



COUNTRY STUDIES

Brazil - Peer Review of Competition Law and Policy 2005

Introduction

“Peer review” is a core element of OECD work. The mechanisms of peer review vary, but it is founded upon the willingness of all OECD countries and their partners to submit their laws and policies to substantive questioning by other members. Brazil’s competition law and policy have been subject to such review in 2005. This report was prepared by Mr. Jay Shaffer for the OECD.

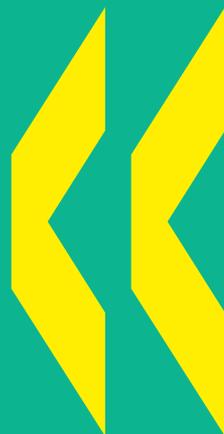
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CO-OPERATION AND DEVELOPMENT
Competition Division

Competition Law and Policy in Brazil

A PEER REVIEW

**The English text is the original version, the Portuguese being
an unofficial translation only.**

ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT

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FOREWORD

The Inter-American Development Bank and the Organization for Economic Co-operation and Development 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.

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

The benefits of this process are particularly clear in the area of competition law and policy. As a result of the activities of the Competition Committee, OECD countries that once had real conflicts on competition issues have become partners in seeking to halt harmful international cartels and mergers. The Committee has also become an important forum for assessing and demonstrating the usefulness of applying competition policy principles to economic and other regulatory systems.

IDB/OECD co-operation in competition law and policy centers on annual meetings of the Latin American Competition Forum. LACF meetings include substantive roundtable discussions and peer reviews of national laws and institutions. The peer reviews have examined Chile, Peru and now Brazil. The IDB is pleased to participate and finance this work, as part of its efforts to promote a better business climate for investment in the countries of Latin America and the Caribbean.

We want to thank the Government of Brazil for volunteering to be peer reviewed at the third LACF meeting, held in Madrid, on 19-20 July, 2005. It was encouraging to hear Brazil’s Delegation confirm at the meeting that the report’s recommendations were helpful and to hear from Delegates of other countries that

this review has improved their understanding of Brazil's competition law and policy. Finally, we want to thank Mr. Jay Shaffer, the author of the report, and the many competition officials whose written and oral contributions to the Forum have been so important to its success.

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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

SUMMARY (cont.)

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.

SUMMARY (cont.)

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.

SUMMARY (cont.)

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

SUMMARY (cont.)

- 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.

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”).¹ 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.² 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 hydrocarbons 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.³ 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.⁴ 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.⁵ 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.”⁶

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.⁷ 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,”⁸ 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.”⁹

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.¹⁰ 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.¹¹

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 afoul 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 1. CADE Decisions in Conduct Cases 2002-2004

Year	Cases Decided	No violation	Violation		Total
			Horizontal	Abuse of Dominance	
2000	39	26	2	11	13
2001	34	18	16	0	16
2002	34	22	11	1	12
2003	23	13	9	1	10
2004	42	24	16	2	18
Total	172	103	54	15	69

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.¹³ 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.¹⁴ 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.¹⁵

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.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.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.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.

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 in that geographic area. 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 an 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 Ultrafertil, a petrochemical company. Ultrafertil’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 Ultrafertil. 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 Ultrafertil 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.¹⁹

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.²⁰

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."²¹ 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).²² In practice, most penalties imposed for failure to file an Article 54 notification relate to transactions that entail some structural realignment among the parties.²³

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 2001.²⁴ 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.²⁵ 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.”²⁶

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 empowers CADE to take any action necessary to undo such damage as may have been caused to the economic order, including the issuance of orders requiring “dissolution, spin off or sale of assets, [and] partial cessation of activities.” 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.”²⁸

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 2. CADE Determinations in Merger Cases 2000-2005

Year	Transactions Reviewed ¹	Approved without conditions	Approved with conditions		Disapproved		
			Structural	Percent of transactions reviewed		Ancillary	Percent of transactions reviewed
2004	618	574	2	0.32	41	6.63	1 (0.16%)
2003	491	484	1	0.20	6	1.22	0
2002	485	474	0	0.0	11	2.27	0
2001	571	559	0	0.0	12	2.10	0
2000	507	490	1	0.20	14	2.76	2 (0.39%)
Total	2672	2581	4	0.15	84	3.14	3 (0.11%)

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).²⁹ 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.³⁰

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 Biommm, a newly-created company. CADE approved the transaction, but barred a contract provision specifying that Biommm 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.

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.

Market Shares (%): All Chocolates

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

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 re-consideration 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.³¹ The commissioner ultimately withdrew his nomination.

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.³²

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 authorised, 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 (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.³³ 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 2004.³⁴

Table 3. Untimely Article 54 Notifications 2000 - 2004

	2000	2001	2002	2003	2004
Transactions reviewed	523	584	518	526	651
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.³⁵ 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).³⁶ 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;³⁷ 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.³⁸ 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 prepares 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 4. Average Time for CADE Merger Analysis

	2001	2002	2003	2004	2005
Transactions reviewed	584	518	526	651	202
Average time for review (days)	85	80	83	125	75

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.

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.⁴¹ 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 USD 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.⁴² A new provision permits fines ranging from BRL 60,000 to BRL 6 million (USD 23,400 to USD 2.34 million) for the submission of false information that leads to an erroneous transaction approval.

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.

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,⁴³ (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.

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).⁴⁴

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.

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.⁴⁵

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).

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.⁴⁶ 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.⁴⁷

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.

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 no 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.

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).⁴⁹ 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).⁵⁰ 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).⁵¹ A determination to close the investigation requires approval by CADE.⁵² 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).⁵³ 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).⁵⁴ The case file, including any recommendation prepared by SEAE, is then forwarded to CADE for action.⁵⁵

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.⁵⁶

Since 2003, SDE has also been developing the leniency program authorised by Article 35-B.⁵⁷ 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.⁵⁹ 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.⁶⁰

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.⁶¹

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.⁶² 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.⁶³ 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).⁶⁴

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. APTCO 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 APTCO 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.⁶⁵ If a supplementary inquiry is undertaken, CADE may employ the investigative powers of Article 35 to obtain the necessary information (Art. 43).⁶⁶ 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."⁶⁷ 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.⁶⁸ 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 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.⁶⁹

Practitioners raise no due process complaints about BCPS procedures.⁷⁰ 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,⁷¹ are not implemented with sufficient care to avoid mistaken disclosures.⁷² 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 review 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 months 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 2000.⁷⁴ 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 5. Timeline in Five BCPS Cases

Case	Investigation commenced	BCPS Status
Airlines	1999	CADE decision -- 2004
Newspapers	1999	CADE decision -- 2005
Lysine	1999	Investigation pending in SDE
Bulk vitamins	2000	Case transmitted to CADE -- June 2005
Generic drugs	2000	Case transmitted to CADE -- August 2003; supplemental investigation ordered by CADE -- February 2005

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 2004.⁷⁵ 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.⁷⁸ 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 4175) (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 8270 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 6. Article 23 Fines Assessed and Collected in Conduct Cases 2002-2004

Year	Assessed (BRL million)	Collected (BRL)	Percentage Collected
2002	2.8	12,770	0.45 %
2003	8.3	620,000	7.46 %
2004	5.6	0	0 %

Source: BCPS, 2005

Table 7. Article 54 Fines Assessed and Collected for Untimely Merger Filings 2002-2004

Year	Assessed (BRL million)	Collected (BRL million)	Percentage Collected
2000	16.3	8.7	53.4 %
2001	9.9	5.7	57.5 %
2002	7.9	4.8	60.5 %
2003	2.2	1.1	50.1 %
2004	3.0	1.4	48.8 %

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.⁷⁹ 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).⁸⁰ 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 filing 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.⁸⁴ 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.⁸⁵ 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.⁸⁶

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 considered 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.⁸⁷ 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.⁸⁸

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)⁸⁹ 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.⁹⁰ 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.⁹¹ 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.⁹² 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:

- (1) 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.⁹⁶ 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.⁹⁷

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.⁹⁸ 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 led 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, focussing 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 collections⁹⁹ 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.¹⁰⁰ 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 8. Trends in Competition Policy Resources – Funds for Non-salary Expenditures (USD million)

	2000	2001	2002	2003	2004
CADE	3.81	3.62	2.09	1.85	2.56
SDE	0.11	3.28	0.74	0.34	1.15
SEAE	0.53	1.95	2.66	3.16	3.42
Total	4.45	8.85	5.49	5.35	7.13

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 9. CADE Salary Expenditures (USD million)

CADE	2000	2001	2002	2003	2004
Salary Expenditures	1.59	1.34	1.11	1.19	0.92

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 10. BCPS Employees – 2000 to 2004

Employees CADE

	2000	2001	2002	2003	2004
Professional	55	32	70	68	85
Support	62	89	66	54	89
Total	117	121	136	122	174

Employees SDE

	2000	2001	2002	2003	2004
Professional	18	33		34	35
Support	10	16	16	16	20
Total	28	49	56	50	55

Employees SEAE

	2000	2001	2002	2003	2004
Professional	60	71	71	71	66
Support	140	148	148	93	94
Total	200	219	219	164	160

Employees CADE, SDE, SEAE Combined

	2000	2001	2002	2003	2004
Professional	133	136	181	173	186
Support	212	253	230	163	203
Total	345	389	411	336	389

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.¹⁰¹ "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.¹⁰² 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 11. BCPS Employee Status

		CADE	SDE	SEAE	Total
Permanent civil servants	DAS	27	16	50	93
	Non-DAS	12	4	52	68
	Total	39	20	102	161
Contract civil servants	DAS	11	20	42	73
	Non-DAS	124	15	16	155
	Total	135	35	58	228
Total		174	55	160	389

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.¹⁰³ 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.¹⁰⁴ 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 Office¹⁰⁵ 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).¹⁰⁶ 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.¹⁰⁷ 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.¹⁰⁸ 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 *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 re-direction 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 12. Trends in Competition Policy Actions 2000 - 2004

	Conduct Cases¹	Merger Cases²
2004: matters presented to CADE	37	511
Matters concluded	32	651
Total sanctions imposed (R\$ million)	5.6	4.2
2003: matters presented to CADE	51	511
Matters concluded	22	526
Total sanctions imposed (R\$ million)	8.3	2.2
	Conduct Cases¹	Merger Cases²
2002: matters presented	31	519
Matters concluded	31	518
Total sanctions imposed (R\$ million)	2.8	6.6
2001: matters presented	30	621
Matters concluded	34	584
Total sanctions imposed (R\$ million)	Data not available	10.1
2000: matters presented	32	668
Matters concluded	39	523
Total sanctions imposed (R\$ million)	Data not available	30.0

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,¹⁰⁹ 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).¹¹⁰

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 Golbo 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.¹¹¹ 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 Telebrasil 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 2002¹¹² and vested with responsibility for regulating freight railway services and interstate and international bus transportation.¹¹³ 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.¹¹⁵ 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).¹¹⁶

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.¹¹⁷ 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.¹¹⁸ 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.¹¹⁹ 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.¹²⁰ 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.¹²¹ 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.¹²² 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.¹²³

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.¹²⁴ 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.¹²⁵

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.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.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 approve 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, *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.”¹³² Similarly, the OECD states that merger reviews “should be conducted, and decisions should be made, within a reasonable and determinable time frame.”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).”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.”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.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.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.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 re-directed 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.

Recommendations for CADE

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.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.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.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.”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.¹⁴³ 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,¹⁴⁴ 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.¹⁴⁵

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.
 21. Joint Directive No. 50, p. 1 n. 1 (Aug. 1, 2001).
 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. See, e.g., "New Commissioner Joins CADE," Global Competition Review (May 11, 2005).
32. 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 "*fumus 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 400million. 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. 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.
45. 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.
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.
 52. From 2000 to 2004, CADE reviewed 127 SDE determinations to close preliminary investigations: 34 in 2000, 32 in 2001, 7 in 2002, 1 in 2003, and 53 in 2004.
 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).
71. SDE Ordinance 849, Ch. VIII (2000), CADE Resolution 12, Pt. II, Sec. 2 (1998).
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).
74. See 2000 Report, p. 194.
75. CADE, in turn, decided the case in July 2005.
76. CADE Resolution 12, Art. 15 (1998).
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 Unimedes 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.

120. CADE: www.cade.gov.br/; SDE: www.mj.gov.br/sde/; SEAE: www.fazenda.gov.br/seae/. SEAE's site also includes materials in English.
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.
127. See OECD, *Recommendation of the Council Concerning Merger Review* (March 23, 2005) [hereafter OECD Merger Review Recommendation] §IA1.2(1), available at: <http://www.oecd.org/competition>; International Competition Network, Merger Working Group, Merger Notification and Procedures Subgroup, *Recommended Practices for Merger Notification Procedures* [hereafter ICN Merger Notification Procedures], § IB comment 1, available at: <http://www.internationalcompetitionnetwork.org/mnprecpractices.pdf>.
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, § VIIC, comment 3; *cf.* OECD Merger Review Recommendation, § ID.
140. See International Competition Network, Merger Working Group, Analytical Framework Subgroup, Discussion Draft Merger Guidelines Workbook [Draft, May 16, 2005], available at <http://www.internationalcompetitionnetwork.org/annualconferences.html>. 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, § VIIC, comment 2.
142. OECD Merger Review Recommendation, § IA.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."

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