

- The fourth and final argument is that the complexity of merger analysis provides discretion that can be used to control the economy in ways that are inconsistent with the economic reform programme. For example, the government might block mergers it does not like on the pretext that they are likely to be anticompetitive. Given Peru’s history of government control and its apparently incomplete commitment to liberal economic reform, it is understandable that Peruvian reformers are particularly sensitive to this risk. However, this risk exists in all countries, and international experience provides methods for addressing it. Political interference is generally combated by giving decision-making authority to independent quasi-judicial agencies or the judiciary, implementing
transparent procedures and principled policies, and providing for judicial review of particular cases and legislative oversight of agency policies.

Second, there have been a substantial number of mergers in Peru since the late 1990s, some of which raised considerable competition concerns.

- In the last few years, the number of firms that manage retirement funds shrank from 7-8 to four, and now those firms have been accused of engaging in price fixing. There has been no finding of price fixing, but collusion is easier with four firms than with 7-8.

- A single brewer has recently acquired all of Peru’s other brewers and is now accused of abusing a dominant position in the beer market. There has been no finding of dominance or abuse, but without some of those mergers, there would be no possibility of dominance.

- Telefónica, Peru’s monopoly provider of fixed telephony, recently acquired Bell South, one of Peru’s major cellular firms. Peru’s absence of merger control means that it has no opportunity to consider whether this acquisition will hurt Peru’s consumers and the Peruvian economy as a whole.

It is noteworthy that the competition law in Argentina, which was the main Latin American model for Peru’s law, did not originally apply to mergers. Argentina added merger control to its law in 1999, after a Carrefour merger with another French firm gave it 70 percent of the market in one Argentine city. Without any merger control provision, Argentina had no way to defend the interests of its citizens. The same is true for Peru.

Merger control in the electricity market

Since 1996, Peru has had a separate law applicable to mergers and acquisitions in the electricity sector. It has been suggested that this law was enacted “because of political reasons relating to the fact that Chilean producers supply a significant portion of the electricity in Peru.” The law bans mergers that are likely to harm competition in electricity or related markets, defining “merger” in a seemingly conventional manner except for a provision that excludes all acquisitions of shares that do not result in “control” of another company. Mergers include acquisitions of state assets that are being privatised, making this the one area in which Indecopi has an important role in the privatisation process. The law contains a comprehensive and conventional list of the factors the Free Competition Commission must consider in making its decisions and authorises the Commission to forbid anticompetitive mergers or to authorise proposed mergers subject to conditions that address the Commission’s competitive concerns.
The law also establishes a premerger notification system. All mergers must be notified unless (a) a horizontal merger will not result in a firm’s having a market share of 15 percent or more; (b) a vertical integration merger will not result in a firm’s having a market share of 5 percent or more; (c) the merger involves the acquisition of assets valued at less than 5 percent of the acquiring firm’s total assets; or (d) the merger gives the acquiring firm less than 10 percent of the shares of the acquired firm. Exclusions based on market share are often criticised, because they permit the parties to define the market and may thereby permit them to avoid notification. This may be less of a problem when dealing with regulated firms, however. The low threshold for vertical mergers apparently reflects the widespread belief in Peru that there is currently too much vertical integration in the electricity field.

The law specifies some information the parties must provide, and the Commission has prepared a questionnaire that must be completed and submitted as part of the notification. Thereafter, the Commission has five days to determine whether the notification is complete, and after this period has expired or any deficiencies are corrected, the Commission has thirty days to make its decision. An additional ten days may be taken in particularly complex cases. During this process, the Commission may compel the parties to provide additional information and require public institutions to provide studies or opinions, but the deadlines on Commission action are not extended until such information is provided. The parties are subject to fines for provide “inexact” data in their notification, and to much larger fines for merging without the Commission’s authorisation or failing to fulfil conditions ordered by the Commission.

Premerger notifications must be accompanied by the payment of a fee amounting to 0.1 percent of the value of the transaction, up to a maximum of about USD 45 000. Since 1992, the Commission has received 8 notifications, and the fees (and one fine) accompanying them have been very important to Indecopi in light of its general resource problems and its largely (now completely) status as a self-financing institution.

Six of the merger notification received by Indecopi related to privatisations. One recent privatisation was cancelled because of protest by the local populace, which tends to support the left-leaning policies of the 1980’s. Another notified transaction was determined to be outside Indecopi’s jurisdiction. The other four acquisitions were authorised without conditions. One international expert has questioned Indecopi’s conclusion that these mergers were not anticompetitive because they lowered the HHI index, noting that in light of the State’s large share of the market, any privatisation would have this effect.31 The acquisitions have increased the HHI index if one considers only privately owned firms. Indecopi defends it approach, however.
Box 4. A Sample of Indecopi’s Merger Cases

Two international mergers in the late 1990s increased the level of vertical integration in Peru’s electricity sector. The Commission fined the parties approximately USD 120,000 for initially failing to notify the transaction, but it authorised the mergers with two requirements intended to minimise problems the integration might cause. One requirement was that under certain conditions, one of the generation firms would need to abstain from voting in an industry association on the allocation and transfer prices of electricity. The conditions triggering this requirement have not occurred. The second requirement was that the distribution firm acquire electricity through public bidding open to all generators. Resolution No. 012-99. It appears that the regulator for the energy sector, Osinerg, monitors compliance with this requirement.

A public tender of stock in an electricity generation enterprise resulted in a vertical merger that the Commission considered unobjectionable and authorized without imposing any conditions. Resolution No. 31-2001.

A more recent acquisition of an electricity generation enterprise constituted a horizontal merger that the Commission authorized without imposing any conditions. Resolution No. 20-2002.

Even more recently, Peru privatised two important electricity transmission enterprises, one of which operated in the south, the other in the north. The firm that acquired these enterprises was already in the electricity transmission business, but the Commission authorised the transaction without conditions. Resolution No. 16-2002.

The other two mergers Indecopi considered were international transactions that were not originally notified but which Indecopi eventually authorised with conditions. Additional information on some of Indecopi’s merger cases is set forth in Box 4.

2.2 The Market Access Law

Although the competition laws of most countries do not include bans on anticompetitive government regulations, taxes, or activities, such bans (of varying scope) are contained in the general competition laws of Russia, Mexico, and a number of other countries, as well as in the Treaty of Rome. In Peru, such bans are included in Legislative Decree 807, which applies to regulations and other activities, and Legislative Decree No. 776, which applies to taxes that limit access to the market. Both laws are currently enforced by Indecopi’s Market Access Commission. Such enforcement means that Indecopi has sometimes been able to compel the kind of procompetitive regulatory reform most competition authorities can only advocate.
The Commission was originally authorised to make administrative decisions striking down governmental barriers to market access, and its decisions were a major part of Indecopi’s core competition mission, both directly (by increasing efficiency) and indirectly (by showing the business community that competition policy can be good for business). In October 2001, however, the Commission’s administrative power to ban regulations was removed. The Commission could and did continue to analyse regulations and advocate reform of those it found to be unjustified, but it began receiving fewer complaints and its recommendations were often ignored. In July 2003, a new law reinstated some of the Commission’s powers. At present, the Commission may issue reports finding that municipal or regional ordinances, and certain Ministerial orders, are unjustified barriers to access to the market. The reports are sent to the responsible council – Municipal, Regional, or the Council of Ministers. If the council does not respond in 30 days, the ordinance is automatically invalidated. If the council issues a decision to retain the restriction, the Commission may bring a legal action to require its elimination.

This new system appears on its face to be a constructive way of providing competition officials with powers going beyond “mere” competition advocacy but at the same time giving regulators an opportunity to defend their rules publicly and in court. Moreover, the system appears to be functioning well. Between July 2003 and March 2004, the Commission has issued 46 reports. In 44 of the cases, the report led to the elimination of the rule, almost always because of council inaction but in one instance by a rule adopted by the Council of Ministers. There were two council decisions to retain the rules, and in both of those cases the Commission has taken legal action them.

As was discussed in the peer review of Russia during the February 2004 meeting of the OECD’s Global Forum on Competition, laws containing enforceable bans on anticompetitive regulations require some means of taking into account the governmental needs that the regulation was intended to meet. In Peru, there is a legislative framework for this analysis.

First, the Market Access Commission examines whether the regulation is “legal” in the sense of being within the authority of the entity that enacted it. If not, the regulation can be condemned without further analysis. For example, the Ministry of Labour charged firms a fee for processing information it required them to submit. The Market Access Commission found that the fees were not authorised, because Peruvian law forbids government entities from charging fees except to cover the costs of services they provide for the person from whom the fee is demanded.
Second, if a regulation is within the government entity’s authority, the Commission examines whether it is “rational” in the sense of being reasonably related to its proper goals. For example, the Commission struck down a requirement that cotton fibre imported into Peru be fumigated in vacuum chambers based on its finding that fumigation in atmospheric pressure was equally effective and significantly less expensive.

For obvious reasons, challenges to government regulations can raise political problems. It is therefore notable that Indecopi has been successful in challenging a number of actions by Ministries as well as municipalities. For example, it eliminated a variety of non-tariff barriers to trade imposed by the Ministry of Agriculture and other entities. It also struck down a requirement that exporters pay a fee for having the Ministry of Industry review their receipts. Since Indecopi was officially part of the Ministry of Industry at the time, this action illustrates the autonomy it once had. The Commission’s cases have not always been so successful, however. In an ex officio case, the Commission ruled that the Ministry of Economy and Finance was illegally charging fees in excess of its costs for issuing and revalidating passports. Although the legal case was successful, the result was reversed by special legislation.

The Market Access Commission is also able to deal with government actions that compel anticompetitive conduct by enterprises. In a recent, important case, the National Society of Industries filed a complaint challenging Ministry of Transport rules that in essence fixed prices in the market for road freight transport. There are significant problems in this market, partly because of “informal” firms with unlicensed drivers, unregistered and unsafe vehicles, etc., but also partly because of lax enforcement of the safety and other rules vis-à-vis the legitimate firms. As a result, the informal sector had cost advantages over legitimate firms, and the Ministry’s response was to fix prices. In principle, this directive could help the legitimate truckers by increasing their fees, but it would also permit illegitimate truckers to increase their fees and to impose unnecessary and unjustified costs both on Peruvian firms that hire truckers and on Peruvian consumers generally. The Commission found the decree to be both unauthorised and irrational, and the decision was affirmed by the Tribunal. The case illustrates the importance of Indecopi’s work by revealing (i) the Ministry of Transport’s failure to consider competition policy principles, and (ii) the large scale of some of the barriers that have been eliminated.

Many of Indecopi’s cases have involved smaller but clearly anticompetitive and illegal taxes on interregional trade and the use of public roads. In addition, many cases have involved attempts by municipalities to impose illegal charges on utilities for installing poles to carry electrical or telecom cable.
Indecopi has also used the Market Access Law to compel government entities to become more transparent. Peruvian law requires each government entity to have publicly available TUPAs (Texts of Administrative Procedures) – written descriptions of what a person must do to get the entity to act within its field of competence. A TUPA might, for example, list all of the information that must be submitted when applying for a license to create a new business, explain how the information is analysed, state what costs are involved, and estimate how quickly a decision can be expected. Early on, Indecopi was very active in seeking to compel government entities to create TUPAs and make publicly available, as well as in challenging anticompetitive requirements contained in TUPAs. There is a perception that Indecopi for a time backed away for this very useful form of work, but Indecopi says that the programme is now active (though the Commission’s staff has been reduced to only three people).

A prominent local case arose after the municipality of Lima adopted a requirement that all buses and “combis” (minibuses that in theory run fixed but overlapping routes and will stop anywhere to pick up passengers) needed to use the municipality’s terminals. Previously, many of the companies in this business (some of them individuals who had purchased a single bus or minivan) had on their own or collectively created their own terminals, and Lima’s new rule threatened to make that investment worthless and to harm companies that owned particularly advantageous terminals. The Commission found that Peru’s law on municipalities authorised Lima to assign obligatory routes and to regulate firms’ creation of terminals through zoning and licensing procedures, but did not authorise it to mandate use of its terminals. Since the rule exceeded the municipality’s authority, it was illegal.37

Market access cases are more complex when they involve an assessment of whether an authorised rule is reasonably related to its legitimate goal. During the 1990s, the Commission was apparently very strict in applying this part of this test, giving relatively little weight to government entities’ regulatory goals. In one well known 1997 case, for example, Indecopi struck down a municipal ordinance that required taxicabs to be painted yellow. The taxicab market is one that most countries view as having market failures that call for some regulation in order to protect consumers, and the ordinance would have provided some such protection. However, Indecopi condemned the requirement as an “irrational” barrier to market access because (a) the cost of repainting would have been prohibitive to some drivers, and (b) it would have prevented the use of family cars as part-time taxis.38 Although the case has been cited as exhibiting how Indecopi’s multiple functions permit a balanced approach that recognises consumer and competition perspectives,39 it is also criticised as exhibiting an over-simplified, anti-
government approach associated with the “Chicago School” of economics. A more nuanced approach, for example, might have permitted the regulation to be phased in to reduce costs and could have exempted family cars used as part-time taxis.

More recently, the Commission is said to have taken a more balanced approach, and it is clearly being more proactive. In the period 1993-1998, the Commission handled 265 cases, 93 percent of which involved complaints and 7 percent were ex officio. Currently, about 50 percent of the cases are ex officio.

2.3 The Unfair Advertising and Unfair Competition Laws

Peru’s laws banning Unfair Competition and Unfair Advertising are both administered by Indecopi’s Unfair Competition Commission. This administration consists primarily of proceedings to resolve disputes between two or more businesses; there is very little ex officio enforcement of the Unfair Competition Law and only a little more of the Unfair Advertising Law. Moreover, since it costs approximately USD 180 to file a formal complaint before the Unfair Competition Commission, it is rarely used by consumers, which is significant because this Commission has exclusive jurisdiction over advertising cases. An increasing share of the Unfair Competition Commission’s work involves advertising cases, but in 2003 unfair competition cases still represented 55 percent of the Commission’s work.

The Unfair Advertising Law generally covers false or deceptive advertising claims. Unfair Competition disputes are said to fall into four main categories, three of which are related in one way or another to false or deceptive claims. One important category is “passing off” that does not involve infringement of a registered trademark. (When a registered trademark is involved, the case is handled by Indecopi’s Trademark Office.) Other forms of deception (e.g., false claims of a product’s origin or contents) are a second major category. False disparagement of a firm or product is the third main category of cases. The fourth category – misusing business secrets and inducing breach of contract – does not have many cases.

As is generally the case in other countries, unfair competition and false or deceptive advertising are illegal in Peru without regard to whether the conduct has any effect on the market as a whole. Moreover, many of the Commission’s cases are essentially private disputes. Nonetheless, the Commission’s activities do make a valuable contribution to Peru’s market reform, because they help establish “the rules of the game” and discourage forms of conduct that reduce citizens’ confidence in the market.
One of the efficiencies of combining unfair competition (and consumer protection) work with core competition enforcement is that the former is a reminder that markets do not work perfectly, and the latter is a reminder that regulations intended to protect firms or individual consumers may cause more harm than good if they unnecessarily restrict firms’ activities. One context in which these issues have arisen at Indecopi involves the application of the advertising law’s restrictions on comparative advertising.

Indecopi’s original approach was established in the 1990s in a case involving an advertisement claiming that one product was “softer” and provided “more protection” than another. The Unfair Competition Commission regarded the claims as legitimate subjective judgments that would not mislead a reasonable consumer. The Tribune took a different approach, holding that advertisements are not comparative within the meaning of the law unless they make objective claims. Since the law’s special provision on comparative advertising was inapplicable, the advertisement should be analysed as a “common” advertisement, meaning that it was lawful unless deemed misleading. The Tribunal agreed with the Commission that the advertisement was not misleading, and dismissed the case.\(^{43}\) The theory underlying both of these approaches was that advertising promotes competition and should not be banned unless it is false or misleading.

Although a 1997 amendment supposedly codified such an “American” approach, a recent Tribunal case is apparently part of an attempt by the Tribunal to realign itself with a European model. The advertisement at issue showed people drinking a dark soft drink and exclaiming how good Coca Cola is, only to be told that they have in fact been drinking Peru Cola. The Tribunal found the advertisement illegal, and issued a mandatory precedent saying that subjective comparative claims are essentially illegal per se; that is, they inherently pose a risk of “confusion” and are therefore illegal without the need for evidence that they are false or misleading.\(^{44}\) On its face, this decision seems consistent with the most recent European Union directive.\(^{45}\)

One interesting aspect of this case is that by some standards at least, the advertisement’s claim was not subjective. The implicit claim of the advertisement can be seen as being that a significant number of Peruvians cannot taste the difference between Coca Cola and Peru Cola. That claim is neither subjective nor unverifiable. Peru Cola offered no survey or other evidence to back up the claim, and the claim might justifiably be condemned for being false. However, by treating the claim as subjective, the Tribunal apparently made the truth of the claim irrelevant. As it develops its approach in this area, Tribunal should consider that combining an essentially per se ban on subjective comparisons with an expansive view of what is subjective could lead to decisions that hurt competition by banning claims that are verifiable, verified, and non-deceptive.
2.4 The Consumer Protection Law

Peru’s Consumer Protection Law is applied by Indecopi’s Consumer Protection Commission. Although the law does not apply to false or deceptive advertising, it is in other respects quite broad. It declares a broad range of consumers’ rights – including a right to be protected from unhealthy and unsafe products – and suppliers’ obligations – including the need to issue an invoice for all transactions; display prices; maintain price lists and make available to consumers on demand; warn consumers about possible problems in promptly obtaining parts or accessories; deliver services speedily; provide sufficient information about products and services; ensure that foreign products have warranty information and warnings in Spanish; make repairs, replacements, or reimbursements for defective products; and compensate consumers for damage caused by inadequate service. It also regulates consumer credit transactions.

The Consumer Protection Commission’s Secretariat spends much of its time handling informal inquiries from consumers and businesses. In addition, during 2003 it handled 4,700 disputes through informal conciliation, satisfactorily resolving about 80 percent of them. Consumers can commence formal proceedings before the Commission by filing a complaint and paying a fee of approximately USD 9, and 1,150 such complaints were filed in 2003. These 1,150 complaints plus 50 ex officio matters gave the Commission a total of 1,200 proceedings in 2003, of which 216 were found to be outside the Commission’s jurisdiction, 300 were resolved by post-complaint conciliation, and 684 required formal resolution. The complaints were determined to be unfounded in 264 of these cases, and 420 cases resulted in findings of illegal conduct.

Among Indecopi’s innovative consumer protection projects in the 1990s was a campaign against racial discrimination in Lima nightclubs. Indecopi began the campaign by collecting and publishing information, and it initiated proceedings – and issued fines – only after a consumer organisation filed a complaint against firms that refused to change their policies voluntarily. The campaign was popular and successful, but for present purposes the competition policy analysis behind the campaign is most noteworthy. Obviously, inequality of opportunity to engage in business activities distorts markets and impedes efficiency, but Indecopi expanded on this and reasoned that markets and efficiency are also harmed when the value of money depends on the skin colour of its owner. In addition to the immediate harm from this inefficiency, such racial discrimination impedes the development of a competition culture because it makes people less confident that they may benefit from market reforms.
Another, more typical consumer protection initiative involved the collection and publication of information on the average amount of time consumers spent waiting in line to cash a check at banks. The result was increased consumer demand for prompt service and increased competition among banks.

As in other fields, Indecopi was initially very reluctant to engage in law enforcement. For example, it engaged in a programme in which its staff members would go to markets and offer to reweigh the meat and other products consumers had just bought. The programme helped some consumers directly and provided very beneficial publicity, but some questioned whether Indecopi’s policy of not checking sellers’ scales and fining “cheaters” had given up a useful added deterrent. Recently, Indecopi and the Commission have become more oriented to law enforcement, though the focus is still on dispute resolution.

It appears that the consumer movement in Peru is still at an early stage of development. One consumer organisation, ASPEC, appears to be both serious and active in working to help consumers learn about and protect their rights under a market economy, but many other so-called consumer groups combine some worthwhile activities with the pursuit of political or personal agendas. Indecopi is seen as useful but as doing too little and working too slowly, though the Consumer Protection Commission says that the average duration of its proceedings is currently only two months. Some of the concerns expressed by consumer organisations appear to reflect a desire that Indecopi protect consumers in ways that may be outside Indecopi’s market-oriented mandate.

2.5 Antidumping and Safeguard Determinations

Indecopi’s Antidumping and Safeguard Commission is, as its name suggests, responsible for making Peru’s antidumping and safeguard determinations. In antidumping cases, it determines whether illegal dumping is taking place by comparing foreign firms’ domestic and export prices, calculating the dumping price differential, and assessing whether and to what extent domestic firms are suffering injury caused by the dumping. If illegal dumping is found, the Commission determines a recommended additional import duty that will bring the “dumped” product’s price up to its “normal value.” The Commission makes such decisions pursuant to a delegation from the Ministry of Economy and Finance, and although the Commission is autonomous in deciding particular cases, it must confer with the Ministry on policy matters, including the regulations it applies in those cases.
This delegation of decision-making power to Indecopi is very unusual. Competition policy officials and experts tend to oppose the antidumping process on the ground that it condemns prices that are low but not predatory, thus protecting domestic producers but injuring domestic consumers (individuals, firms, and governments). In addition, they believe that antidumping proceedings may lead to cartels in previously competitive markets. WTO rules give countries a certain amount of leeway in how they make the various calculations involved in antidumping cases, and competition policy principles seek to ensure that countries use approaches that minimise the harm antidumping proceedings have on consumers and the economy as a whole.

On its face, Peru’s system provides an opportunity for competition considerations to be given some, and perhaps substantial, weight at various stages of antidumping proceedings. During the 1990s, Peru’s approach to antidumping sought to minimise the anticompetitive effects of antidumping in various ways, such as declining to adopt some WTO-authorised policies and procedures, and strictly requiring complainants to prove injury and causation. There was a dramatic jump in antidumping complaints beginning in 1998, but that is not surprising given Peru’s economic difficulties and China’s growing presence in the global economy. The number of cases continued to grow substantially until 2003, when there was a significant decline.

It appears that Indecopi’s involvement in antidumping matters continues to promote competition to some extent, but the system has experienced several ups and downs.

- As noted above, early in the current administration, all of Indecopi’s Antidumping Commissioners suddenly resigned and were replaced by a new team presided over by an oil executive who held a prominent position in the National Industries Society. Shortly thereafter, the Commission’s Secretariat resigned. It is widely believed that the Commissioners’ resignation and replacement were the result from ministerial pressure, and that the Secretariat’s resignation was a protest against the new Commissioners’ policies.

- Controversy about and between the Commission and the Secretariat appears to have died down, and it is clear that the current Secretariat is inclined to give weight to competitive considerations. Moreover, ministerial pressure has apparently stopped, perhaps because Indecopi now reports to the President of the Council of Ministers rather than the Ministry of Industry.
However, as a result of changes in its composition, the Competition Tribunal itself is now generally regarded as being more supportive of the antidumping process than the Ministry of Economy and Finance, or even the Ministry of Trade. Indeed, at Indecopi’s urging, Peru has adopted rules that make more use of WTO-authorised policies and procedures that facilitate antidumping cases. There is nothing improper about Indecopi’s actions, but as a policy matter competition officials generally regard the antidumping process as anticompetitive and do not seek to make it more effective.

2.6 Technical Standards and Certification Laws

The Technical and Regulatory Standards Commission operates as the National Standardisation Body, responsible for approving technical standards (voluntary) and regulations (mandatory) in accordance with Peruvian law and the rules of multinational bodies such as the WTO. For example, the Commission seeks to ensure that the standard setting process includes representatives of producers, consumers, and public bodies, and that standards do not create entry barriers by imposing design rather than performance criteria. It also operates the national accreditation system, evaluating, authorizing, and monitoring the performance of certification bodies. In addition, it oversees compliance with WTO rules on health and safety standards that may be technical barriers to trade.

Domestic standards can promote competition by promoting consumer confidence, and internationally consistent standards can promote competition by increasing technical compatibility. On the other hand, standards can be anticompetitive, preventing market access by new or alternative products. Thus, there are some competition-related implications to the activities overseen by the Commission, but its work is basically technical and does not normally involve the application of competition policy principles.

2.4 Intellectual Property Laws

Peru’s intellectual property laws were revised in 1991 because the government believed that sound laws and enforcement mechanisms were necessary to attract the foreign direct investment that would help create economic growth. Indecopi enforces these laws through three offices, which are functionally the same as its commissions except that each is headed by a single individual. The Trademark Office promotes the registration of trademarks, registers them, and resolves trademark-related
disputes. The Copyright Office and Patent Office engage in similar activities in their respective fields.

Indecopi has promoted respect for intellectual property and competently held proceedings to resolve complaints filed by individuals and firms, and the result has been both more registrations and less piracy. By 2000, the piracy rate for computer software had fallen from 85 to 60 percent, and the piracy rate for motion pictures and sound recordings was 50 percent and 85 percent, respectively.\textsuperscript{51} As in other fields, however, Indecopi received criticism for not being a more aggressive law enforcer. One commentator’s 1999 criticism of the Intellectual Property Tribunal is very similar to what others said about the Competition Tribunal:

“[It] is considered technically skilled … but perhaps not guided enough by the deterrence-oriented approach of the courts and too steeped in the administrative culture of Indecopi.”\textsuperscript{52}

Piracy rates have apparently continued to fall, and Indecopi is now participating in a broad, aggressive campaign against piracy.

\textbf{2.8 The Market Exit Law}

The Market Exit Commission was created in order to provide a more efficient and less corrupt alternative to the judicial bankruptcy process.\textsuperscript{53} In addition, the Commission was intended to and did develop a reorganisation process, whereas the judiciary could offer only liquidation. The Commission’s activities have contributed to the development of a market economy, but Indecopi’s day to day work in this area has little or nothing to do with competition.

\textbf{3. Institutional Issues}

When Peru’s market reform began in the early 1990s, the reformers feared that government ministries lacked the political will and the technically proficient professionals to implement the new and in some cases complex policies. They concluded that the agencies charged with these reforms should not be subject to ministerial control, should be able exceed normal civil service pay limits in order to hire qualified staff, and should draw on private sector expertise through volunteer advisory councils.

Indecopi was one of the first of these agencies. This section begins by describing Indecopi’s internal structure, the procedures it uses in resolving complaint and \textit{ex officio} proceedings, its investigative and remedial powers, and its caseload and resources. Thereafter, it discusses the potential for private
remedies under the competition law, after which it considers the advantages and disadvantages of Indecopi’s extraordinarily broad mandate. It concludes with comments on other means of handling competition law cases in Peru and on international issues relating to Indecopi’s competition activities.

3.1 Indecopi’s organisational structure

Indecopi is governed by a three-person Board of Directors. Its President and one other board member are appointed by the President of the Council of Ministers, and the third member is chosen by the Minister of Economy and Finance. The Presidency is Indecopi’s highest office and a full-time position, and the President is charged with overseeing the agency’s day-to-day operations and the refinement and implementation of policies whose broad outlines are set by the Board. The other two board members are paid to attend four-hour meetings that take place every other week. One of their major functions is to participate in selecting the individuals who serve as Indecopi’s unpaid Commissioners. Both the President and the other board members are subject to removal without cause.

In theory, the Board is overseen by a nine-member Advisory Council. It was originally contemplated that the Council – made up of distinguished lawyers, businessmen, academics, legislators, etc – would play an important role in ensuring public scrutiny and responsiveness to the public and government. In practice, however, the Council has been almost completely inactive.

Indecopi’s “jurisdictional” bodies

In broad terms, Indecopi is divided into two parts, the most important of which for present purposes is the “jurisdictional” part that handles cases. The highest “jurisdictional body” is the Tribunal for the Defence of Competition and Intellectual Property. Members of the Tribunal are nominated by Indecopi’s Board of Directors and appointed by the President of the Republic. Officially, the Tribunal is an independent part of Indecopi with respect to its handling of particular cases. The original law protected this independence by providing that Tribunal members were appointed for a fixed five-year term during which they could be removed only for cause, but as amended in 1994 the law permits removal without cause.

Until recently, the Tribunal had two chambers – an “Intellectual Property Chamber,” and a “Free Competition Chamber” (the latter being commonly and in this report referred to as the “Competition Tribunal”). The Intellectual Property Chamber handles appeals from the Trademark, Patent, and Copyright Offices. The Competition Tribunal has in the past handled
appeals from all of Indecopi’s seven commissions – Free Competition, Market Access, Unfair Competition, Consumer Protection, Antidumping, Technical and Regulatory Standards, and Market Exit (bankruptcy). Today, however, appeals from decisions by the Market Exit Commission are heard by a new “Bankruptcy Chamber” of the Tribunal.

The Tribunal’s most obvious responsibilities relate to the disposition of cases that have been appealed, but it also establishes procedural guidelines and has developed a system of issuing de facto substantive guidelines. When a case before the Tribunal raises important legal issues, the Tribunal writes a statement of how the issue should be resolved and declares this to be a special “mandatory precedent.” The Tribunal is also specifically authorised to make recommendations to Indecopi’s President concerning legislative or regulatory measures “needed to guarantee competition and intellectual property rights,” but the President has the final say on such matters.

The presidency of the Competition Tribunal is a full-time position, and the President runs the Tribunal on a day-to-day basis. The other four positions on the Tribunal are part-time, and members are paid to attend six 2½-hour meetings per month. The position of the Tribunal President therefore tends to be very influential.

There is a complex relationship between on the one hand, the Presidents of the Tribunal’s Chambers, and the other hand, the President of Indecopi. The Competition Tribunal President, for example, is nominated by the Indecopi President, is independent of the Indecopi President in handling formal proceedings, typically has greater expertise in his field than the Indecopi President, but is subordinate to the Indecopi President on policy issues (such as the desirability of amending the competition law). If the Tribunal President and the Indecopi President do not work well together, this system could make policy planning very difficult.

Like the other commissions whose appeals are heard by the Competition Tribunal, the Free Competition Commission has six positions, all of them part-time and unpaid. Commissioners’ work consists of attending one three-hour meeting per week, plus whatever preparation time is involved. The Commissions are independent from the Tribunal in their handling of individual cases except that they must follow procedural guidelines and mandatory precedents. They are also nominally independent from Indecopi’s President and Board, though the Board can remove Commissioners without cause at any time.

Each of Indecopi’s jurisdictional commissions and offices is served by its own staff, which is headed by a person designated “Technical Secretary.” The staff evaluate, investigate, and prepare proposed resolutions disposing of the complaints that have been filed. When resources permit, the staff may
also conduct *ex officio* investigations and consider policy questions raised by their work. The Free Competition Commission’s staff consists of a manager, three lawyers, two economists, four students, and a secretary. The Market Access Commission’s staff consists of a manager and two assistants (all lawyers), four students, and one secretary.

**Indecopi’s departments**

Outside Indecopi’s jurisdictional bodies, its personnel are for the most part organised into “departments” whose missions are mostly administrative, but which also include units that co-ordinate Indecopi’s international activities and implement its public education and some advocacy functions. For present purposes, the most important of these departments is the Economic Policy Department. This department has about a dozen economists and has two important functions: (i) co-ordinating strategic planning and policy analysis (for advocacy and other purposes), and (ii) providing economic expertise to jurisdictional units when complex economic issues arise (e.g., defining markets in a free competition case, or calculating the dumping margin and assessing injury in a dumping case). Because its work more frequently raises complex economic issues and because it is perceived as having particularly limited resources, the Free Competition Commission is a primary client and is currently receiving assistance in 4-5 cases.

**Indecopi’s “decentralised” regional offices**

Indecopi’s official office is in Lima, but in the 1990’s it began a programme of “decentralising” and even privatising many of its functions. It created Decentralised Indecopi Offices (ODIs) by entering into joint ventures with various partners, mostly local chambers of commerce but also some universities, regional authorities, and a bar association. The programme was initially based on a commercial “franchising” model, with Indecopi providing its “brand” and oversight to respected local groups. So far, none of the ODIs has been delegated Indecopi’s authority to decide actual contested proceedings except in the bankruptcy area; thus, the ODIs are not used on core competition matters. As economic problems increased following the crisis of 1998, Indecopi created new decentralised offices to handle bankruptcy proceedings, though these offices have now been closed down (except for three offices in different parts of Lima).

Indecopi initially had problems ensuring that ODIs’s decisions were consistent with each other and with Indecopi policies, but this situation has apparently improved.
Observers have pointed out that the decentralisation programme’s structure raises significant incentive issues. Like Indecopi, the ODIs have a financial incentive to focus on bankruptcy and trademark registration, which provide income, and to skimp on free education and consumer complaint services. Unlike Indecopi, however, the franchisees are generally not public authorities, and they all have other functions that they may be tempted to subsidise with the fees they charge for Indecopi-related work. Preventing such conduct is very difficult. Nonetheless, there is apparently agreement that Indecopi needed to find ways to reach beyond Lima, and it clearly lacks the resources to create offices of its own.

3.2 Indecopi’s case-handling and other procedures

As is the case for most of Indecopi’s commissions, Free Competition Commission proceedings usually begin with the filing of a complaint and the payment of a fee. (The size of the fee varies by Commission. It costs about USD 275 to begin a free competition case, USD 118 to begin a Market Access case, USD 200 to begin an unfair competition case, and USD 9 to begin a consumer protection case.) The remainder of this section focuses on the powers and procedures of the Free Competition Commission, with relevant variations noted in footnotes.

The Secretariat may also open ex officio proceedings, but as a matter of policy this was rarely done during the 1990s. Indecopi reportedly decided to become more proactive in 2002, but resource limitations make this difficult, and the Free Competition Commission currently has only one ex officio proceeding. This does not, however, mean that the Commission and staff have no ability to favour cases with real importance over purely private disputes. Formal complaints accompanied by a fee are often preceded by inquiries or informal complaints, and the staff can use this time to emphasise either the difficulties or the importance of a formal proceeding. In addition, staff resources are allocated in part on the basis of cases’ relative importance, and if a complaint is filed in an important matter, the Commission can and does pursue it even if the complainant chooses not to press the case or resolves its dispute with the defendant.

When the Secretariat concludes that a formal complaint contains reasonable indications of violation, it notifies the defendant of the charges, which are a matter of public record but are not publicized. The defendant then has 15 working days to reply to the charges and present evidence, and other parties with a legitimate interest in the matter may intervene as formal parties to the proceeding. Investigations that are opened ex officio are not a matter of public record until the Secretariat has notified the defendant and received its reply. In either situation, this reply period is followed by an
evidentiary period that in theory consists of 30 working days. Thereafter, the Technical Secretariat prepares a proposed resolution for the Commission, which must in theory issue its ruling within five working days after receipt of the Secretariat’s report.

These deadlines are frequently ignored, however, and both investigations and proceedings can take years. In fact, the only common complaint about proceedings before the Free Competition Commission is that they take too long – a complaint that is consistent with the often expressed view that this Commission is particularly understaffed. Indecopi says it has taken steps to speed up the process, but complaints continue. In other respects, the Commission and its Secretariat are highly regarded. Lawyers who represent clients before the Commission (and other Indecopi commissions) describe the process as fair and the staff as professional. Business and consumer groups consider Indecopi a basically trustworthy and useful agency (though too slow and insufficiently proactive).

In one recent case, the Tribunal for the first time asserted the power to issue interim relief – orders that that the parties cannot engage in particular forms of conduct during the pendency of the proceeding.

As noted previously, decisions of the Free Competition Commission may be appealed to the Competition Tribunal. Appeals must be filed with 15 days of receipt of the Commission’s ruling. The Tribunal’s decisions may also be challenged, first in the Administrative Chamber of the Superior Court of Lima, and secondarily in the Civil Chamber of Peru’s Supreme Court. Exceptionally, there may be third-instance appeals to the Court’s Constitutional and Social Chamber.

With respect to matters other than case-handling, Indecopi has general policies and procedures intended to ensure transparency and fairness. It publicizes its more important decisions, and reports those decisions and other relevant information on its web site. By law, all of the Competition Tribunal’s mandatory precedents are also published in the Peru’s Official Gazette.

3.3 Indecopi’s investigatory and remedial powers

All of Indecopi’s commissions and offices have quite extensive investigatory powers. Indecopi can summon and interrogate individual suspects and representatives of firms under investigation. It can also demand the production of documents (broadly defined to include computer records and the software necessary to access it), and it can order that documents be “immobilised” for 2-4 days. With judicial authorisation, it can also remove documents from a company facility for up to six days. Finally, Indecopi has the
power to make unannounced inspections of company records, during which it can obtain copies of documents and interrogate company representatives. Indecopi can if necessary call upon the police to overcome resistance, and with judicial authorisation it can compel closed facilities to be unlocked by force. Both the police and the judiciary have sometimes proved less than co-operative during the 1990s, and it is unclear whether this continues to be a problem.

Indecopi’s investigative powers are backed up by strict sanctions. Making false statements to Indecopi, destroying or failing to produce a document demanded by Indecopi, and obstructing Indecopi’s investigative functions in other ways is punishable by fines not less than USD 1 000 and not more than USD 50 000.

When Indecopi finds a party has committed a violation, it is authorized to issue cease and desist orders and order the payment of fines. Any firm found to have committed a violation is subject to a fine of up to 10 percent of its sales or revenues form the previous tax year. In addition, when a firm or association commits the violation, Indecopi can impose fines of up to USD 100 000 on each firm or association representative who engaged in the illegal conduct. If the illegal conduct continues, Indecopi can double the fines and keep doubling them without limitation.

In addition to these administrative sanctions that the Commission can impose directly, it can make a criminal complaint to the public prosecutor’s office. Such complaints can be made only after a person has been found to have violated the Free Competition Law, but the Peruvian Penal Code does provide for imprisonment for up to six years for violating the Free Competition Law.

In general, the Free Competition Commission and Indecopi’s other quasi-jurisdictional bodies – especially the Tribunal – have been cautious in ordering fines. Two of the firms in the Chicken Case were fined USD 450 000, but in other cases cartel members have not been fined or received fines of around USD 1 000. Moreover, the Free Competition Commission has never fined an officer or other individual representative of a firm. (The Market Access Commission has fined the mayors of municipalities, however, and the Unfair Competition Commission has fined officers of firms.) The only criminal referral for a competition law violation occurred long ago and did not result in a criminal proceeding. Arguably, this cautious approach is consistent with the widely accepted view that it can be counterproductive to impose what the public sees as harsh fines for conduct that it does not regard as harmful. Some regard Indecopi as having been too cautious, however, and after ten years of enforcement, Indecopi says that it is now beginning to take a stricter approach.
3.4 Indecopi’s core competition resources and caseload

The resources of Indecopi’s core competition commissions have grown in a fairly steady manner over the years, but both commissions have always had a very small number of staff members. In 1996, the Free Competition Commission had an authorised staff of 4, which grew to 5 in 1999 and 7 in 2003. Understandably, the Commission has not handled a large number of cases. The Market Access Commission’s authorized staff grew from 2 in 1996, to 3 in 1999, to 4 in 2003.

Table 1

<table>
<thead>
<tr>
<th>Year</th>
<th>Matters opened</th>
<th>Orders or sanctions imposed</th>
<th>Total sanctions imposed</th>
<th>Average sanction</th>
</tr>
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<tbody>
<tr>
<td>2003</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Horizontal Agreements</td>
<td>Vertical Agreements</td>
<td>Abuse of Dominance</td>
<td>Mergers</td>
<td>Unfair Competition</td>
</tr>
<tr>
<td>2003</td>
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<td>3 0 0 0 97</td>
<td>US$ 208 590 0 0 0</td>
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<td>3 0 6 3 129</td>
<td>5 0 3 0 37</td>
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<td>0 0 0</td>
<td>US$ 270 942 0 0</td>
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<tr>
<td>2000</td>
<td>- - - - 4 02</td>
<td>- - - -</td>
<td>US$ 158 647 - US$ 3 647</td>
<td>US$ 9 307 0 0</td>
</tr>
</tbody>
</table>
Horizontal Agreements  Vertical Agreements  Abuse of Dominance  Mergers  Unfair Competition

**2000**
- Matters opened: 5
- Orders or sanctions imposed: 2
- Total sanctions imposed: US$ 5,800
- Average sanction: US$ 2,900

<table>
<thead>
<tr>
<th>2000</th>
<th>Horizontal Agreements</th>
<th>Vertical Agreements</th>
<th>Abuse of Dominance</th>
<th>Mergers</th>
<th>Unfair Competition</th>
</tr>
</thead>
<tbody>
<tr>
<td>Matters opened</td>
<td>5</td>
<td>0</td>
<td>2</td>
<td>0</td>
<td>127</td>
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<tr>
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<td>1</td>
<td>0</td>
<td>52</td>
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<tr>
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<td>Average sanction</td>
<td>US$ 2,900</td>
<td>-</td>
<td>US$ 16,571</td>
<td>-</td>
<td>US$ 4,155</td>
</tr>
</tbody>
</table>

**1999**
- Matters opened: 1
- Orders or sanctions imposed: 1
- Total sanctions imposed: US$ 2,058
- Average sanction: US$ 2,058

<table>
<thead>
<tr>
<th>1999</th>
<th>Horizontal Agreements</th>
<th>Vertical Agreements</th>
<th>Abuse of Dominance</th>
<th>Mergers</th>
<th>Unfair Competition</th>
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</thead>
<tbody>
<tr>
<td>Matters opened</td>
<td>1</td>
<td>0</td>
<td>1</td>
<td>3</td>
<td>125</td>
</tr>
<tr>
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<td>1</td>
<td>1</td>
<td>70</td>
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<tr>
<td>Total sanctions imposed</td>
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<td>0</td>
<td>US$ 25,533</td>
<td>US$ 82,353</td>
<td>US$ 486,122</td>
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<tr>
<td>Average sanction</td>
<td>US$ 2,058</td>
<td>-</td>
<td>US$ 25,533</td>
<td>US$ 82,353</td>
<td>US$ 6,945</td>
</tr>
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</table>

**The Free Competition Commission**

In 2003, the Free Competition Commission had a budget of USD 183,000 and 7 full-time staff positions. There are currently six staff members: a manager, three lawyers, and two economists. (Support personnel are covered by another budget category). There are also 6 Free Competition Commissioners, of course, but they are unpaid and work only a few hours per week. The Commission’s staff is sometimes assisted by the Economic Policy Department, meaning that on average there may be 9-10 Indecopi employees doing Free Competition Commission work. Indecopi has done a good job in supplementing its resources with student interns, and the Free Competition Commission staff now has four such interns.

Given the small size of the staff and the relative complexity of competition investigations, it is not surprising that the Commission resolves only a small number of cases per year. The first four columns of Table 1 provide data for the 1999-2003 period on the number and kind of competition cases, as well as information on sanctions. For comparative purposes, the fifth column contains the same information for unfair competition cases.
The Free Competition Commission’s relatively high number of horizontal cases reflects the previously noted policy of focusing on cartels. Indeed, as noted above, the only *ex officio* cases the Commission has began involved alleged cartels. The lack of vertical cases also reflects a previously noted policy decision to pursue such cases only as possible abuses of dominance. Otherwise, the small number of cases makes it difficult to discern trends or make generalisations.

**The Market Access Commission**

The Market Access Commission had a (reduced) budget of only USD 147 000 (and four work-years) in 2003. It currently has a staff of three. Since the Market Access Commission’s legislative authority changed in late 2001 and again in early 2003, a five-year historical presentation of the Commission’s cases would be of little value. Between October 2001 and July 2003, the Commission issued 36 reports, many of which were ignored. Between July 2003 and March 2004, the Commission has issued 46 reports, all but two of which resulted in the almost immediate elimination of the anticompetitive rule.

**Resource levels and sources**

The two Indecopi Commissions doing core competition work had a combined budget in 2003 of USD 320 000 (11 work-years), and currently there are apparently only nine staff members assigned to these two commissions. If one attributes one-fourth of the Economic Policy Department’s 12 work-years and one-half of the Competition Tribunal’s eight work-years to the core competition mission, one gets a total of 18 authorised positions. It appears that at present, 16 people are doing all of Indecopi’s core competition analysis and investigation.

(Osiptel, the telecomm regulator that enforces the Free Competition Law in all cases in which a telecom firm is a party, has 5-6 people doing competition work, but they also have regulatory responsibilities. Including Indecopi and Osiptel, it appears that the number of work-years devoted to competition enforcement is about 20.)

Over the period 1999-2003, these numbers have been growing, but for a country of its size – even a developing country – Peru’s competition enforcement resources are very small, particularly if one focuses on the seven work-years assigned to the Free Competition Commission. As noted above, Indecopi’s Economics Policy Department regards the Competition Commission as particularly understaffed.
Neither competition principles nor international experience provide any basis for estimating how much of a country’s scarce resources should be devoted to competition law and policy, and since different countries have different enforcement systems, it is not possible to make precise work-year comparisons. However, a 6-7 person competition law enforcement staff is very small, and even the 20 work-year number (including Osiptel) is small compared to the allocation in other countries (such as Romania and Chile) with comparable GDP levels or even to some countries (e.g., Bulgaria) with much smaller GDP levels. Because South Africa was recently the subject of an OECD peer review, there is data for a more precise comparison, and the comparison may be a good one because South Africa and Peru are considered to be at the same level of economic development. Peru’s GDP is about one-third that of South Africa, but it allocates only one-sixth as many work-years to its core competition mission.59

3.5 Private actions for damages

Even when Indecopi proceedings are initiated by a private party claiming that the defendant’s illegal conduct has caused it injury, the Commissions are not authorized to order the payment of damages. However, if a Commission finds that a defendant has engaged in illegal conduct, the Commission’s finding will be conclusive proof of the violation if a complainant files suit in civil court for damages. It is unclear whether any such cases have ever been brought.

3.6 The breadth of Indecopi’s mandate

Although it has been claimed that Indecopi’s many functions were assigned to a single agency merely because then-President Fujimori had promised to decrease the size Peru’s government, the combination of functions has been seen by many as efficient and as a possible model for developing countries. Explore the nature and extent of the efficiencies is therefore important.

It is useful to begin with some idea of the absolute and relative size of Indecopi’s various parts. Annex Table A.1 provides detailed information on the budget and personnel allocations to each of Indecopi’s commissions and offices in 2002 and 2003. Annex Table A.2 provides the same information for Indecopi’s Tribunal. The most meaningful measure is the allocation of personnel among the commissions and offices. The data show that close to 75 percent of these staff members are engaged in bankruptcy or intellectual property work.
The Free Competition Commission had 7 authorised work-years, and the Market Access Commissions had four. Together, they had 7.6% of the 146 employees in this category.

The Unfair Competition and Consumer Protections Commissions had 6 and 13 authorised position, respectively, for a combined 11.6%.

The Antidumping and Standards Commissions both had 6 authorised positions, for a combined 8.2%.

The Bankruptcy Commission had 40 authorised positions (32.6% of the total).

The Intellectual Property offices had a combined total of 76 authorised positions (45.2% of the total).

It is also important to bear in mind that discussion at the OECD Global Forum on Competition indicated that there is no single, optimal design for a competition agency, and that the structural design of a competition agency is not key to its performance. Independence from political influence of law enforcement is important, but may be achieved without structural independence. Proper funding levels and qualified personnel are crucial, as is the establishment of principles such as transparency and predictability.

Some of the most important advantages and disadvantages of Indecopi’s mandate and structure stem from the realisation of economies of scale:

- Given the small size of these Commissions, making them part of any larger agency would produce efficiency benefits by holding down administrative costs.

- Placing the competition policy function in a larger agency whose mandate relates to even indirectly to economic reform presumably produces additional efficiency benefits by creating synergies in connection with the promotion of market reform in general.

- On the other hand, placing the competition policy function in a larger agency inevitably means sacrificing some degree of autonomy. Even if the independence of decision-making units is protected, which it is not in the case of Indecopi, the agency officials who may have no competition policy expertise make budget and policy decisions that can undermine competition policy.

- When Indecopi was being created, there were some who feared that an agency with such broad powers could become “a Frankensteinian thing,” though it was decided that the Advisory Council would be able to control it. In fact, the Advisory Council has been almost completely
inactive, and instead of being unduly powerful, Indecopi needs strengthening in various ways.

The other potential benefits to Indecopi’s structure are efficiencies that may result from combining the specific functions assigned to Indecopi.

- The Free Competition Commission and the Market Access Commission both combat anticompetitive restraints and apply core competition principles in their work. There are clear efficiency benefits in having these two Commissions in a single agency.

- Core competition analysis (assessment of market power, etc.) is relevant in antidumping and safeguard proceedings. The applicability of competition principles to such matters is limited by international treaties, but it appears that Indecopi has sometimes been able to inject some competition analysis into these proceedings. On the other hand, some of Indecopi’s recent positions in this area have apparently been less procompetitive than the positions taken by the Ministry of Economy and Finance and the Trade Ministry.

- Core competition analysis is also relevant in some intellectual property issues and in assessing some product standards, but it is not clear whether these potential efficiencies are more than theoretical. The vast majority of Indecopi’s intellectual property work does not call for core competition analysis, though familiarity with basic market concepts can sometimes be helpful.

- Core competition analysis is not used in Indecopi’s unfair competition or consumer protection work. Nevertheless, research conducted in connection with the OECD Global Forum on Competition reveals that competition agencies that have these functions believe that they complement each other, with competition principles serving as a reminder that government actions intended to protect consumers can instead harm them if they are unnecessarily restrictive, and the consumer protection function serving as a reminder that markets do not operate perfectly.

- Core competition analysis is much more relevant to the work of other government entities, including privatisation and the access regulation done by Peru’s sectoral regulators, than it is to the work done by Indecopi’s commissions and offices other than the Free Competition Commission. (For this reason, some countries combine sectoral regulation and competition policy.)

- A basic competition policy principle – that governments should not restrict competition more than necessary to achieve other goals – can be
a useful tool in all of Indecopi’s functional areas. However, since this principle is equally applicable to all other government regulatory functions, combining competition policy with Indecopi’s other functions does not provide any specific efficiency benefits.

In sum, there are some advantages to assigning Indecopi responsibility for various fields involving market reform. Even when the fields have little substantive relationship to each other, there are advantages relating to scale economies in such things as administration and promotion of market reform in general. There are also real some efficiencies stemming from the substantive relationship of one group of functions (free competition, market access, antidumping, unfair competition, and consumer protection). Combining that group with intellectual property and standards may produce some limited efficiencies, and the inclusion of market exit adds no particular efficiencies. Moreover, the substance of Indecopi’s core competition work is less closely related to Indecopi’s other work than to many regulatory activities that are not part of Indecopi. The disadvantages to this structure relate primarily to the fact that as part of a larger entity, competition officials necessarily lose some budgetary and policy-making autonomy. Indeed, under the current law, even the first and second instance decision-makers have no protections of their independence. These disadvantages and recommended ways of minimising them are discussed Part 6, below.

3.6 International issues

Article 3 of the Free Competition Law bans all abuses of dominance and restrictive practices that injure the general economic interest in the national territory. Indecopi takes the position that this includes conduct that occurs outside Peru, though the matter has not been litigated. Article 9 of the law establishing merger control in the electricity sector specifically includes “acts of concentration made abroad.”

In practice, international issues have been very rare in Peru. This is partly the result of Peru’s lack of merger control except in the electricity sector, and partly the result of the Free Competition Commission’s small staff and caseload. International firms that have been involved in Indecopi’s cases have had local subsidiaries in Peru. Substantively, Indecopi takes international competition into account when defining markets and assessing market power.

Indecopi has no bilateral co-operation agreements with competition authorities in other countries, but Peru is seeking a competition chapter in its FTAA negotiations with the United States. With Bolivia, Columbia, Ecuador, and Venezuela, Peru is a member of the Andean Community, which has established a free trade area and is seeking to develop a common
market. Peru is also associated with MERCOSUR and is a member of APEC. Indeed, Peru was APEC’s “convening economy” for competition policy in 1999-2001. Peru is also a member of the Iberoamerican Competition Forum.

4. Competition Policy in Regulated Sectors

The Free Competition Law does not exempt any sectors, but the role of Indecopi and the applicability of the law are not straightforward when dealing with infrastructure monopoly sectors. In the telecom sector, Indecopi does not enforce the law but the telecom regulator, Osiptel, enforces an essentially identical law whenever one of the parties to a dispute is in the telecom industry.

Indecopi enforces the Free Competition Law in other infrastructure monopoly sectors, but the Law on Access to Public Infrastructure gives sectoral regulators exclusive jurisdiction over all access issues. These regulators include: in the transportation sector, Ositran (Organismo Supervisor de la Inversion en Infraestructura de Transport de Uso Publico); and in the energy sector, Osinerg (Organismo Supervisor de la Inversion en Energia). These agencies are all administratively independent, meaning that – like Indecopi – they report to the President of the Council of Ministers rather than to any Ministry, and they are not bound by normal civil service pay scales. Except for Osiptel, none of the sectoral regulators has competition law enforcement authority.

All of these sectoral regulators are apparently charged with promoting competition in their sectors, but their ability to do so is limited by the fact that Ministries retain the power to issue licenses or concessions and make other key decisions (e.g., spectrum allocation in telecom). It is not clear to what extent the Ministries seek or consider independent regulators’ (or Indecopi’s) views on their decisions. In any event, whereas the competition authority in Chile was able to sue the government to compel it to allocate spectrum by means of an auction, it appears that Peru provides no such method for a competition agency to compel attention to competition issues.

4.1 The Telecom Sector

In 1991, a new telecommunications law was adopted in order to bring about the progressive demonopolisation and privatisation of the telecom sector. A 1994 privatisation gave Telefónica a five-year monopoly in fixed telephony and domestic and international long distance, during which cross-subsidies between long distance and local telephony were to be eliminated
and Telefónica was to expand and improve fixed telephony service. Competition was permitted in other services, including mobile telephony, pay-phones, beepers, and cable television.

Telefónica gave up its legal monopoly in 1998, one year before it was due to expire. Osiptel reports that there are now eight providers of fixed telephony, three mobile providers (down from four, now that Telefónica has acquired Bell South’s Latin American operations), 52 long distance carriers, 24 local carriers, 126 cable television firms, and around 180 registered companies providing other services, including 72 internet service providers. Moreover, the penetration rate has greatly increased, average waiting time has decreased from 118 months to less than two months, and the system is 90 percent digital. These are for the most part impressive numbers, but competition problems may exist even in fields where there are many providers. Examination of these various fields is beyond the scope of this report.

In 2002, Telefónica had almost a 99 percent share of the local fixed telephony market, a 31 percent share of international long distance, an 86 percent share of domestic long distance, and a 34 percent share of local mobile telephony. Its acquisition of Bell South’s Latin American operations has caused great concern in Peru because Bell South had just entered the market for fixed local telephony and had an 18 percent share of local mobile telephony. A consumer group is seeking to mitigate the effects of this acquisition by arguing that under the Telecommunications law, Telefónica is not allowed to hold two licenses to provide mobile telephony, but the lack of a merger control system prevents Osiptel from directly reviewing the acquisition’s impact on competition and consumers in Peru.

Osiptel’s regulatory responsibilities include resolving interconnection issues, setting quality standards, establishing maximum tariffs when no effective competition exists. To help implement its law enforcement responsibilities, Osiptel has issued formal guidelines explaining its approach to free competition and unfair competition enforcement. The free competition guidelines cover some of the same subjects as the mandatory precedents issued by Indecopi’s Competition Tribunal, but they also explain the criteria by which Osiptel defines markets and assesses whether a firm is dominant. Originally, Osiptel did not have as strong investigation or sanctioning powers as Indecopi, but those problems have been corrected.

Osiptel data indicate that it has issued sanctions in 20 proceedings. Nine of these were for failing to comply with investigatory demands or misconduct in the course of a proceeding, which is a commentary on the lack of maturity of the regulatory process. Of the other 11 fines, five were in free competition cases, one was in an unfair competition case, two were in
interconnection cases, and three related to other regulatory matters. The fines in two of the free competition cases were revoked in second-instance appeals, and a fine of about USD 940 000 – by far the largest against a single firm – is currently pending on appeal. The two confirmed fines were for about USD 45 000 and USD 22,500.

Osiptel and Indecopi are in the same building complex, and at least two Osiptel officials have worked at Indecopi as staff or on a commission. Informal co-ordination between the two is said to be adequate but could use improvement.

4.2 The transportation sector

The transportation sector in Peru exhibits everything from continued government ownership and operation of infrastructure monopoly (e.g., ports) to complete privatisation and deregulation in markets (e.g., taxis and buses) that most countries regulate on market failure grounds. Overall policies are set by the Ministry of Transport and Telecommunication. In 1998, Peru created Ositran to review compliance with concession obligations, set tariffs where necessary, and promote competition. In 2001 Ositran adopted rules governing access to essential facilities, including ports, and new rules were adopted in November 2003.

Ports are an important infrastructure monopoly in Peru, and the government had planned to privatise them some time ago. It has expressed interest in offering concessions to operate some ports after electricity liberalisation is completed, but the prospects for this are unclear. It has been estimated that even in Lima’s relatively efficient port, inefficient access and government “red-tape” add a 3-7 percent cost to the value of commodities in transit. Indecopi’s Market Access Commission has previously taken some steps that reduce exporters’ costs, and perhaps it could do so again.

Peru’s railway company was privatised in 1999. Previously, low investment in maintenance had led to poor service and greater use of alternative modes of transportation, but World Bank financing of the concessionaire is expected to increase competition between rail and trucking, reduce transportation costs, decrease domestic prices, and increase the competitiveness of exported goods. The government owns and operates an airline that is used to provide subsidised passenger and freight service to remote areas.

Peru has one of the lowest levels of paved road density in Latin America. Public-private partnerships may provide some assistance for high volume highways, but not for rural and municipal roads. Problems with Peru’s roads – together with problems in other transportation sectors – are
important. A 2001 World Bank study identified the high cost of transport and business logistics as a major reason for high prices and low competitiveness.61 The ratio of logistics costs to total revenues in Peru was 30.7 percent, compared to 23 percent in Argentina and 8 percent for OECD countries. Such costs help explain why Peru is doing less well than one would expect in exports than one might expect in a number of areas, such as fruit; Peru’s exports of fruit are USD 40 million, compared to USD 800 million for Ecuador and USD 1.3 billion for Chile.

Although this section focuses on ways in which competition law and policy are being or might be applied to benefit consumers in regulated sectors, it is noteworthy that Indecopi’s invalidation of a municipal ordinance requiring taxis to be painted yellow may have given insufficient attention to the need for regulation when market failures exist.62 Taxi and bus transportation in Lima and Peru’s other cities is almost completely unregulated, whereas most countries regard these markets as requiring some regulation to address market failures. Peru’s consumers might gain from taxi and bus (or “combi”) regulation that is not more restrictive than necessary to protect riders.

4.3 The energy sector

Ministry of Energy and Mining sets policies and issues concessions in the energy sector. Although Peru has recently embarked on a major natural gas development programme, electricity has been and remains the focus of its energy programme.

The 1992 Energy Law sought to promote competition and efficiency in the electricity sector. The law set the stage for privatisation by requiring that except in isolated areas, the electrical industry be divided into separate generation, transmission, and distribution units operating under concessions from the Ministry. The goal was for the generation market to become competitive, whereas transmission and distribution would be regulated monopolies. At the national level, ElectroLima was divided into four distribution units and one generator, while ElectroPeru was divided into four generation units. The transmission assets of both enterprises were combined into a single transmission enterprise.

Privatisation began at a good pace in 1994, slowed down in 1999, and in 2002 two privatisations were called off due to local protests. Currently, there are a large number of companies competing in the generation market, including privatised enterprises and some new concessions. The government, however, continues to own the huge Montaro hydroelectric plant which generates 35 percent of Peru’s electricity. The transmission enterprises for two Peru’s two interconnected systems are both still
government-owned, but there is now some private participation in the transmission market. About 50 percent of distribution is majority-owned by private interests. (The State typically retains a 30-40 percent share of the stock of privatised enterprises.)

Notably, the 1997 and 1999 acquisitions involving the Chilean and Spanish firms brought vertical integration to Peru (as it did to Chile). There is some real competition in the wholesale power market, in that generators are free to negotiate price and other terms in their contracts with large buyers. Regulation governs transfers between generators and to distribution companies. The regulated price is not permitted to vary more than 10 percent from the market price. Small residential consumers have subsidies of about 50 percent of their cost of service, but most consumers pay rates that cover the cost of service.

Osinerg was created in November of 1996 to supervise the privatization of energy firms and monitor the firms’ compliance with legal requirements. In 2000, Osinerg merged with the Comisión de la Tarifas Electras, which was and is responsible for setting tariffs. Recently, Osinerg has created a new Research Department that focuses policy studies and policy-making in the energy field generally. In general, Osinerg apparently does promote competition when possible, in part because even those who are not competition advocates believe that it is harder to control one huge firm. Some observers have expressed concern that Osinerg lacks real autonomy and is therefore subject to political interference. It has also been suggested that poor co-ordination between the privatisation agency (“Pro-Inversion”), Osinerg, and Indecopi has sometimes been a problem.

As discussed above, a 1996 law made electricity the only area in which Peru has merger control, and Indecopi has authorised all of the mergers it has considered. Some believe that Indecopi may have been unduly lenient in this respect. Osinerg officials are divided on the desirability of such control, and the Research Department is studying the issue. The same law provided for the government’s retention of a “golden share” in all privatisation, thus giving the government control of corporate decisions to shut down the company, bring in new shareholders, reduce capital, register on the stock exchange, or merge with other companies.

4.4 Other sectors

Banking and finance. The banking sector has experienced considerable concentration, largely through mergers, but there has been no opportunity to review such mergers to assess their effect on competition. Of the 25 banks operating in 1997, only 15 remain, and the largest four have 75 percent of the market. The Superintendency of Banking regulates the market, focusing
mainly on solvency and other systemic considerations, but its hiring one of Indecopi’s foremost former economists may signal increasing interest in competition issues. The financial sector (and some banks, indirectly) have been involved in two of Indecopi’s recent price fixing cases – the automobile insurance case, in which price fixing was confirmed, and the ongoing case involving price fixing by pension fund managers. It has been suggested that the banking industry itself (including the Banking Association) merits closer scrutiny by the Free Competition Commission.

Small and medium-size enterprises account for 42 percent of GDP and employ 76 percent of the economically active population, but the capital market in Peru is such that even medium-size enterprises find it almost impossible to obtain capital. An IBD project is seeking to improve the regulatory environment, encourage a corporate governance code, and educate market participants.

Mining. Peru’s minerals industry is key to its development both economically (generating more than 45 percent of Peru’s export earnings) and socially (helping some of Peru’s poorest regions). A World Bank report notes, however, that investment has dropped, due in part to regulatory problems. For example, the lack of a clear regulatory framework creates confusion and high transaction cost for mining firms, and Peru’s environmental regulators are not seen as credible by the public. Competition policy principles would support resolution of these problems, because clear rights and duties, enforced in a transparent manner, are important to the development of healthy, competitive markets.

5. Indecopi’s Competition Advocacy

As used in this report, the term “competition advocacy” refers to activity designed to promote understanding of the overall benefits of a competitive market economy, as well as the value of competition law enforcement and the importance of the core competition policy principle that government regulation should not interfere with firms’ ability to respond efficiently to consumer demand except to the extent necessary to satisfy other social goals. It does not include Indecopi’s legal proceedings in and of themselves, but does include the dissemination of information about such proceedings.

Competition advocacy in the broadest sense – demonstrating or explaining the benefits of a competitive market economy – has always been a major part of Indecopi’s role and its activities. This broad approach to competition advocacy reflects the concept underlying Indecopi’s organisation as an agency with a mandate that includes fields that are quite diverse but that all relate in one way or another to market liberalisation and
the promotion of competition. Thus, Indecopi’s promotion of its bankruptcy work is not what would usually be thought of as competition advocacy, but by reducing exit barriers it also encourages new entry. Similarly, Indecopi’s promotion of trademark registration and respect for intellectual property informs firms about competing through product differentiation and educates the public about the risks of buying pirated goods. This kind of activity is very important in Peru, where major portions of the public and the government do not understand the benefits of a competitive market economy and in fact oppose liberal market reform.

Despite the contribution that these activities have to promoting market reform in general, this section focuses on Indecopi activities that focus more directly on competition law and policy. In this respect, Indecopi’s consumer protection and unfair competition mandates have definitely complemented its advocacy of competition law and policy. For example, Indecopi’s publishing information on the waiting time to cash checks at different banks stimulated competition and educated both consumers and banks. More broadly, promotion of Indecopi’s consumer protection and unfair competition activities discourages opportunistic conduct by sellers and reassures buyers that they have remedies in case they are unfairly treated.

Indecopi also engages in more explicitly educational activity. First, the “Indecopi Educa” programme trains school teachers to help students become more sophisticated consumers and develop a better understanding of the benefits of competition policy and other economic reforms. Second, “Indecopi Empresa” is an education programme aimed at small and medium sized enterprises, including many that operate in the informal sector. The objective is to promote awareness of competition and intellectual property rules and the policies behind such rules.

Indecopi’s conventional competition advocacy work with the government has also been important. In 1999, for example, the agency provided other Government bodies with 150 competition policy analyses on a wide range of topics. Most of the analyses were submitted to Congress. Other government agencies have generally been less likely to seek Indecopi’s advice. In particular, although competition policy considerations are obviously important when a government considers the privatisation of state assets, Peru’s privatisation agency has not consistently consulted with Indecopi. The consultation process Indecopi and the autonomous regulators for telecom and energy, Osiptel and Osinerg, apparently works more smoothly.

It should be recalled, however, that Indecopi is not always perceived as a competition advocate in relation to antidumping and safeguard matters. The Competition Tribunal is viewed as more supportive of antidumping
actions than the Ministry of Economy and Finance or the Ministry of Trade, and Indecopi advocated the rule-changes that facilitate such actions.

Much of Indecopi’s recent competition advocacy has related to the Constitutional provisions that prohibit the state from engaging in economic activity unless the activity is expressly authorized by law and is “subsidiary” to private sector activity. To ensure adherence to these and other principles, the government in 2001 created a process for reviewing the activities of all state-owned enterprises (SOEs). The National Financing Fund of State Managerial Activity (Fonafe) was placed in charge of this process.

During 2001-2002, Indecopi’s Free Competition Commission prepared reports analysing 13 SOEs in a variety of sectors, including the postal service, commercial aviation, ship building, and the commercialization of coca leaves. A total of 115 separate activities were analysed, of which 24 were found not to be expressly authorized by law. Of the 91 activities that met the express authorization requirement, Indecopi concluded 41 failed to meet the subsidiarity requirement.

Indecopi’s reports were both forwarded to Fonafe and publicly released. Fonafe is known to have made some decisions, but the decisions have not been made public. It is not even known when or whether the decisions will be made public. Their publication would, it appears, promote public confidence that constitutional requirements are being followed, clarify the government’s interpretation of the requirements, and encourage domestic and foreign investment.

Regardless of what decisions Fonafe made and whether it makes those decisions public, Indecopi’s reports received considerable public attention when they were released and thus have helped to shape public opinion respect to the proper role of the State and the private sector in the Peruvian economy.

Indecopi’s reputation for performing sound economic analysis has also permitted it to be influential in other ways. For example, the parties that challenged the Ministry of Transportation’s directive for price fixing in the road transport industry not only filed a complaint with the Market Access Commission, but petitioned the Constitutional Court to find the Ministry’s action a violation of the State’s duty to facilitate free competition. In ruling in favour of the petitioners, the Court relied in significant part on the Market Access Commission’s analysis of the impact and justification for the price fixing requirement.

A project that began in 1997 with IDB funding sought to assess the impact of Indecopi’s actions on the Peruvian economy. The research showed that the economic benefits of Indecopi’s activities during its first seven years were about USD 120 million, which is at least six times the agency’s operating costs. Of all Indecopi’s functional areas, the two that
made the greatest relative contributions were the Free Competition Commission and the Market Access Commission. During the 1993-1994 period alone, Free Competition Commission decisions reportedly created benefits of USD 28.6 million. This kind of information could have helped explain the benefits of competition, and in particular could have supported requests for greater public funding for Indecopi’s core competition mission. It is unclear whether Indecopi used the information in its general competition advocacy, however, and it presumably did not use it in seeking greater funding because Indecopi then regarded self-financing as a benefit.

6. Evaluation and Recommendations

6.1 Protect the real and perceived autonomy, credibility, and technical competence of Indecopi’s quasi-judicial bodies by enacting legislation to revise the process for selecting and removing first and second instance decision-makers.

- The process for selecting Tribunal members should be transparent and include checks and balances. The establishment of specific qualifications requirements should also be seriously considered.
- The process for selecting first-instance decision-makers should also be revised, perhaps by having them selected by Tribunal members.
- All first and second instance decision-makers should be selected for fixed (and preferably staggered) terms and should be removable only for cause.

Although Indecopi is nominally an independent agency, it has no legal protection for its independent status, and the independence of its quasi-judicial units has not always been respected. Indecopi now reports to the President of the Council of Ministers, rather than any Ministry. This system may be satisfactory vis-à-vis Indecopi’s Presidency and Board insofar as they oversee the agency’s administrative, investigative, analytical, and promotional units. It is not unusual for agency officials in charge of these activities to be removable at will and thus subject to some degree of government influence.

However, Peru’s current system clearly falls down in its failure to protect the independence of Indecopi’s quasi-judicial positions – its Tribunal members and its Commissioners. The 1992 law establishing Indecopi provided some protection for Tribunal members, since they were given five-year appointments during which they could be removed only for cause, but
that protection was removed in 1994. These protections should be re-instituted and new protections should be afforded to commissioners.

In addition to protecting the autonomy of those individuals who have been selected to serve as quasi-judicial decision-makers, Peru should introduce some transparency into the selection process, apply relevant selection criteria, and subject the process to a system of checks and balances. Currently, the system by which Indecopi’s quasi-judicial positions are selected – by the President of Peru (for Tribunal members) or the Indecopi Board (for commissioners) – has none of these elements. This system contributes to general fears – and some specific rumours – of “behind-the-scenes” government intervention. It also undermines confidence in Indecopi’s technical competence; the Competition Tribunal’s reputation has suffered because of concern that only its President has real knowledge of competition law and policy issues. This report makes no judgment on these other members’ qualifications, but the existence of the concern underscores a problem with the current, non-transparent selection process.

In this regard, it is notable that Chile, whose competition policy system was the subject of a peer review at the first meeting of the IDB-OECD Latin American Competition Forum, faced precisely the same problem and has adopted legislation to deal with it. Chile’s overall system is different from Peru’s, but its new law’s provisions provide a useful starting point for analysis. First, the law requires that all candidates for its Tribunal have expertise in competition issues. Such a requirement is not unusual in countries with new competition systems. Second, the law provides checks and balances in that the Supreme Court and the Central Bank screen all candidates on the basis of a public competition; only individuals nominated or selected on the basis of this process may become Tribunal members. This is, of course, only one way of providing checks and balances; presidential nomination and legislative confirmation is another, more common, model. Third, members of the Tribunal have terms of six years, and may be removed for only cause during their terms. Such protection is standard in many countries.

A formal, transparent system of checks and balances would be a logical approach for Peru to take with respect to its Tribunal, but might not be practical as a means of choosing and protecting the autonomy of the unpaid commissioners and office heads who are Indecopi’s first instance decision-makers. One possible solution with respect to these quasi-judicial officials would be to provide that they be selected for fixed terms by the Tribunal and be removable only by the Tribunal and only for cause.

Some in Peru argue that in order to assure Indecopi’s continued existence and independence, the Peruvian Constitution should be amended...
to provide specifically for the agency (as is now done for the Central Bank and, apparently, the Superintendency of Insurance). In considering this proposal, it is important to bear in mind that the real need is to ensure that Indecopi’s quasi-judicial units are independent. Declaring Indecopi itself independent seems neither necessary nor sufficient to accomplish that goal.

### 6.2 Peru’s system of funding Indecopi should be changed, and more funding should be allocated to the Free Competition and Market Access Commissions.

- Peru should eliminate or substantially reduce Indecopi’s reliance on fines as a source of revenue. Fines should go to the Treasury, and public funds should be given to Indecopi.

- Peru should provide public funding for Indecopi’s Free Competition and Market Access Commissions because it is an investment that can pay for itself. Indecopi should allocate more funding to core competition work, even if this means cutting back on other useful work, because core competition cases generally have a more substantial market impact.

### Sources of funding

The percentage of Indecopi’s budget that is represented by the fines it imposes has increased over time and is now almost 60 percent. This highly unusual system undermines efficient administration difficult and is certain to create domestic and international concern about the integrity of Indecopi’s decisions.

More broadly, it seems highly likely that Indecopi’s initial belief in self-financing contributed to underinvestment in core competition activities (see below), and the government’s 2003 decision to cut off all funding for Indecopi makes it even harder to provide adequate funding for these activities. Except to the extent that it relies on the fines it imposes, Indecopi can carry out its core competition work only by charging fees that exceed the cost of its registration and other services (which is contrary to one of the laws Indecopi enforces). Although fees are preferable to fines as a funding source, this practice seems unlikely to permit Indecopi to maintain and increase respect for the integrity.

Peru is a developing country with many important demands on its resources, but public funding for Indecopi’s core competition commissions – at higher levels than they are allocated today – would be an investment that could be expected to pay for itself many times over.
In the next section, this report recommends that Peru at a minimum make mergers subject to the Free Competition Law. If it does so, and if it also establishes a premerger notification system along the lines of what it now has for electricity mergers, filing fees would be a legitimate though somewhat risky source of funding for the activities of at least the Free Competition Commission. Even if such a system is adopted, the government should commit to provide the necessary funding so that competition enforcement is not wholly dependent on filing fees.

Resource levels

Although unfair competition and consumer protection enforcement is beneficial in laying down rules that encourage confidence in the marketplace, the practices condemned in such cases do not necessarily have an adverse effect on Peru’s economy. Free competition and market access cases are much more likely to benefit the market as a whole. Peru is in the unusual position of having empirical evidence on this point – an IDB-sponsored research project confirming that Indecopi’s free competition and market access work made larger relative contributions to Peru’s economy than Indecopi’s other functions.

Despite these considerations, in 2003 the Free Competition Commission and Market Access Commission received only a combined 8 percent of the money and 7.5 percent of the personnel that were allocated to Indecopi’s commissions and offices. Moreover, the Economic Policy Department views the Free Competition Commission as being particularly understaffed. Finally, Peru devotes fewer resources to these missions than other developing countries with comparable and even smaller GDP levels. There is no international or other objective standard for determining appropriate resources levels for competition enforcement, but the evidence suggests that Peru would benefit by expanding its core competition work, even if that means cutting back on some other activities by Indecopi or other government agencies.
6.3 Indecopi should (a) be more proactive in enforcing the Free Competition Law, (b) issue guidelines on market definition and assessment of dominance, and (c) bring more market access cases to eliminate the many municipal barriers to market access by entrepreneurs and small businesses.

Ex officio free competition cases

Because it was created in part as an alternative to the judiciary, Indecopi’s commissions and offices must accept all formal complaints that are accompanied by the payment of the applicable filing fee. This requirement has some benefits, but it also makes enforcement less cost-beneficial by limiting the commissions’ ability to open ex officio investigations that focus on matters of the greatest public importance. The problem seems particularly acute for the Free Competition Commission, which brings few ex officio cases despite a rising consensus that it should be more proactive. At a minimum, the effect of this requirement should be considered in deciding on the appropriate funding level for the Free Competition Commission. Moreover, Indecopi should consider whether there are other means it can use to maximise its cost-effectiveness while fulfilling its responsibilities to resolve formal complaints.

In addition, Peru should push ahead vigorously in pursuing judicial reform. In the first place, an efficient, predictable, and trusted judiciary is necessary for markets to perform competitively. In the second place, the establishment of a more accessible court system would take some of the decision-making responsibility from Indecopi and make the agency better able to pursue ex officio cases.

Sectors that have been suggested as warranting additional competition scrutiny are cement, liquid fuels, steel, and banking.

Guidelines

The Competition Tribunal’s use of mandatory precedents is a useful way of clarifying how the Free Competition Law should be interpreted, but it provides guidance only on what the Tribunal sees as the key issues in a few cases. Although many free competition cases have required the definition of product and geographic markets and the assessment of market power, there is no mandatory precedent concerning these important topics. The text of the Tribunal’s resolutions that do not contain mandatory precedent may provide some guidance on its approach, but any such guidance is not authoritative and is, as a practical matter, available only to competition experts in Peru (because the resolutions are public but unpublished). Given the importance
of market definition and the assessment of market power, the Tribunal (or Indecopi) should issue guidelines on these issues.

**Market access cases**

The Market Access Commission has succeeded despite a very small staff in bringing a large number and high percentage (50 percent) of *ex officio* cases. Moreover, the activities of this Commission can be very important to enhancing efficiency (because anticompetitive regulation abounds, particularly at the municipal level) and to demonstrating the value of competition policy to consumers (who could see new entry and lower prices), small entrepreneurs (who remain informal because of regulatory costs), and the established business community (whose domestic and exports prices are higher than necessary because of bureaucratic red-tape). In light of the substantive and educational, “public relations” benefits of eliminating anticompetitive regulation, the Market Access Commission should, if possible, be given additional resources and should embark on a major national campaign against such regulation. At present, the utility companies make most of the complaints to the Commission, and it is good that the Commission can clear away the administrative barriers they face. But one goal of the recommended campaign would be to expand awareness and acceptance of the Commission’s powers so that small entrepreneurs, and small and medium size companies, come to regard the Commission as an important ally.

6.4 **The Free Competition Law should be amended to provide for merger control and to clarify the legal standard to be applied to cartels and other horizontal agreements; there is no apparent reason to amend the law to cover excessive pricing.**

**Merger control**

A Working Group at Indecopi is considering a number of possible proposals to amend the Free Competition Law. One proposal the Working Group is considering is that the law be amended so that it (i) provides a legal basis for challenging anticompetitive mergers and acquisitions, and (ii) establishes a premerger notification system. This proposal should be made and accepted. Peru has witnessed increasing concentration in quite a few industries. Some of the markets in which Indecopi has found or is investigating price fixing and abuse of dominance have recently become significantly more concentrated because of mergers, and it is arguable that merger control would have prevented these problems. Moreover, neither
Indecopi nor Osiptel has the authority to assess the likely impact of Telefonica’s recent acquisition of Bell South. The arguments against merger control are for the most part either wrong or outdated. The argument that small, open economies do not need merger control or that such control could interfere with domestic firms’ realisation of scale economies has been thoroughly discredited. Merger analysis can be complex, but the Free Competition Commission’s ten years of experience have prepared it for the process. And the cost of merger control can be managed by giving Indecopi the authority to set thresholds for pre-merger reporting.

If Peru adopts a premerger notification system, it should give careful consideration to how it establishes its filing thresholds. Its current law on electricity mergers bases filing obligations on the parties’ market share, which may work well in a regulated market but which otherwise presents the problem that parties may manipulate the system by defining markets in ways that mean that they can avoid filing. Simple size and volume measures may be preferable, especially in a country in which data relevant to market definition may be scarce. In addition, Indecopi should consider proposing that the amendment not set a particular threshold, but rather that it authorise the Commission to establish such thresholds as it considers necessary and appropriate. This would permit the Commission to begin with very high levels as it first implements merger control and then to lower the thresholds – either selectively or across the board – based on its actual experience.

**Cartels**

The Working Group is also considering a proposal to clarify the legal standard applicable to hard core cartels and other restrictive practices. The current thinking appears to be that Peru should have a system that sounds something like Mexico’s: cartels would be subject to an “absolute” ban, while other agreements would be subject to a “relative” ban. Clarification is definitely in order, and the contemplated system seems sensible.

**Abuse of dominance**

When it adopted the Free Competition Law, Peru apparently made a policy decision not to include a ban on “excessive pricing” or other means of exploiting a dominant position. Many countries do not have such bans, and many countries with such bans do not currently enforce them. The reason is not that these countries think excessive pricing or other exploitative practices are harmless or good, but that it is difficult if not impossible to enforce such bans in a manner that makes the situation better rather than worse. It is true that developing countries such as Peru cannot
expect excessive pricing to stimulate entry as quickly as would be the case in developed countries. As a result, the harm from excessive pricing may be greater in developing countries. Nevertheless, competition authorities generally have no workable remedy to use against excessive pricing unless it is able to remove the entry barriers that support an enterprise’s dominant position. The Market Access Commission already has that power with respect to the most important entry barriers — anticompetitive regulations. Moreover, the lack of authority to condemn excessive pricing has apparently not been a problem in the past. In these circumstances, it appears unlikely that banning excessive pricing or other exploitative conduct would benefit Peru’s consumers.

6.5 **Competition advocacy should continue, with increased emphasis on clarifying that Free Competition and Market Access cases halt conduct that injures the public at large, rather than being an efficient means of resolving private disputes.**

Indecopi is well known for its competition advocacy and for using the Indecopi “brand” to promote market reform. In some ways, however, the brand may have obscured the differences in its various functional areas. Although Indecopi’s work in resolving unfair competition and consumer protection complaints is useful and important in establishing the rules of the game and providing remedies to complainants, many of the cases are essentially private disputes that in and of themselves have no market impact. Indecopi brings many more of these cases than it does free competition or market access cases, and it appears that much of its advocacy treats all of these (and other activities) as “competition cases.” This practice may help explain why the public does not for the most part understand that free competition and market access cases, even if they are begun in response to complaints rather than *ex officio*, are not merely private disputes but rather cases that affect the market as a whole.

In the future, Indecopi should seek in its competition advocacy to stress that its core competition cases represent Peru’s commitment to consumers and the economy as a whole, not merely Indecopi’s provision of an efficient means of resolving private disputes. Use of data on the impact of Indecopi’s activities, such as that produced by IDB-sponsored research in the 1990’s, should be useful in this regard.
6.6 Peru’s Government and its Ministries should provide increased, visible support for competition policy and economic reform.

1. Indecopi is not the only proponent of competition policy in Peru. Policy offices within the Ministry of Economy and Finance and the Ministry of Trade and Tourism also support competitive reform – perhaps even more than the Competition Tribunal in the antidumping area. Osiptel and at least some parts of Osinerg also support competition. Some representatives and parts of the government, however, seem not to understand the benefits of competition policy. For example, the Competition Tribunal was surely correct that ordering price fixing was “irrational” as a means of trying to address problems that legitimate truckers face from informal truckers.

2. In fact, competition policy and economic reform have brought tremendous benefits to Peru’s citizens over the last dozen years, but it is clear that the public and parts of the government do not understand how Peruvians are benefiting from this reform. Particularly in remote villages and rural areas, it is likely that the marketplace as they experience it does not show significant benefits. Even in these areas, however, those who have electricity or telephone service have in fact received enormous benefits.

3. Peru’s Government and Ministries should join with Indecopi and other competition advocates to explain that these and other benefits are the result of competition policy and market-based reform. They should also emphasise that competition policy does not interfere with social programmes, but rather helps make such programmes more efficient. Moreover, the government should take advantage of the public’s distrust of the judiciary by explaining that judicial reform will help Peruvians realise the benefits of market reform. Finally, since market reform has clearly benefited Peru’s economy overall, the government could usefully examine whether and to what extent its current tax or other policies interfere with the widespread dissemination of these benefits.
Notes

1. LMIC countries that have participated in the OECD Global Forum on Competition include Albania, China, Egypt, Morocco, South Africa, Thailand, and Tunisia.

2. Vargas Llosa first became politically active in August of 1987, when he protested Garcia’s proposal to nationalize all financial institutions and insurance companies.

3. During 1993-1997, the percentage of people living in poverty fell from 27 to 14 percent.

4. Indecopi-Educa is a training programme through which the agency trains primary and secondary school teachers in how to explain free market concepts to their students.

5. See n. 14 and accompanying text.


7. The Tribunal relied heavily on the writings of United States Judge Robert Bork Judge, and Indecopi appears to have taken a quite hostile approach to government regulation.

9. Peru was selected in 1999 to serve a term as APEC’s “convening economy” on competition law and policy matters.

10. Robert M. Sherwood, “Indecopi: The 21st Century Arrives a Little Early,” in Peru’s Experience at 140. See also Kwang Wook Kim, supra n.6, at 47 (referring to Indecopi’s “lack of political capital”), 50 (referring to the weakness of Indecopi’s legal mandate), and 57 (noting that historically in Peru, autonomous agencies have not fared well after changes in government).

11. See, e.g., Aurora Belmore, “Indecopi in Partnership with the Inter American Development Bank,” in Peru’s Experience at 89 (expressing concern about Indecopi’s ability to maintain its independence from the government and to avoid being frustrated by the courts).

12. Technically, Osiptel enforces Decree Law 702, whereas Indecopi enforces Decree Law 701, but the two laws are essentially the same.


15. Resolution No. 206-97. Specifically, the mandatory precedent was as follows:

"Price fixing and market division agreements shall be illegal per se when they are intended to restrict the competition, i.e. when they are pure or naked cartels. On the other hand, the price fixing and market division agreements that are ancillary or complementary to an agreed association or integration that have been made to improve the economic activity shall be analyzed case by case to determine if they are rational or not. In case they are not considered to be rational, they shall be deemed illegal.

If, depending on the economic activity to be analyzed, it is concluded that the integration agreed among the companies is essential for that activity to be carried out, then such integration agreement, as well as the restrictions on competition that would arise therefrom in order that such activity can be carried out, shall be allowed. However, when the integration is considered to be beneficial but not essential to carry out such economic activity, then the integration agreement and the ancillary or complementary agreements that restrict the competition shall be permitted only whether they meet the following three conditions:

i). the agreement fixing prices or dividing market is ancillary to a contract integration; that is the parties must be cooperating in an economic activity other than the elimination of rivalry, and the agreement must be capable of increasing the effectiveness of that cooperation and no broader than necessary for that purpose;

ii). the collective market of the parties does not make the restriction of competition a realistic danger;

iii). the parties must not have demonstrated a primary purpose or intent to restrict the competition.

When these three conditions are not met, the agreement shall be considered to be unlawful."
16. Resolution No. 224-03.


18. At least in the past, the fines imposed by the Intellectual Property Chamber of the Tribunal were said to be so low that it is profitable for pirates to continue their illegal activities and treat the fines as a cost of doing business. Whereas the Offices used deterrence criteria in setting fines, the Tribunal apparently chose not to impose fines that exceeded the harm resulting from the illegal conduct. Elvia Patricia Gastelo, “Recent Developments in Peru’s Response to Intellectual Property infringement,” in Peru’s Experience at 143, 162.


22. Resolution No. 14-93.

23. Resolution No. 15-02.


26. Resolution No. 006-03.


30. The law refers to “direct or indirect” control, but does not require notification of a stock acquisition that gives the acquiring firm the ability to appoint board members who could monitor the acquired firm’s activities and influence its decisions.

32. The Market Access Commission was created as a separate unit in 1996. Before then, Indecopi’s powers under Decree Law 776 were exercised by the Free Competition Commission and the Consumer Protection Commission.

33. Armando Caceras, “Indecopi’s First Seven Years: The Challenge of Changing the Paradigm of Succeeding in the Market, in \textit{The Role of the State} at 108.

34. Resolution No. 02-1998.
35. Resolution No. 03-98.
36. Resolution No. 448-03.
37. Resolution No. 34-98.
38. Resolution No. 182-97.
40. Decree Law No. 26122.
41. Legislative Decree No. 691.
42. As of 1998, Indecopi had apparently not developed a system to assure trade secret protection. Robert Sherwood, Indecopi: the 21st Century Arrives a Little Early, in Peru’s Experience at 138. It is unclear whether such a system exists today.
43. Resolution No. 163-96.
44. Resolution No. 547-03.
46. Legislative Decree No. 716.
48. Supreme Decree No. 133.

49. The Commission’s activities are based on Decree Law No. 668.

50. At the time Peru had some intellectual property laws and an intellectual property office, but the military government of the 1970s had used the office to prevent the import of goods that were based on intellectual property. The current laws are Copyright Law, Decree Law No. 822 (1996); Trademarks Law, Decree Law No. 823 (1996); Patents and New Technologies Law, Decree Law No. 823 (1996).


52. Id. at 334.

53. The law administered by the Commission was issued by Presidential decree in 1992. Decree Law No. 26116. See also Decree Law No. 845 (1996) and Legislative Law No. 27146 (1999).

54. Removal without cause requires a “favourable opinion” by Indecopi’s Board, its Advisory Committee, and the President of the Council of Ministers. Since the Advisory Committee is essentially non-functional, and since the Board members are all removable without cause, it seems unlikely that this requirement would provide any real protection to a Tribunal member whom the government wanted to remove.


56. Understandably, the duration of proceedings varies considerably both with a given Commission and among Commissions. For example, proceedings before the Consumer Protection Commission are usually resolved in 2-3 months.

57. The Consumer Protection Commission is also authorised to order simple remedial actions such as repairing or replacing a defective product.

58. Precisely comparable historical data are not available throughout this period, but it appears that only 8 or so staffers were engaged in competition investigation and analysis in 1999.

59. South Africa’s Competition Commission has 91 full-time positions, and its Tribunal has 13 full-time positions – two Tribunal members and a support staff of eleven. Since South Africa’s telecomm regulator has
competition law enforcement power (though not exclusive, as in Peru), South Africa’s total of 103 seems most fairly comparable to Indecopi’s 15 work-years.


62. See Part 2.2, above.

63. See Part 2.1.4, above.

64. Armando Caceres, supra n.21, at 123.

65. In Chile, the Tribunal will be an independent entity that has judicial powers but is not formally part of the judiciary. It will have five members. The President of the Tribunal, who must be a lawyer with at least ten years of experience in the competition law field, will be appointed by the President of the Republic from a list of five nominees established by the Supreme Court through a public competition. The other members (two lawyers and two economists) will be chosen as follows. One lawyer and one economist will be chosen by the President from a list of three nominees established by the Central Bank (Council of Governors), also through a public competition. The other lawyer and economist will be appointed directly by the Central Bank from candidates selected by this same public competition. The Tribunal will also have four surrogate members, selected by the President of the Republic and the Central Bank from the same lists of nominees. All candidates are required to have expertise in competition issues. The members of the Tribunal have terms of six years, and may serve more than one term. During their terms, they can only be removed for cause. Neither public servants nor officers or employees of publicly held corporations (or their affiliates) are eligible.
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Annex

Table A.1
Resource Allocation among Commissions and Offices

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<tr>
<th></th>
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<tbody>
<tr>
<td></td>
<td>USD</td>
<td>%</td>
<td>USD</td>
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<tr>
<td>Free Competition</td>
<td>189 000</td>
<td>4.6</td>
<td>183 000</td>
</tr>
<tr>
<td>Market Access</td>
<td>186 000</td>
<td>4.6</td>
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<tr>
<td>Core CLP total</td>
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<td>Unfair Ads Comp.</td>
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<td>270 000</td>
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<td>Dishonesty total</td>
<td>461 000</td>
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<td>427 000</td>
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<tr>
<td>Antidumping</td>
<td>226 000</td>
<td>5.5</td>
<td>186 000</td>
</tr>
<tr>
<td>Bankruptcy</td>
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<td>35</td>
<td>1 398 000</td>
</tr>
<tr>
<td>Standards</td>
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<td>254 000</td>
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<td>Trademark Office</td>
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<td>Copyright Office</td>
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<tr>
<td>Patent Office</td>
<td>409 000</td>
<td>10</td>
<td>411 000</td>
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<tr>
<td>IP combined</td>
<td>1 300 000</td>
<td>32</td>
<td>1 397 000</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>4 062 000</td>
<td></td>
<td>3 982 000</td>
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* FTE (full time equivalents) refers to the total number of authorized positions.
Table B.1

Allocation of Resources among Tribunal Chambers

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<tr>
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<th>2002</th>
<th>2003</th>
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<tbody>
<tr>
<td></td>
<td>USD</td>
<td>%</td>
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<tr>
<td>Competition Trib.</td>
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<td>51</td>
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<tr>
<td>IPTribunal</td>
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<tr>
<td>Bankruptcy Trib.</td>
<td>35 000</td>
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<tr>
<td>Total</td>
<td>108 2000</td>
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</tr>
</tbody>
</table>
Competition Law and Policy in Latin America

PEER REVIEWS OF ARGENTINA, BRAZIL, CHILE, MEXICO AND PERU

The Inter-American Development Bank (IDB) and the Organisation for Economic Co-operation and Development (OECD) co-operate in competition law and policy to promote increased economic growth, employment and economic efficiency, and a higher average standard of living in the medium to long term. There is increasing consensus that sound competition law and policy are essential to achieving these goals.

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