

Competition Law and Policy in Brazil



A Peer Review



COMPETITION LAW AND POLICY IN BRAZIL

A Peer Review

-- 2010 --



ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT

The OECD is a unique forum where the governments of 30 democracies work together to address the economic, social and environmental challenges of globalisation. The OECD is also at the forefront of efforts to understand and to help governments respond to new developments and concerns, such as corporate governance, the information economy and the challenges of an ageing population. The Organisation provides a setting where governments can compare policy experiences, seek answers to common problems, identify good practice and work to co-ordinate domestic and international policies.

The OECD member countries are: Australia, Austria, Belgium, Canada, the Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, the Slovak Republic, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States. The Commission of the European Communities takes part in the work of the OECD.

The opinions expressed and arguments employed herein do not necessarily reflect the official views of the OECD member countries.

*The OECD has two official languages: English and French.
This English version of this report is the only official one.*

© OECD / IDB 2010

You can copy, download or print OECD content for your own use, and you can include excerpts from OECD publications, databases and multimedia products in your own documents, presentations, blogs, websites and teaching materials, provided that suitable acknowledgment of OECD as source and copyright owner is given. All requests for public or commercial use and translation rights should be submitted to rights@oecd.org. Requests for permission to photocopy portions of this material for public or commercial use shall be addressed directly to the Copyright Clearance Center (CCC) at info@copyright.com or the Centre français d'exploitation du droit de copie (CFC) at contact@efcopies.com.

Foreword

The Brazilian Competition Policy System (BCPS) was peer reviewed at the 2010 Global Forum on Competition (GFC), held in Paris on 18-19 February. The GFC, a gathering of competition leaders from close to 80 jurisdictions around the world, is a major source of best practices for competition officials.

Peer review is a core element of OECD work. It is founded upon the willingness of a country to submit its laws and policies to substantive reviews by other members of the international community. The process provides valuable insights to the country under study, and promotes transparency and mutual understanding for the benefit of all.

Peer review is also an important tool to strengthen competition institutions. Strong and effective competition institutions in turn can promote and protect competition throughout the economy, which increases productivity and overall economic performance.

This is the second peer review of the BCPS and comes at an important moment when strengthening and streamlining the system is before the Brazilian Congress. The analysis and recommendations of this peer review will hopefully prove useful to this reform process. The first review was held in 2005 in the IDB/OECD Latin American Competition Forum.

The OECD and the IDB, through its Integration and Trade Sector (INT), are delighted that this partnership contributes to the promotion of competition policy in Latin America and the Caribbean. This work is consistent with the policies and goals of both organisations: supporting pro-competitive policy and regulatory reforms which will promote economic growth in LAC markets.

Both organisations would like to thank the Government of Brazil for volunteering to be peer reviewed. We would also like to thank Mr. John Clark, the author of the report, the Examiners (Enrique Vergara, Chile; Mona Yassine, Egypt; and William Kovacic, United States) and the many competition officials whose active participation in the peer review contributed to its success.

Bernard J. Phillips
Head Competition Division
OECD

Carlos M. Jarque
Representative in Europe
IDB

Table of Contents

Executive Summary	7
Introduction	9
1. Competition policy in Brazil: foundations and context	10
2. Substantive issues: content and application of the competition law	10
2.1. Conduct	12
2.2. Mergers.....	27
2.3. Unfair competition and consumer protection	36
3. Institutional issues: structures and practices	37
3.1. The BCPS institutions	37
3.2. Procedures in conduct cases	39
3.3. Procedures in merger cases	43
3.4. Agency resources	46
3.5. International aspects of enforcement.....	50
3.6. Enforcement by the states and private parties	52
3.7. Judicial review.....	53
4. The pending legislation	56
4.1. The BCPS structure	57
4.2. Procedures in conduct cases	57
4.3. Merger review	58
5. Limits of competition policy: exemptions and special regulatory regimes	61
5.1. Telecommunications	61
5.2. Oil and gas.....	62
5.3. Electricity	63

5.4.	Surface transportation.....	64
5.5.	Civil air transport.....	65
5.6.	Health	66
5.7.	Banking	66
5.8.	The omnibus bill for sector regulatory agencies	68
6.	Competition advocacy.....	68
7.	Conclusions and recommendations	72
7.1.	Strengths and weaknesses.....	72
7.2.	Recommendations calling for legislation	74
7.3.	Other recommendations.....	78
Notes	81

Tables

1.	The anti-cartel effort: 2003-2009.....	15
2.	Abuse of dominance cases.....	25
3.	Mergers between 2004 and 2009	32
4.	Distribution of behavioural and structural remedies, 2007-2008.....	33
5.	Complaints	42
6.	Preliminary investigations	42
7.	Administrative proceedings	42
8.	Matters sent to CADE and backlogs, 2006-2008.....	42
9.	Average time for cases in CADE (in days).....	43
10.	Time lapse for cases dealt by SDE and CADE.....	43
11.	Fast track mergers in BCPS	45
12.	Average time of review - All mergers	45
13.	Employment data for CADE, SDE and SEAE	48
14.	Budget for CADE, SDE and SEAE (in BRL millions).....	49
15.	Status of the collection programme and fines collected.....	54
16.	Judicial cases instituted per year.....	55
17.	Court decisions output, 2005-2009	56

Boxes

1.	Recent significant cartel cases	20
2.	AmBev	26
3.	Recent significant merger cases.....	34

Executive Summary

Brazil's modern era in competition policy began with the competition law of 1994, which created the three bodies that form the Brazilian Competition Policy System – BCPS. Improvements since 2003 eliminated overlapping functions, so SDE concentrated on anticompetitive agreements and abuse of dominance while SEAE concentrated on merger analysis.

Cartel investigations were aided by powers to conduct dawn raids and to create a leniency programme. Criminal prosecution of cartels is conducted by federal and state prosecutors, in co-operation with the BCPS.

Merger review was improved by a “fast track” process, so mergers that do not present competitive problems are reviewed and approved quickly. Merger review continues to suffer from the lack of pre-merger notification, though.

Competition advocacy to other parts of government and to regulators is particularly important, and effective, because it is performed principally by SEAE, whose position as part of the powerful Ministry of Finance affords it access to many other government bodies.

The most serious problem confronting the BCPS continues to be its lack of resources, which is compounded by a high rate of employee turnover. CADE had no permanent professional staff. SDE is also chronically understaffed, leading to a large backlog of investigations. Another ongoing problem is judicial review. Appeals to the courts from CADE's decisions are common. Cases take years to make their way through the Brazilian judicial system. The result may be effectively to frustrate the enforcement of CADE's orders during this long appeals process.

Proposals to amend the defects in the 1994 competition law have been made for years, without success. But prospects for reform look more promising now. As of mid-January 2010, legislation to consolidate the BCPS into one agency, impose pre-merger notification and provide the agency with a significant number of new, permanent positions had been approved by one house of the Congress and was under consideration in the second. Still, it had not been accomplished, and there was urgent need to complete the process in the first half of the year, lest other important events, including particularly a national election scheduled for later in the year, push it aside.

.../

/...

This report offers several recommendations for improvement. The most important by far is that the proposed legislation in Congress be enacted. Other recommendations relate to: reducing the backlog in conduct investigations; increasing the use of settlement procedures in both conduct and merger cases, thereby both enhancing efficiency and reducing the number of appeals to the courts; increasing the use of structural remedies in merger cases; strengthening the co-operation between the competition agency and federal and state prosecutors in criminal cases initiated by the prosecutors; enacting proposed legislation that would extend to the competition agency the power to review bank mergers, which is currently in question; developing a stronger competition advocacy capability in CADE and co-ordinating it with SEAE; and continuing to strive for a more effective litigation programme in court.

Introduction

Competition policy in Brazil has a rich and interesting history. The modern era in competition policy began in the mid-1990s, coincident with the country's transition to a market based economy. The newly active competition law enforcement system quickly gained a reputation for professionalism and hard work; its decisions reflected an understanding of competition policy and analysis. It was confronted with several problems, however, many of them rooted in the competition law, which had been enacted in 1994. The competition policy system was made up of three separate agencies, which co-ordinated their activities inefficiently. Investigations proceeded slowly; too many resources were devoted to the review of mergers, the great majority of which posed no threat to competition; little attention was paid to prosecuting hard core cartels, widely understood to be the most harmful of all types of anticompetitive conduct. Perhaps most debilitating, the agencies suffered from inadequate resources and excessive rates of staff turnover.

The defects in the competition law became apparent fairly quickly. There were proposals to amend it as early as 2000, but most were not enacted. Nevertheless, the competition policy system has made steady, even remarkable, progress. It has become more efficient, especially in merger review, permitting it to refocus its priorities toward prosecuting cartels. Its anti-cartel programme is now widely respected in Brazil and abroad. Further progress, however, depends on making changes in the competition law. At the publication of this report it seemed that this important step was about to happen. The legislation, which is discussed in detail in Section 4 below, had been passed by one house of the Congress and was being debated in the second.

This is the second report on competition policy in Brazil prepared as a part of the OECD peer review process. The first was published in 2005 ("2005 Report").¹ The Report contained several recommendations for further improving competition policy in the country, many of which required amendments to the competition law. Those amendments may now finally be enacted. The 2005 Report also made other recommendations that did not depend on new legislation, most of which were adopted. Finally, the report suggested changes to improve the legislation that was then pending in the Congress, and many of those were also accepted.

This report is in the traditional format employed by the OECD in its competition policy peer reviews. It concentrates in particular on anti-cartel enforcement, merger review (substance and procedure) and judicial review of competition cases.

1. Competition policy in Brazil: foundations and context

Brazil's economic policies after World War II were characterised by pervasive government intervention in market operations. Most of the country's largest industrial, transportation, and financial enterprises were state owned. The state controlled prices, and indeed this was done in close co-operation with the private sector; trade associations of enterprises consulted regularly with the government body that controlled prices.² A competition law was enacted in 1962 (Law 4137/62), creating the Administrative Council for Economic Defence (Conselho Administrativo de Defesa Econômica – CADE). CADE was charged with, among other things, preventing "...the abuse of economic power manifested by means of... the complete or partial elimination of competition."³ Because of the pervasive control of the economy by the government, however, the law had little effect.

An economic liberalisation process began in 1990, when the country's President initiated a series of reforms, featuring privatisation, price liberalisation and deregulation. In 1994, in response to a period of hyperinflation, the "Real Plan" was implemented. Its principal features were the introduction of a new currency, which was then pegged to the U.S. dollar (it is no longer so, having been allowed to float in 1999), and tight fiscal and credit policies. As a part of the 1994 reforms, a new competition law was enacted, law 8884/94. The new law invigorated CADE, making it an independent agency, and introduced merger control. Privatisation of state-owned enterprises continued throughout the 1990s. New, independent regulatory agencies for telecommunications, electricity, petroleum and natural gas, surface transportation and air transport were created. Privatisation is not complete, however. The government remains active in some sectors, notably in oil and gas through its control of Petrobras, the dominant firm in that sector, in electricity generation and transmission and in banking.

2. Substantive issues: content and application of the competition law

Competition policy has its foundation in the 1988 Brazilian constitution. Article 173 §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." 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." Article 1 of the competition law reflects these constitutional principles. It states that the law

“sets 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.”

Law 8884, enacted in 1994, remains as Brazil’s competition law. It vests decision making powers in CADE, an independent agency.⁴ CADE consists of a President and six Council members, or commissioners. The President and commissioners are appointed by the President of the Republic and approved by the national Senate for terms of two years. They may be reappointed for one additional term.⁵ The law also assigned important enforcement responsibilities to two other government agencies, the Secretariat of Economic Law of the Ministry of Justice (Secretaria de Direito Econômico – SDE), and the Secretariat for Economic Monitoring of the Ministry of Finance (Secretaria de Acompanhamento Econômico – SEAE). SDE initiates all conduct investigations (anticompetitive agreements and abuse of dominance) and submits reports and recommendations to CADE for decision. SEAE also has investigative powers in conduct investigations begun by SDE, and both it and SDE analyse and submit reports to CADE on proposed mergers. CADE can complement investigations conducted by SDE and SEAE in either conduct or merger cases. Collectively the three agencies – CADE, SDE and SEAE – compose the Brazilian Competition Policy System (BCPS).

The law has been amended three times: in 1999, imposing a merger notification fee, in 2000, giving the BCPS important new powers in conduct investigations, notably powers to conduct dawn raids and to institute a leniency programme, and in 2007, clarifying the procedures for settling conduct cases and authorising settlement in cartel cases. Pending in the Congress is comprehensive legislation that would change the structure of the BCPS and alter its procedures in several ways. Most of the functions conducted by three agencies that now make up the system would be consolidated into CADE. The terms of CADE’s commissioners would be extended from two to four years, without the possibility for reappointment. A new office would be created within CADE to perform the investigative functions now carried out by SDE and SEAE. Premerger notification, requiring the parties to a proposed merger to delay the consummation of their transaction until the completion of CADE’s review, would be instituted. Importantly, CADE’s resources would be augmented by the creation of 200 new, permanent positions in the agency. This legislation is described in greater detail in Section 4 below.

2.1. Conduct

Articles 20 and 21 of law 8884 deal with all types of anticompetitive conduct other than mergers. Unlike the laws of many other countries, Brazil's law does not contain separate provisions dealing with anticompetitive agreements and single firm abusive conduct.⁶ Article 20, the general provision, proscribes

...any act in any way intended or otherwise able to produce the effects listed below, even if any such effects are not achieved ...

- I. to limit, restrain or in any way injure open competition or free enterprise;*
- II. to control a relevant market of a certain product of service;*
- III. to increase profits on a discretionary basis; and*
- IV. to abuse one's market control.*

The article specifically excludes from the violation in item II, however, the achievement of market control by means of "competitive efficiency." The article further provides that a dominant position is presumed when "a company or group of companies" controls 20% of a relevant market; the article provides that CADE may change that 20% threshold "for specific sectors of the economy," but CADE has not done so formally to date.

Article 21 contains a lengthy list of acts that are considered violations of Article 20 if they produce the effects enumerated in Article 20, though the list is not exclusive. The listed practices include various types of horizontal and vertical agreements and unilateral abuses of market power. Cartels are clearly prohibited. Specifically listed are agreements to fix prices or terms of sale, divide markets, rig bids and limit research and development. Enumerated vertical practices (they could be abusive if imposed unilaterally) include resale price maintenance and other restrictions affecting sales to third parties, price discrimination and tying. Listed unilateral practices include various actions to exclude or disadvantage new entrants or existing rivals, including refusals to deal and limitations on access to inputs or distribution channels, "unreasonably sell[ing] products below cost" and charging "abusive prices, or unreasonably increas[ing] the price of a product or service."⁷

In addition to these practices, which are commonly considered competition law violations in other countries, Article 21 lists several others that, as described, are less familiar. Some of these are: "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;" "to abandon or

cause abandonment or destruction of crops or harvests, without ... good cause;” and “to partially or fully discontinue the company’s activities without ... good cause.” These provisions create the potential for inappropriate application of the law, but this has not happened. CADE’s decisions are regularly based upon antitrust concepts now employed in many countries.

The competition law applies to corporations, associations of corporations and individuals.⁸ Businesses are subject to fines of between 1 and 30 per cent of their pre-tax total turnover in the year prior to the beginning of the investigation, but no less than the amount of the unlawful gain from the conduct. Managers of companies in violation may be fined between 10 and 50 per cent of their company’s fine. Note that the fine is to be calculated as a percentage of the respondent’s total revenues, not just those that it derives from the affected or relevant market.⁹ Other individuals and organisations not engaged in commerce (such as trade associations), and therefore not generating revenues upon which a fine can be calculated, may be fined between approximately BRL 6,000 and 6,000,000 (currently about USD 3,500 – 3,500,000).

CADE also has other sanctions at its disposal, including powers to prevent a company from participating in public tenders for a period of up to five years, to require the dissolution of a firm or a partial divestiture of assets and to issue remedial orders for the purpose of preventing recurring violations.¹⁰ It can also impose fines for failure to observe one of its orders and for obstruction of an investigation by various means.¹¹

Guidelines for the analysis of “restrictive trade practices” are set out in annexes to CADE Resolution 20, issued in 1999. Annex I to the resolution contains definitions and classifications relating to anticompetitive practices. It differentiates between “cartels” and “other [horizontal] agreements.” It does not specifically apply a “*per se* rule” to the former, but it implies that a stricter standard applies to cartel conduct. The annex notes that non-cartel agreements may have beneficial, pro-competitive effects, which requires “a more judicious application of the rule of reason.” The annex defines “predatory pricing” as “deliberate practice of prices below average variable cost, seeking to eliminate competitors and then charge prices and yield profits that are closer to monopolistic levels.” This definition specifically requires that conditions exist that would permit the recovery of the initial losses after a successful exclusion of competitors from the market. The annex also defines vertical restrictive trade practices, noting that their principal anticompetitive effects can be to exclude rivals or to facilitate downstream or upstream collusion, but also that such practices can benefit competition in certain instances, thus requiring the application of the rule of

reason. It notes that “vertical restrictive practices presume, in general, the existence of market power in the relevant market of origin...”

Annex II outlines “basic criteria for the analysis of restrictive trade practices.” It describes a series of steps that are to be followed. They include: definition of the relevant market in both product and geographic dimensions, applying considerations of actual or potential substitution by buyers; developing market shares and measures of concentration, using either or both of the CRx and HHI indices; analysis of barriers to entry; analysis of the competitive effects of the practice; analysis of the economic efficiencies likely to result from the practice; and balancing the efficiencies against the competitive harm from the practice, if necessary.

2.1.1. Cartels

By 2000 the BCPS was beginning to focus on prosecuting cartel conduct. It had completed in 1999 what many considered its first true cartel case, that in the steel industry.¹² In 2000 an amendment to the competition law gave the BCPS two important new powers, the ability to conduct dawn raids and to create a leniency programme.¹³ For a few years these new powers were underutilised, however. The BCPS was hobbled by what had been a highly inefficient merger review process. Merger review was slow, even for cases that obviously posed no significant threat to competition, and it occupied too many resources – up to 70% according to some estimates. The BCPS did not have sufficient resources to undertake a vigorous anti-cartel programme, and it also lacked the experience that it needed to use its new investigative tools effectively.

The situation began to change in 2003. The BCPS adopted new procedures that made the merger review process more efficient, freeing resources for anti-cartel work. In that year SDE conducted its first dawn raids and the first leniency agreement was reached. SDE has reconfigured itself to become primarily an anti-cartel unit. In 2007 it established a special group to concentrate on bid rigging and to promote competition in public procurement. In 2009 it created its own computer forensics unit, run by an IT expert and operating sophisticated hardware and software, for the purpose of analysing electronic information obtained in dawn raids and by other means.

In recent years, especially beginning in 2006, the BCPS’ anti-cartel programme has grown steadily (see [Table 1](#)).

Table 1. The anti-cartel effort: 2003-2009

	2003	2004	2005	2006	2007	2008	2009*
Cartel cases opened**	N/A	N/A	5	4	5	3	14
Dawn raids***	7	4	0	19	84	93	24
Sanctions imposed	5	8	10	5	8	6	3
Fines assessed (USD millions)	418	1 833	0	1	2 495	60 485	61 199

* January through September.

** These numbers represent full investigations, or “administrative proceedings,” begun. An administrative proceeding is the third stage in the investigation process at SDE, after “proceedings docketed” and “preliminary investigations.”

*** Warrants issued.

2.1.1.1. The leniency programme

Brazil has an active leniency programme, which is generating applications and cases¹⁴. Its structure resembles those that exist in several other countries. Article 35B of the competition law is the enabling legal authority for leniency agreements. It provides that SDE can enter into agreements with individuals and corporations participating in a cartel that can, depending on the circumstances, either completely excuse the applicant from sanctions or reduce them by one- to two-thirds. The applicant must satisfy the following conditions:

*(i) the applicant is the first to come forward and confesses his participation in the unlawful practice; (ii) the applicant ceases its involvement in the anticompetitive practice; (iii) the applicant was not the leader of the activity being reported; (iv) the applicant agrees to fully co-operate with the investigation; (v) the co-operation results in the identification of other members of the conspiracy, and in the obtaining of documents that evidence the anticompetitive practice; (vi) at the time the company comes forward, the SDE has not received sufficient information about the illegal activity to ensure the condemnation of the applicant.*¹⁵

The degree to which the applicant is excused from sanctions for its cartel activity depends on whether SDE was previously aware of the alleged cartel. Full immunity is available if SDE had no knowledge of the illegal activity; partial leniency of up to two-thirds of the possible fine is available if SDE did have such knowledge. If a fine is imposed, however, it may not

be greater than the lowest fine imposed on any other cartel participant in the case. An agreement with a corporation can be extended to its officers and employees if they also sign the agreement and observe the other conditions described above. A grant of leniency under this programme also excuses the applicant from criminal prosecution for the same conduct under the Federal Economic Crimes Law.¹⁶ It does not address other criminal laws, such as racketeering and fraud, that might apply to this conduct, however, nor does it excuse the applicant from possible liability for damages in a private lawsuit.¹⁷

Article 35 also provides for “leniency plus,” which also is a part of leniency programmes in other countries. An applicant who does not qualify for leniency in one cartel but who discloses to SDE the existence of a second is eligible to receive full leniency for the second cartel and a reduction of up to one-third of the applicable penalty in the first. Finally, while SDE, the principal investigating body in conduct cases within the BCPS, has authority to enter into a leniency agreement on its own, it is up to CADE to make the final decision on the sanction, either excusing the applicant from all sanctions or reducing the amount of the fine, depending on whether SDE had prior knowledge of the conduct.

The BCPS continues to update its leniency programme. Brazil’s programme, like that of some other countries, offers leniency only to the first participant in a cartel to come forward. This can have a strong destabilising effect on a cartel, creating an incentive among the participants to be the first to apply, especially in situations in which there is a new-found fear that the cartel may be discovered. An applicant may not have sufficient information to fully qualify for leniency at the time it first comes forward, however. In 2006 the BCPS created a “marker system”, again like that found in other countries, pursuant to which an applicant can assure its place in the leniency queue simply by making an initial, informal application to SDE, supplying certain basic information.¹⁸ It must perfect its application by supplying more detailed information within 30 days, and it must negotiate a final leniency agreement within six months.¹⁹ In 2008 SDE published a *Model Annotated Leniency Agreement* and *Leniency Policy Interpretation Guidelines* and the BCPS published a full colour booklet for public consumption, *Fighting Cartels: Brazil’s Leniency Programme*.²⁰

Between 2003 and 2009 SDE entered into 15 leniency agreements, and others were being negotiated. Approximately 60% of these agreements were with parties to international cartels, in situations in which the participants had entered into leniency agreements in other countries. Still, there were also some prosecutions of domestic cartels resulting from leniency agreements. Perhaps the most notable of these was a cartel of providers of security guard services, described below. SDE has been especially proactive

in promoting the leniency programme. It sent a letter to 1,000 businesses in Brazil informing them of the programme, which caused several companies to come forward to discuss their eligibility. It also conducted a “roadshow,” in which it held meetings with international law firms with offices in Washington and Brussels informing them of the liability, including possible criminal prosecution, facing foreign executives who engage in cartel conduct that affects Brazilian commerce.

2.1.1.2. Settlement of cartel cases

Article 53 of the competition law permits CADE to reach settlement agreements with respondents in conduct cases, but cartel cases had been specifically excluded by law from those procedures. That changed with a 2007 amendment to the competition law.²¹ A respondent can propose a settlement at any time in the process, whether the investigation is in SDE or at CADE. CADE has sole responsibility for settlement negotiations, however, but SDE can make recommendations to CADE on settlement terms. In 2009 CADE created a special unit whose members handle all settlement negotiations.²² In a case with multiple respondents, a single respondent can settle, while the case continues against the others.

Respondents have only one opportunity to settle. Agreement must be reached within 30 days of initiation of negotiations, with the opportunity for one extension of 30 days. Settlements can be reached either with an admission of guilt or without (*nolo contendere*), at CADE’s discretion, but if the case was initiated through a leniency agreement the respondent must admit guilt. The agreement will contain the amount of the monetary penalty, which must not be lower than the minimum fine fixed by the competition law (1% of the respondent company’s total revenues for the prior year). The agreement may also require other actions by the respondent, such as necessary steps to end the alleged violation or a compliance programme. A settlement extends only to administrative liability. A non-lenieny respondent must deal with federal and state prosecutors on a case-by-case basis.

To date, settlement agreements have been reached in five cartel cases. Three were recent, one involving an international cartel in marine hoses, a second in an international cartel in compressors and a third involving driving schools. In 2007 CADE settled with two companies, also operating internationally, in separate cases in the cement and beef industries.

2.1.1.3. Criminal prosecution of cartel conduct

In a few short years Brazil has developed a programme for criminally prosecuting cartels that places it as one of the most active of all countries in this area. Violation of the competition law is an administrative offence, but cartel conduct is also a violation of the federal Economic Crimes Law.²³ Article 4 II of that law prohibits as a crime: “agreements among competitors designed to fix prices or quantities, divide markets, or control supply or distribution channels.”²⁴ The law applies only to individuals and not to corporations. Violations are punishable by a fine and imprisonment of two to five years. The BCPS does not have authority to enforce the Economic Crimes Law. That falls to federal and state prosecutors (there are 26 states and a Federal District in Brazil). While the Economic Crimes Law is a federal statute, state prosecutors also have jurisdiction to enforce it.

Data on criminal prosecutions of cartels are unfortunately incomplete. The BCPS reports, however, that since the initiative began 34 individuals have been criminally convicted. Most of these were participants in local or regional conspiracies, including particularly retail fuel cartels. Of these, ten received jail sentences, but none of those sentences have been served to date, as all of the cases are on appeal. The BCPS also states that as of late 2009, approximately 100 executives were formally charged with a crime or were under investigation for criminal cartel activity.

The BCPS and federal and state law enforcement officials enjoy close working relationships. A 2002 law allows federal police to assist the BCPS in cartel investigations when the conduct has interstate or international effects.²⁵ SDE and the Department of Federal Police have entered into a formal co-operation agreement, most recently renewed in 2008. The agreement provides for an exchange of information and technical assistance. It creates a Working Group comprising two representatives from each party, whose responsibilities are: “(i) co-ordinating the exchange of information, documents and expertise between the Parties and (ii) setting up a Cartel Investigation Centre which shall use the synergies of the work done regarding anticompetitive conduct...” The police actively assist SDE in its cartel investigations, particularly in conducting dawn raids.

One interesting effect of this co-operation results from the fact that Brazilian criminal law authorises the temporary jailing of individuals (for up to five days, with the possibility for a five day extension) at the time of a search or dawn raid of their premises, for the purpose of preventing the destruction of or tampering with evidence. The BCPS reports that in 2007 30 individuals were jailed in cartel investigations under this provision and the number rose to 53 in 2008. In one case in 2007, involving a suspected retail fuel cartel in Belo Horizonte, Brazil’s third largest metropolitan area,

250 police and BCPS officers participated in dawn raids on 42 companies. Twenty-three individuals were temporarily detained. This power is exercised pursuant to court orders sought by the prosecutor. SDE can suggest that the prosecutor seek such orders, but SDE seldom does so in its investigations. It is more likely to be employed by prosecutors in cases that they initiate independently, described below.

SDE and federal and state prosecutors co-operate closely. When SDE initiates a cartel investigation it routinely asks prosecutors to begin a parallel criminal investigation. Prosecutors are also invited to sign leniency agreements, thereby ensuring that the applicant will not be subject to parallel criminal prosecution. In 2008 the Sao Paulo State Prosecutor's Office created a special unit to investigate cartels and to co-operate with the SDE in joint criminal and administrative investigations. This arrangement became a template for co-operation between SDE and other state prosecutors. There are now agreements between SDE and state prosecutors in 23 states. These arrangements culminated in the "National Anti-cartel Strategy (Estratégia Nacional de Combate a Cartéis – ENACC)," adopted in October 2009 as a part of the second national Anti-Cartel Enforcement Day. Two hundred prosecutors and police officers from different Brazilian states gathered to discuss the implementation of the country's criminal anti-cartel laws. At the end of the event the principal authorities signed the "Brasilia Declaration," dedicated to re-affirming and enhancing the co-operation among these authorities in the anti-cartel programme.

Federal and state prosecutors can initiate competition cases under the Economic Crimes Law independently of the BCPS. While data describing these cases are not readily available, it seems that this practice is fairly common. Prosecutors are not required to notify the BCPS when they begin such cases, but there are increasing efforts to enhance co-ordination between the agencies in these cases through ENACC, described above.

2.1.1.4. Competition advocacy in cartels

The BCPS has been especially active in creating public awareness of its anti-cartel programme. In addition to the full colour booklet published on the leniency programme, noted above, SDE published similar booklets in 2008 and 2009 on "Fighting Bid-rigging," "Fighting Cartels in Trade Associations" and "Fighting Cartels in the Fuel Retail Sector." It commissioned a comic book for children, featuring the characters from the country's most popular comic book series, telling the story of a cartel among lemonade stands.

Box 1. Recent Significant Cartel Cases

2009: Compressors used in refrigeration²⁶

This recent case, which involves an alleged international cartel, was initiated as the result of a leniency agreement with SDE. Thereafter there were simultaneous dawn raids conducted in Brazil, the United States and Europe of suspected cartel participants. More than 60 officers from SDE, the federal police, and federal prosecutors conducted the operation in Brazil. Observers considered the case a milestone in the Brazilian anti-cartel effort. One Brazilian commentator noted: "It was the first time Brazilian antitrust authorities played a major role in an international cartel investigation and possibly the dawn of a new era in global anti-cartel enforcement, but it was also the culmination of a process of steady evolution of antitrust enforcement in the country."²⁷

Three Brazilian subsidiaries of the U.S. appliance maker Whirlpool reached a settlement agreement with CADE under which the company would pay a fine of BRL 100 million (about USD 58.7 million) and six executives would pay fines totalling BRL 3 million (USD 1.8 million). These were the largest fines assessed and paid to date in a cartel case. While the respondents admitted guilt as a result of the agreement, the settlement did not require them to further co-operate in the investigation, a fact that drew criticism from some quarters.²⁸ CADE responds that the BCPS was already in possession of a great deal of evidence concerning the cartel and therefore the possible additional co-operation by the respondents was considered marginal. It opted instead to seek to maximise the fine, for its deterrent effect. The case against other respondents continues.

2008: Sand for construction²⁹

CADE found that four companies engaged in the mining of sand used in construction in the State of Rio Grande do Sul had engaged in a price fixing cartel. Together they had hired a consulting firm to conduct comparative studies on pricing by the parties. It analysed such factors as the distances between the companies' mines and their warehouses (transportation being an important component of the cost of this bulk product), and then recommended prices for each that would minimise the migration of customers among them. Evidence of agreement among the respondents was provided by internal documents, telephone records and oral testimony.

CADE imposed fines of between 10% and 22.5% of 2005 revenues on the four companies, including the consulting firm.

2007: Security guard services³⁰

CADE concluded that 16 corporations, three trade associations and 18 individuals had participated in a long-running bid rigging scheme in the market for provision of security guard services in the state of Rio Grande do Sul. This prosecution resulted from the first leniency agreement entered into by SDE. The evidence of wrongdoing included that supplied by the leniency applicant as well as audio records of telephone conversations and documents collected in dawn raids. The evidence showed that since 1990 the companies had engaged in concerted practices, dividing contracts among themselves and adopting predatory pricing schemes to punish firms that deviated from the cartel rules.

The parties held regular meetings at a trade association's headquarters, in restaurants and even at barbecue parties in order to organise the outcomes of bids for public tenders. The bid-rigging participants attempted to manipulate the requirements that a company had to meet in order to qualify to participate in public tenders. The trade associations and the security guards' labour union collaborated by notifying government officials of labour irregularities in companies that were not part of the cartel.

CADE imposed a fine of 15% of the companies' gross revenues for the year 2002 plus an increase of 5% for the leaders. The managers were fined 15% to 20% of their company's penalty. The fines totalled BRL 40 million (USD 23 million). In addition, the companies were prohibited from participating in government tenders and from engaging in contracts with official financial institutions for a period of five years. This was the first case in which that sanction was imposed.

2005: Crushed rock³¹

This case involved an alleged cartel involving crushed rock, an essential raw material used in civil construction. The respondents included a trade association and 21 member companies, which together controlled about 70% of the crushed rock produced in the State of Sao Paulo. Pursuant to an anonymous tip, SDE carried out a dawn raid of the premises of the trade association in 2003, which was its first under the 2000 amendments to the competition law. The raid was highly productive. It produced documents showing that the respondents regularly met at the association's office, where they maintained pricing data and daily sales data on a computer; in their meetings they set prices, allocated customers, rigged bids on public tenders and created sophisticated enforcement mechanisms that punished members who deviated from the agreement.

The language in some of the documents was especially colourful. The members of the association called themselves "The Group." The Group established a formal mission, part of which was to "organise the market." The participants agreed to "respect [one another's] customers." The Group articulated its "values," which were "integrity, trust, respect and harmony." The cartel set forth specific pricing targets, which were achieved. Prices had steadily declined in the late 1990s until the cartel was formed in 1999. An analysis of prices by SDE showed that by 2001 they had risen by about one-third.

Upon the conclusion of the investigation SDE recommended to CADE that it find the trade association and 18 companies guilty of collusion. CADE did so, fining the companies between 15 to 20% of their total 2001 revenues. There was close co-operation between the BCPS and public prosecutors throughout the case, which led to the institution of criminal proceedings against some individuals. The criminal cases were all settled with the payment of fines.

Some of the respondents in the BCPS proceeding appealed CADE's decision to the courts. CADE's decision has so far been upheld in the lower courts, but the appeals process has still not been concluded.

SDE also created, in March 2008, an e-tool called “Click here to report a violation,” permitting Brazilians to provide confidential tips on suspected cartel activity on SDE’s website. More than 300 tips were received through September 2009, about 70% of which were cartel related. In 2008, a Presidential Decree created an Anti-Cartel Enforcement Day in Brazil to be celebrated on October 8th, the day on which the first leniency agreement was executed in 2003. On that day a campaign was conducted in seven major airports of the country, where 450,000 brochures and other materials were distributed. The second Anti-Cartel Enforcement Day was attended by several senior officials from the Brazilian government, including the President and Vice President, and senior enforcement officials from the United States, the European Commission and Portugal, and featured the gathering of federal and state prosecutors described above.

In July 2009 SDE and the OECD collaborated in a programme called Fighting Bid Rigging in Public Procurement, which took place in five cities. In each city there were two training sessions on detecting and prosecuting bid rigging, one for procurement officials and another for criminal investigators. More than 600 trainees attended. As a part of the bid rigging initiative SDE released its Guidelines for the Analysis of Complaints Involving Public Procurement,³² describing SDE’s methodology for analysing bid rigging and related conduct. SDE has signed co-operation agreements with three other government agencies – the Brazilian Federal Court of Auditors and the Office of the Comptroller General, which conduct audits of government contracts, and the Public Expense Observatory, which focuses on fraud and corruption in government – for the purpose of expanding the anti-bid rigging programme. Finally, at SDE’s behest the Brazilian Ministry of Planning issued in September 2009 a regulation requiring participants in federal public tenders to present a Certificate of Independent Bid Determination (CIBD), stating that they have not engaged in bid rigging. The CIBD was based on a model produced by SDE with assistance from the OECD³³.

2.1.1.5. The anti-cartel programme and the business community

The BCPS’ new emphasis on prosecuting cartels has gained the attention of the business community, especially larger businesses and the corporate bar. Business executives are aware of their potential liability for criminal sanctions, including jail, if they participate in cartels. The potential for large fines for businesses is a driving force in the growing number of leniency applications. Another is the possibility that a contractor could be prohibited from doing business with the government if convicted of cartel conduct.

SDE is praised for its aggressiveness, though some practitioners feel that on occasion it is too aggressive. Practitioners are critical of the use of temporary imprisonment at the beginning of an investigation, described above, but as noted above this remedy is rarely used in SDE investigations. There is criticism of the delays between the opening of a case at SDE, often by conducting dawn raids, and its conclusion. SDE, it is sometimes said, is better at beginning cases than concluding them. SDE is addressing the problem, as discussed below in Section 3.2. It is recognised by all that fundamentally the problem is one of lack of resources at SDE.

Litigation initiated by businesses themselves is another important source of delay, however. In recent years, subjects of investigations have increasingly sought to block investigations in court, on procedural grounds. Businesses also understand that they can delay for a significant time the final imposition of sanctions in a cartel case by appealing CADE's decision to the courts. As discussed in Section 3.7 below, many of the fines assessed by CADE have not been paid because the cases are on appeal. Still, businesses, especially those operating internationally, are increasingly willing to discuss settlement with CADE, principally in order to resolve a case completely and to remove uncertainty. It is said that individuals are still reluctant to consider settlement with CADE, however, because of the potential criminal liability that they face. As noted above, there seems to be increasing co-ordination between SDE and prosecutors for the purpose of removing this uncertainty, at least in the leniency programme.

2.1.2. *Non-cartel horizontal agreements*

The BCPS has considered relatively few non-cartel horizontal agreements. This is due in part to the fact that it classifies as cartels some cases that might be considered as non-cartel cases. As noted above, the *per se* rule is not applicable in Brazil. Thus, in all cases some degree of market power must be shown to exist, though in true cartel cases it seems that only a minimal showing is required.

The BCPS has long been active in health care, where there is an active private sector that supplements the public health service. In 2006 CADE considered four cases involving the issuance of suggested price schedules by associations of health care professionals. One of these was effectively a cartel. A group of anaesthesiologists in the State of Bahia published a schedule that effectively raised their fees to insurers. When an insurer protested, two co-operatives simultaneously cancelled their existing agreements by means of identical letters prepared on the same typewriter. CADE fined the co-operatives a total of USD 94,000.³⁴

SDE has been investigating the use of exclusive arrangements between Visa and its processing network. Originally the major banks maintained their own credit card networks, which eventually evolved into two separate but exclusive networks, one each for Visa and MasterCard. Banks are effectively required to belong to both, as are merchants. As a part of the BCPS' competition advocacy mandate SEAE and SDE, along with the Central Bank, had submitted proposals for reform in the industry, which included eliminating the exclusivity requirements. Recently MasterCard did so, and in December 2009, CADE reached a settlement agreement with Visa in which Visa agreed to lift its exclusivity constraints.

2.1.3. *Vertical agreements*

The BCPS prosecutes very few vertical restraints that are not also considered abuses of dominance. One of these, however, decided in 2008, involved exclusivity agreements between Odebrecht, a construction company, and four major suppliers of hydroelectric turbines, General Electric, Alstom, Siemens and Voith Madeira, that prohibited the turbine companies from participating with other consortia in bidding on a BRL 20 billion hydroelectric concession agreement. After an investigation SDE entered an interim order suspending these arrangements. Odebrecht challenged the order in court, but before a decision was reached it negotiated a settlement with CADE that resulted in the cancellation of the exclusivity agreements. Odebrecht ultimately won the auction, but because CADE's order permitted other bidders to participate, the contract price was significantly lower than it would otherwise have been. The final price was substantially lower than the reserve price, and it was estimated that the total savings for Brazilian consumers over the 30-year life of the concession were approximately BRL 16.4 billion (USD 9.4 billion).

2.1.4. *Abuse of dominance*

The BCPS regularly considers complaints of abuse of dominance complaints lodged by private parties. A significant number of these are ultimately dismissed as non-meritorious. SDE also regularly initiates dominance investigations *ex officio*. The data in the following table relate to cases that reach the full investigation stage.

Several of BCPS' dominance cases have involved Unimed, a physicians' co-op and one of the largest health insurance companies in Brazil. There are Unimed affiliates in almost every city or district in the country. The affiliates, which act independently, contract with local physicians and hospitals for the provision of health care services, and often

these arrangements are exclusive, that is, the providers are not permitted to affiliate with any other plan. It is common that more than 50% of the physicians in a community affiliate with Unimed. The BCPS analyses these arrangements on a city-by-city basis, and where the market share is high CADE forbids the exclusivity arrangements. Between 1994 and 2008 CADE had considered more than 60 of these cases. A second type of dominance case that is fairly common involves sham litigation – the institution of allegedly frivolous lawsuits for the purpose of excluding competitors. In the period 2005-08 SDE initiated a total of nine such investigations in various sectors, including pharmaceuticals and auto parts. All are still under consideration within the BCPS.

Table 2. Abuse of dominance cases

	2005	2006	2007	2008	2009*
Cases opened**	18	13	11	15	22
Violations found	19	3	17	11	7
Fines imposed (USD millions)	0	0	0	0	***205.6

* January through September.

** Administrative proceedings.

*** In one case, AmBev, described below (see Box 2).

Abusive or excessive pricing is considered an abuse of dominance and a violation of Article 20 of the competition law. A special provision of Article 30 of the competition law requires SDE to begin an administrative proceeding (bypassing the preliminary inquiry stage) whenever it is requested to do so by either house of Congress. Congress has regularly made such requests involving possible abusive pricing of pharmaceuticals. Early in the decade SDE opened dozens of these investigations, but they languished in SDE for some time. SDE has made a concerted effort to eliminate this backlog, with the result that in the period 2005-08 CADE considered 55 administrative proceedings of this nature (not shown in the table above). SDE and CADE emphasise applying an economic approach to these cases, and in none of them has CADE found a violation. Indeed, CADE has never found conduct to be an abuse of dominance on the basis of abusive pricing.

In recent years CADE has decided two cases that involved “radius clauses” imposed by large shopping centres on their tenants forbidding the tenant from locating a store within a specified distance from the shopping centre. In both cases the restraint was held to be unlawful and the respondent was required to terminate the clause. The cases tended to turn on market definition, as do many dominance cases. Thus, in one, the relevant market

was determined to be “high luxury regional shopping centres” in certain sectors of Sao Paulo. CADE’s decisions in both cases were appeal to the courts. Lower level courts have upheld CADE, but the appeals continue.³⁵

Box 2. AmBev

The BCPS has a long and interesting history with AmBev, the country’s largest beer producer. AmBev is the product of a merger in 2000 of what were then Brazil’s two largest brewers, Brahma and Antarctica, which controlled approximately 50% and 25%, respectively, of the sales of beer nationally. The merger attracted a great deal of interest. The transaction clearly presented significant competitive problems. There were disagreements within the BCPS on the appropriate remedy. CADE ultimately decided to require the divestiture of one of the lesser brands controlled by the two firms, together with other behavioural remedies designed to promote new entry or expansion by smaller brands. There was some entry, and follow-up studies after the merger suggested that prices did indeed decline, at least in the short run, but AmBev continues to control about 70% of the Brazilian beer market. In recent years AmBev affiliated by merger with several other international brewers (including the largest brewer in Argentina), and today it is a subsidiary of Anheuser-Busch InBev, headquartered in Belgium, the largest brewer in the world.

In 2004 SDE initiated administrative proceedings against AmBev relating to a loyalty programme that it had instituted. The programme awarded points to retail establishments based upon their purchases of AmBev beers, which could be exchanged for gifts. On its face the programme was not exclusionary, but the investigation, which included an inspection that produced important documentary evidence, revealed that in practice AmBev was effectively requiring the retailers to purchase its beers exclusively in order to participate in the programme. In 2009 CADE determined that the conduct was an abuse of dominance; it ordered AmBev to terminate the programme and fined the company 2% of its total 2002 revenues in Brazil. The fine, approximately BRL 353 million (USD 206 million), was the largest ever imposed by CADE.

CADE is currently considering a second case against AmBev. Much of the beer sold in Brazil is packaged in reusable bottles. The bottles have been a standard size (600 ML), allowing the country’s brewers to co-ordinate their recycling (for re-use) programmes. AmBev recently introduced a 630ML bottle, which its smaller competitors claim will raise their costs of recycling. SDE issued an interim order prohibiting AmBev from introducing the new bottle while the case continued. AmBev appealed that order to CADE, which is permissible under the competition law (see Section 3.2 below). CADE partially lifted the order, restricting the geographic area within which AmBev can introduce the bottle and requiring it to create a temporary exchange programme under which AmBev will absorb most of the additional costs. A final decision in the case has not yet been made.

CADE decided four cases in some part of the telecommunications sector in the 2005-09 period. One involved an arrangement between Telemar, a provider of fixed line services, and a telephone directory publishing company. The complainant was an independent directory publisher that had previously enjoyed the same contractual relationship with Telemar. CADE concluded that the new arrangement was simply the result of competition for the market and was not itself anticompetitive. CADE worried that a continuation of the arrangement could result in domination by the new entrant, however, and recommended to SDE that it study in a broader way the relationship between telephone service suppliers and directory publishers.

In two other cases involving Telesp, a fixed line provider in the State of Sao Paulo, CADE found that Telesp had discriminated against an Internet provider and a long distance provider in the terms of access to its network, and ordered that it provide access on a non-discriminatory basis. The fourth telecommunications case involved Globosat, a television programming provider, which had exclusive arrangements with the most attractive sporting events, the most significant of which were football championships. Globosat is affiliated with Globo Group, the largest media group in Brazil, which provides broadcasting, cable and satellite television services. CADE found that the arrangements harmed competition in the market for sports network broadcasting (the upstream market) and in the provision of retail satellite television (the downstream market). Under the settlement with CADE, Globosat was required to relinquish its exclusive rights to some of the events, including the football championships, for a period of three years and to end its exclusive arrangements with the Sport TV channel, the most important sports channel in Brazil.

2.2. Mergers

2.2.1. Substantive rules

The controlling provision in law 8884 relating to mergers is in Article 54:

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 language would appear to include all agreements, not just mergers. In 2001 SEAE and SDE jointly issued a set of merger guidelines, which by their terms apply only to horizontal mergers. The guidelines confirm, however, that Article 54 “also applies to the control of other 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.” The very great majority of notifications submitted, however, have involved mergers.

Article 54 does not contain language specifically setting forth the substantive standard to be employed in reviewing mergers. Paragraph 1 of the article, however, provides that a merger that has the four following attributes may be approved:

1. the transaction “increase[s] productivity; improve[s] the quality of a product or service; [and] cause[s] an increased efficiency, as well as foster[s] technological or economical development;”
2. the resulting benefits of the transaction are “ratably [equitably] allocated” between the merging parties and consumers;
3. the transaction does not eliminate competition in “a substantial portion of the relevant market for a product or service;”
4. the transaction is limited to acts that are necessary to obtain these beneficial effects.

This language 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. This paragraph is considered to provide an efficiencies defence, to be applied only in the case of mergers that are otherwise anticompetitive.

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 and that are “in the public interest or otherwise required to the benefit of the Brazilian economy, provided no damages are caused 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 that present issues of overriding national interest. To date, however, no merger in Brazil has been approved specifically under this provision.

The SEAE/SDE merger guidelines employ traditional merger analysis. They describe five steps in the process: (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 first step, market definition, uses methodology for defining the relevant product and geographic markets that is mostly based on substitution by consumers in response to hypothetical changes in price.³⁶ In step two the guidelines describe threshold levels of market concentration that raise concerns about the possible exercise of market power in either of two ways: by a single firm unilaterally, when that firm has a market share of at least 20%; or through co-ordination of firms in a market in which the four-firm concentration ratio is at least 75% and the resulting firm has a market share of at least 10%. If the market concentration exceeds either of those levels, SEAE will proceed to step three, consideration of market conditions relating to the likely exercise of market power. These conditions include the opportunity for increased imports, conditions of entry, and other factors that may affect rivalry. If after completing step three SEAE continues to have concerns about the competitive effects of a transaction, the analysis proceeds to the consideration of efficiencies that the merger may generate, and ultimately to an evaluation of the net economic effect of the transaction.

The guidelines do not explicitly employ the Herfindahl-Hirschman Index (HHI) as a measure of concentration. CADE and SEAE state that they do use it, however, as a matter of course. The guidelines also do not refer to the failing firm defence, but CADE has also considered it in a few cases, usually rejecting it. Finally, while CADE has not formally adopted the SEAE/SDE guidelines, it treats them as non-binding guidance, and their provisions are often cited in CADE's decisions. Two new sets of guidelines, for horizontal and vertical mergers, are under discussion in the BCPS, and they are expected to be approved in 2010.

2.2.2. *Notification*

Proposed mergers that meet certain minimum size thresholds must be notified to the BCPS. Applicants must also pay a notification fee of BRL 45,000 (USD 26,000). The fees are shared equally between CADE, SDE and SEAE.

Paragraph 3 of Article 54 sets out the notification thresholds. Mergers must be notified that satisfy either of two tests: the resulting company or group of companies "accounts for twenty per cent (20%) of a relevant market," or the transaction "results in gross revenue of BRL 400,000,000" (USD 232 million).³⁷ These criteria have been subject to three criticisms: (1) the revenue threshold seemed to apply to worldwide turnover, giving rise to the possibility that a merger having minimal impact on Brazilian markets would have to be notified. (2) Since it was only necessary that the resulting firm have the requisite market share or total revenues, even very small acquisitions by large firms that already met one of those criteria would have to be notified. (3) The 20% market share

test introduces a subjective element into the notification obligation: market definition. The parties and CADE could disagree in good faith about the definition of the relevant market for this purpose, giving rise to uncertainty about whether a transaction must be notified.

In 2005 CADE effectively eliminated the first problem, decreeing that the 400 million threshold would apply only to revenues derived in Brazil.³⁸ It is still the case that a small acquisition by a firm with revenues already above 400 million must be notified, but these transactions are usually subject to the BCPS' "fast track" procedures, described below, which result in quick approval. The applicability of the market share criterion also has been administratively modified by CADE, which has decreed that it applies only if the transaction causes the share of the resulting firm to exceed 20% or if both parties to a merger operate in the same market and one of them has a 20% share of that market. The third criticism, that the market share test is too subjective, remains, but this effect too has been blunted over time. The number of notifications in which the market share test is met but not the revenue test are few. CADE seldom initiates an enforcement action for failure to notify under the market share criterion.

An important and, many say, notorious feature of the merger notification regime in Brazil is that the notification, while mandatory, need not be made premerger; that is, the parties are not forbidden from consummating their transaction before or during the review of the transaction by the BCPS. (As described fully in Section 4 below, the pending legislation in Congress would impose premerger notification and it would remedy the notification threshold problems described above.) Paragraph 4 of Article 54 requires that the notification must be made "no later than fifteen business days after the occurrence [of the transaction] (emphasis added)." CADE's internal rules³⁹ further define the date on which the 15 day period begins to run as the date on which "the first binding document [is] settled by the Applicants".

This lack of premerger notification has important ramifications for both the procedure and substance of merger review in Brazil. A procedural effect is to lengthen the review process. The BCPS is subject to no formal deadline by which its decision must be made. Also, because the merging parties are permitted to consummate their transaction before the review is completed (absent a preliminary order, discussed below), they lack incentive to speed the process. One result of that is that the parties may be less responsive to requests from the BCPS for information. SEAE, which conducts the principal investigation of notified mergers, complains of this sluggishness in some cases.

Substantively, consummation of the transaction may affect the remedies that are available to CADE should it find the merger unlawful. Specifically,

CADE's ability to prohibit a transaction entirely is complicated by having to undo a consummated merger, a notoriously difficult task. Since 2004, a total of three mergers have been completely disapproved by CADE. CADE does not point to the lack of premerger notification as the primary reason for the small number of disapprovals, however. It says that where possible it prefers to fashion remedies that would permit the underlying transaction to go forward, preserving the efficiencies and scale economies that it says are important to Brazil's economy.

In any case, these infirmities have been at least partially resolved by CADE's use of preliminary orders requiring the parties to adopt certain measures to preserve CADE's ability to order effective relief if the merger turns out to be unlawful. CADE has the power to issue a "precautionary order" for this purpose, authorised in CADE Resolution 45.⁴⁰ The procedures relating to the issuance of these orders are essentially adversarial, however, and CADE's order can be appealed to the courts. In the period 2005-09 it issued 11 preliminary orders in mergers.

CADE can also enter into consent orders to the same effect, which it is using more frequently. Resolution 45 created a mechanism termed "Agreement to Preserve Reversibility of Transaction" ("Acordo de Preservação de Reversibilidade da Operação" or APRO). In the years 2007-09 CADE issued 10 APROs. Typically, preventive orders and APROs impose restrictions or conditions on the acquiring company's freedom to integrate activities, close stores or plants, dismiss workers, terminate brands or product lines, alter marketing, investment, or research plans, or liquidate assets. Both preventive orders and APROs include provisions that specify fines for failure to comply with the restrictions imposed.

The lack of premerger notification has had one other effect on the BCPS merger regime. Because a merger may be consummated before CADE's review is complete, it is in CADE's interest to learn of the transaction as quickly as possible, both to minimise the anticompetitive effects if the merger is harmful and to preserve CADE's ability to order effective relief, should it be necessary. As noted above, CADE's rules define the date that begins the 15 day period within which a merger must be notified, known as the "trigger date." In years past CADE had aggressively interpreted this definition of the trigger date and had instituted a large number of cases seeking fines for failure to make timely notification. (Article 54(5) provides that CADE may levy fines of between BRL 6,000 and 6,000,000 for failure to make a timely merger notification.)⁴¹ That number has dropped since the late 1990s, as both the BCPS and the private sector gain experience in interpreting these provisions.⁴² Still, the number of these cases is high by most standards, as reflected in [Table 3](#) below.

Table 3. Mergers between 2004 and 2009

	2004	2005	2006	2007	2008	2009*
Mergers notified	516	386	411	591	616	306
Approved	574	345	352	490	550	364
Cleared with restraints	43	37	20	37	58	19
Denied	1	0	0	0	1	1
Settled	0	3	1	4	8	3
% of total requiring remedies	7.2	9.7	5.4	7.0	9.7	5.2
Non-timely notification cases opened	18	8	13	24	20	13

* January to September

2.2.3. *The merger caseload in the BCPS*

These data show a decline in the number of mergers notified in 2005 and 2006 from the 2004 level. Much of this decline was due to the decision by CADE to apply the 400 million revenue threshold to Brazilian revenues only. In 2007 CADE issued other rulings that clarified the need to notify in certain specific situations.⁴³ The number of notifications rose again in 2007 and 2008, however. The increase is ascribed to a strengthening of the Brazilian economy in those years and to currency fluctuations that favoured merger activity involving Brazilian firms. The drop in 2009 reflects economic reversals in Brazil and worldwide.

The proportion of notified transactions that require some remedy ranges between 5 and 10 per cent, generally within the range experienced in most countries. Still, the number in some years seems high – as many as 58. A principal reason for this is the relatively high number of mergers that involve non-compete clauses – arrangements in partial acquisitions in which the selling party agrees not to compete with the acquirer in the affected market for a period of time. The BCPS regularly finds these clauses to be too restrictive and orders them to be eliminated or scaled back. Transactions involving non-compete clauses accounted from 40% to 78% of the total in which remedies were imposed.⁴⁴

Another feature of merger review by the BCPS is the relatively high number of transactions in which behavioural remedies – orders requiring the merged entity to provide access to its distribution network, or requiring transparency in pricing, for example – are imposed, as opposed to structural remedies – divestitures of assets or, less frequently, outright denial of the transaction. [Table 4](#) shows the distribution of these two types of remedies for 2007 and 2008. These data do not include orders involving non-compete clauses. Also, it should be noted that in some cases both types of remedies were imposed; those cases are represented twice.

Table 4. Distribution of behavioural and structural remedies, 2007-2008

	2007	2008	Total
Behavioural	8	10	18
Structural	4	8	12

It seems inevitable that behavioural remedies are one result of the BCPS' having to deal with mergers *ex post*. CADE says that it has a preference for structural remedies, but that it is also conscious of the need to preserve the efficiencies that a merger generates, which might not be possible with a structural remedy. In a recent railroad merger, for example, the parties' systems did not directly overlap, but CADE concluded that the transaction would eliminate competition in the transportation of soya, one of Brazil's principal agricultural exports, from western Brazil to alternative ports in Sao Paulo and Santa Catarina. Moreover, one of the merging parties was vertically integrated into soy production, and the transaction could have led to discrimination by the merged company against non-integrated producers. CADE also identified significant efficiencies resulting from the merger, however, that could significantly reduce shippers' costs. CADE and the parties entered into a consent agreement that did not require any asset divestitures but did impose behavioural remedies forbidding discrimination by the merged entity and including certain pricing and service constraints for the purpose of ensuring that the benefits would be passed on to consumers.⁴⁵

Also notable is the use of a mechanism for settling merger cases. Article 58 of the competition law authorises CADE to enter into "Performance Agreements" (TCD), which are agreements with parties on remedies in mergers considered to be anticompetitive. TCDs may contain both structural and behavioural remedies. They have required such actions as divestitures of physical assets or of intellectual property, such as brand names, compliance with performance and / or investment targets, the provision or supply of goods or services to customers or other parties for a specified period, elimination of exclusivity agreements and maintenance of employment levels. CADE's use of TCDs was common in the late 1990s but dropped off between 2000 and 2004. It has picked up again since 2005, as shown above in [Table 3](#).

Box 3. Recent significant merger cases

2009: Ready to drink tea⁴⁶

Coca-Cola agreed with Leão Junior SA, a Brazilian company, to acquire the latter's business in the manufacture and sale of ready-to-drink tea ("mate") and iced tea. Coca-Cola already sold these products in Brazil under the Nestea brand pursuant to a joint venture with Nestle, the owner of the brand. CADE and Coca-Cola negotiated an APRO requiring Coca-Cola to preserve the assets and management of the acquired company while the investigation continued. The transaction was opposed by Coca-Cola's rival, Pepsi-Cola, which also sold these products under its Lipton brand, and by the Brazilian Association of Soft Drink Producers. The case turned on the definition of the relevant product market. Coca-Cola argued that there was a market consisting of virtually all non-alcoholic drinks, including mate, in which Leão was strongest, but not including iced tea, in which Coca-Cola was strongest.

SEAE requested econometric studies from both Coca-Cola and Pepsi-Cola on the substitutability of mate and iced tea. The studies produced conflicting results. Also at issue was whether a tea made from guaraná, a Brazilian berry that is used to make locally popular soft drinks, was also in the relevant product market. It was argued that mate and the guaraná tea were substitutable on both the demand and supply sides. There was some persuasive evidence of supply side substitutability between these two products.

In the end, however, after considering both quantitative and qualitative evidence on the issue CADE determined that the relevant market consisted of the two types of tea and that the merger would be anticompetitive. It permitted the acquisition subject to a requirement that Coca-Cola divest its Nestea operations.

2009: Magazine distribution⁴⁷

The relevant market in this case involved the national distribution of magazines. Some magazine publishers distributed their publications directly to consumers ("direct distribution"). Others used intermediary distributors, who dealt with retail establishments ("indirect distribution"). The merger did not create a problem in direct distribution, but in the national market for indirect distribution it created a monopoly. One of the parties, Abril, was the country's largest magazine publisher, controlling about 60% of that sector, and was integrated vertically into distribution through its distributor DGB, whose share of the indirect distribution market was 70%. The other party engaged in distribution only, in which it held a 30% share.

The analysis of the case turned on the likelihood of entry. SEAE and CADE determined that entry was difficult. A successful national distributor must have sufficient scale and scope; specifically, it must have an adequate mix of publications that would be attractive both to its upstream publishers and its downstream retailers. An important factor in this regard was the vertical relationship between Abril and DGB, which ensured that up to 60% of the country's

magazines would not be available to a new entrant. The BCPS considered a scenario in which the remaining 40% would contract with a new entrant, but it found that this would not be likely, for various reasons. New entry was further complicated by the fact that the arrangements between publishers and distributors had been exclusive and by the need to incur significant sunk costs to achieve entry.

SEAE recommended to CADE that the merger be denied. In one of the few instances in which CADE did not agree with SEAE's recommendation, CADE entered in to a settlement agreement with the parties (a TCD, described above). Among other things, the agreement required actions that would facilitate new entry. DGB was required to divest its physical assets used in distribution in Sao Paulo and Rio de Janeiro, Brazil's two largest markets, and to eliminate the exclusivity provisions in its distribution contracts for a period of ten years. Also there were behavioural provisions in the TCD intended to preserve the autonomous structure of the Abril group's distribution business.

2008: Fibreglass reinforcements⁴⁸

This case involved the acquisition by Owens Corning of the glass fibre reinforcements and composite fabric assets of Saint-Gobain, which had effects in several markets worldwide.⁴⁹

The two firms were the only firms manufacturing fibreglass reinforcements in Brazil. The key issue in the case was the definition of the relevant geographic market. The merging parties contended that it was worldwide, which included manufacturers of these products in China. Both the merging parties and SEAE conducted econometric studies of price movements, comparing movements in Brazil to those in other regions. An interested third party also submitted an econometric study.

CADE concluded that none of the studies was conclusive. It turned to qualitative evidence developed by SEAE. Third party buyers were asked about the viability of China as a source of supply, and they stated that it was not a sufficient alternative for them for reasons of quality and the transit time required. CADE concluded that the merger was unlawful and required the divestiture of Saint Gobain's plant in Brazil.

2005: Iron ore and rail transportation⁵⁰

Vale S.A., (formerly known as Companhia Vale do Rio Doce – CVRD) is the world's second largest mining company, with operations in several countries worldwide, and is the world's largest exporter of iron ore. Vale was formed in 1942 as a state-owned enterprise and privatised in 1997. In Brazil it also controls several railway freight lines and harbour terminal facilities. Since its privatisation Vale has continued to acquire mining assets, both in Brazil and abroad. In the early 2000s it acquired four iron ore mining companies and their associated rail lines in the southeast region of Brazil and a large steel producer, CSN, which also controlled a large iron ore mine.

In the course of the investigation SDE concluded that the acquisitions would have adverse effects in certain iron ore and rail markets and issued a preliminary order imposing certain restrictions on Vale until CADE reached its decision. In 2005 CADE agreed that the transactions were competitively harmful. It approved them on the condition that Vale either divest acquired mining company Ferteco, which before Vale's acquisition was Brazil's third-largest mining company, or renounce its exclusive right of buying the mining production of CSN. The case is notable for the vigorous legal challenges that Vale then mounted. It appealed CADE's decision on procedural grounds, and the case was the first competition case to reach Brazil's Supreme Court. In 2007 the court ruled in CADE's favour, and Vale then launched a second legal challenge, which was also rejected by an appeals court⁵¹.

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). Public prosecutors may bring criminal charges under the statute and 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. There are three components to what is called the “National Consumer Defence System”: (1) a federal agency, the Consumer Protection and Defence Department (“DPDC”), which is part of SDE, (2) state and local consumer protection agencies, (called “Procons”) and (3) non-governmental consumer organisations (NGCOs). DPDC is responsible for overall co-ordination of the system and has various specific responsibilities under the law.

The Procons, located in all 26 Brazilian states, in the Federal District (Brasilia), and in many municipalities, provide specific services to consumers and engage in consumer class action litigation. The NGCOs include several national, state and regional organisations in Brazil. They are 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, NGCOs, 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. The two departments also exchange case referrals and consult on competition advocacy issues that have a consumer protection component.

3. Institutional issues: structures and practices

3.1. The BCPS institutions

Three separate institutions make up the BCPS: SDE, SEAE and CADE. SDE, a part of the Ministry of Justice, is headed by a Secretary and is divided into two Departments, one with responsibility for enforcing 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). As of October 2009 there were 32 professionals and 27 administrative personnel employed in DPDE.

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 programmes (including analysis of prices), and (3) monitoring market conditions in Brazil. As of October 2009 there were 78 professionals and 72 support staff employed at SEAE. SEAE's competition advocacy work is carried out from its offices in Brasilia. Its merger analysis unit has been located in Rio de Janeiro since 2004.

The competition law (Art. 3) establishes CADE as “an independent federal agency,” associated with the Ministry of Justice for budgetary purposes. Its governing body is a Council consisting of a President and six commissioners. The President and commissioners are appointed by the President of Brazil and confirmed by the Senate for a term of two years, and can be reappointed for one additional term. Council members may not be removed except for certain criminal offenses or other malfeasance as specified by law.⁵² As of October 2009 there were 49 professionals and 137 support staff employed at CADE.

In October 2008 CADE underwent an internal restructuring. It created four technical groups, augmenting the regular case decision infrastructure: (a) regulated markets, (b) economics, (c) international affairs, and (d) settlement (plea agreements) negotiations. Each group is supervised by one or more commissioners. The Technical Group on Negotiations is responsible for developing expertise in negotiations. The Group is composed of ten members, all recruited among CADE’s technical and legal staff, and is supervised by one of CADE’s commissioners. Ad hoc committees of three members, which usually include one or more members of the Technical Group, are selected to negotiate settlements and plea agreements. By November 2009 two agreements had been completed using this process and three more were in negotiation.

The International Affairs Group, as the name indicates, is responsible for representing CADE in its many relationships with international organisations and foreign governments. The Technical Group on Regulated Markets has an ambitious agenda. It is recognised that many of CADE’s cases arise in regulated sectors, where specialised knowledge of the relevant markets is essential. It will fall to this group to acquire expertise in these sectors and to assist CADE in its cases when necessary. To this end the group is charged with, among other things, conducting studies of regulated markets, especially as the regulation affects competition within a sector, building relationships with sector regulators and participating in inter-agency discussions in matters of regulation and competition. It is not clear how this new group will interact with SEAE, which already has substantial expertise in these areas.

In September 2009 CADE created the Department of Economic Studies (DEE), into which the Technical Group in Economics, created in 2008, will be integrated. By the end of 2009 DEE was expected to have on its staff four full-time economists, two of whom hold PhD degrees from United States universities. DEE’s principal responsibility will be to provide economic assistance to the commissioners. For this purpose it, together with the Technical Group on Economics, has engaged in a variety of activities, including conducting internal training sessions, participating in international

forums on antitrust economics and in bi-lateral consultations with expert economists from other jurisdictions, evaluating reports by economic consultants, engaging in econometric exercises and the preparation of technical papers on various topics in the field. It has an ambitious agenda for 2010, which includes conducting studies of exclusionary practices, calculation of damages and detection of cartels.

There are two independent legal officers with CADE. One is the CADE Attorney General (authorised by Article 10 of the competition law), who is 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 Council. The Attorney General represents CADE in court. He or she also may render opinions in cases pending in CADE. In 2009 there were a total of 20 people assigned to the Attorney General's office, including eight professionals. In 2009 the Attorney General was given the task of monitoring CADE's decisions for compliance.

The second legal officer is the Public Prosecutor, a representative of the Federal Prosecutor General. Article 12 of the competition law 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's decisions in court and take other judicial action in furtherance of the Prosecutor's statutory duty to protect the economic order. It seems that the role of the Public Prosecutor is principally that of an independent voice within the agency, representing the public interest. The office (there are currently two professionals in this unit) can prepare written opinions on cases before CADE. If it concludes that a decision or action by CADE is legally defective it can challenge the action in federal court. On occasion it has done so, but not in recent years.

3.2. Procedures in conduct cases

SDE can initiate a "preliminary investigation" into a possible violation either *ex officio* or upon a complaint or request of an interested party. SDE has powers to require the subjects of the investigation and other private and public entities to provide information during this phase. On or before the conclusion of 60 days (which may be extended by requests for information), SDE can decide to close the investigation, which must be approved by CADE, or to commence administrative proceedings, which are a more formal stage in the investigative process. The respondent or subject of the investigation is formally informed of the nature of the alleged violation and

is asked to submit a defence thereto. SDE may conduct further discovery and has full information gathering powers at this stage, including the power to obtain the testimony of witnesses. At the close of this phase, SDE will issue a written report containing its findings and recommendations and forward it and the case file to CADE.

SDE can, either *ex officio* or upon the request of the CADE Attorney General, enter a “cease and desist order” (preliminary injunction) at the administrative proceeding stage when it concludes that there are “sound reasons to believe that the defendant directly or indirectly caused or may cause irreparable or substantial damages to the market, or that he/it may render the final outcome of the proceedings ineffective.”⁵³ The order can be appealed to CADE.

SDE is required to notify SEAE of the commencement of an administrative proceeding, and SEAE may elect to provide an opinion to SDE on the matter.⁵⁴ Further, a separate law provides SEAE with powers to investigate possible violations of the competition law.⁵⁵ Accordingly, SEAE may separately or in co-operation with SDE conduct such preliminary investigations. As described below, however, SEAE has sharply curtailed its participation in conduct cases. SEAE has no adjudicatory or enforcement functions under the competition law.

Upon receipt by CADE of the SDE report in a matter, the case is assigned on a random basis to one of the six commissioners, who is designated as the Reporting Commissioner, and to the CADE Attorney General. The law requires that the Attorney General provide an opinion on the case within 20 days;⁵⁶ the Attorney General’s opinion generally focuses on the legal aspects of the matter, but it can extend to substantive issues as well. The Reporting Commissioner must decide whether to institute a supplementary investigation within 60 days of receiving the case. CADE is provided with the same powers as SDE to acquire information. It is rare that a supplemental investigation is begun, however. On occasion, CADE has sent the matter back to SDE for more information. Like the SDE Secretary, the Reporting Commissioner has the power to invoke Article 52 to issue a cease and desist order for the purpose of preventing immediate and irreparable harm. The order is effective immediately but can be appealed to the CADE Plenary and then to the courts.

Upon completion of the 60 day period or the supplemental investigation the case is placed on the CADE trial docket “to be judged as soon as possible.”⁵⁷ The Reporting Commissioner must prepare a written report and a recommended resolution of the case. The Commissioner must provide that report to the other commissioners and the parties not less than five days before the judgment session. The decision of the Council is rendered at a

public meeting, during which the CADE Attorney General and the respondent are accorded an opportunity to participate. SDE and SEAE may also participate and explain their technical opinions in these hearings. The required quorum for the Council is five members and a decision is taken by a majority of those participating. The President is one of the seven voting members and, in the event of a tie, may cast an additional vote.

A strength of this review process is its transparency. Private practitioners voice no due process complaints. Respondents are adequately informed of the charges they face and have sufficient opportunity throughout the process to make their defence. CADE's decisions are made in a public hearing; the proceedings can be followed live, in audio on the Internet. Its decisions are presented in writing and are made public.

There had been complaints from the private bar about the treatment of confidential information. CADE has attempted to address this through its Regulation No. 45, which is a comprehensive formulation of official procedures in the agency relating to the protection of confidential information. The regulation provides that upon a motion by an interested party the Reporting Commissioner or the President may declare information confidential and not available to the public. The regulation lists the types of information that may be classified as confidential, such as revenue, cost and profit and loss information, trade secrets and industrial processes and customer and supplier information. It also lists types of information that may not be considered confidential, such as information that is otherwise public, corporate and ownership structure and lines of business. The proponent of confidentiality has the burden of showing that the information should be protected.

The BCPS is criticised for the time that it takes to resolve a conduct case. It has taken steps to ameliorate the problem that are beginning to bear fruit. An obvious structural problem created by the competition law is the overlap in responsibilities among the three agencies, especially as between SDE and SEAE. Beginning in 2003 those two agencies began to rationalise their work; SDE would concentrate on conduct matters, especially cartels, while SEAE would focus on mergers. The two entered into a formal agreement in 2006 that articulated joint investigation procedures for both merger and conduct cases.⁵⁸ Today the division of responsibilities is almost complete. While the law requires that SDE issue an opinion on notified mergers, it relies heavily on SEAE's analysis for this purpose. SEAE, on the other hand, no longer becomes involved in conduct cases.

The following [Tables 5-7](#) describe the workload at SDE.

Table 5. Complaints

	2004	2005	2006	2007	2008	2009*
Received	163	154	172	120	181	146
Concluded	60	128	131	126	186	143

Table 6. Preliminary investigations

	2004	2005	2006	2007	2008	2009*
Opened	33	32	10	19	76	85
Concluded	15	29	11	50	76	41

Table 7. Administrative proceedings

	2004	2005	2006	2007	2008	2009*
Opened	36	18	17	16	18	36
Concluded	29	37	8	34	58	19

* Through September

For years there has been a backlog of matters in SDE, and it had been growing. In recent years SDE has made a concentrated effort to address it. Note that until 2007 in each of the three investigative stages above, there were usually more matters begun than concluded. That trend was reversed in 2007 (see [Table 8](#)). While it seems to have resumed in the first three quarters of 2009, SDE has made progress in reducing its backlog.

Table 8. Matters sent to CADE and backlogs, 2006-2008

	2006	2007	2008
Matters sent to CADE*	21	90	134
Backlog*	396	341	300

* Includes both preliminary investigations and administrative proceedings

Data on the length of time that it takes to conclude a matter in SDE are not fully available and could be somewhat misleading. The average total time in SDE for investigations that reach the administrative proceeding stage has varied between two and six years. Moreover, the average has been increasing in the past few years. One reason is that respondents are resorting more to litigation over procedural matters. In addition, the increase may be the result, at least in part, of SDE's effort to reduce its backlog. As it resolves some of the oldest cases on its books the effect is to raise the average for all cases in that year. Still, some matters remain in SDE for years. One possible obstacle in this regard is the requirement in the law,

described above, that CADE approve decisions by SDE to close preliminary investigations and administrative proceedings without taking further action. Those of course are the results in a substantial majority of matters. This procedure consumes resources both in SDE, which must prepare a report, and in CADE, which must formally approve each decision to close. In any case, it seems that the fundamental reason for this persistent backlog at SDE is a shortage of personnel, which is discussed further below. Of the three agencies, it appears that the resource problem is most acute at SDE.

CADE has also focused on reducing the time required to complete its cases, with positive results.

Table 9. Average time for cases in CADE (in days)

2005	2006	2007	2008	2009
453	426	261	268	409

CADE concludes that the increase in 2009 resulted from SDE having sent more cases, and of higher complexity, to CADE that year in SDE's effort to reduce its backlog. In any case, it can be seen that conduct cases can take up to a year or more to be finally decided in CADE.

The following table shows the total elapsed time in SDE and CADE for four of the five conduct cases, three cartels and one dominance case, described above in Boxes 2 and 3. The fifth case, the compressors case described in Box 2, is still ongoing. One party entered into a settlement agreement with CADE. The agreement was reached approximately seven months after the case was opened at SDE.

Table 10. Time lapse for cases dealt by SDE and CADE

	Time at SDE (in days)	Time at CADE (in days)	Total
Sand for construction	479	359	838
Security guard services	1 066	355	1 421
Crushed rock	493	230	723
AmBev (loyalty programme)	1 031	861	1 892

3.3. Procedures in merger cases

Article 54 of the competition law sets forth the procedures for the review of notified mergers. The notification is to be made to SDE, which promptly supplies copies to SEAE and CADE. SEAE must within 30 days provide a technical report to SDE, which must, within 30 days of receipt of

the SEAE report, provide a recommendation to CADE. The SEAE and SDE recommendations are made public, with confidential information redacted. At that point the files are transferred to CADE, which must render a decision within 60 days. CADE is not in any way bound by the recommendations of SEAE and SDE. If SEAE and SDE fail to meet their statutory 30 day deadlines there are no legal consequences. If CADE does not issue a decision within its 60 day period, however, the merger is deemed to be approved. Thus, 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 the running of the statutory periods is suspended from the time of the request until the information is supplied.

Resolution 15, the implementing merger regulation, was adopted in 1998. The resolution introduced a “two stage” process involving an initial notification form (attached as Exhibit I to the resolution) and a second form (Exhibit II), requiring substantially more information if it is determined that a supplementary investigation is required.⁵⁹ As practice has developed, however, if a merger is sufficiently complex to warrant a “second request” for information, 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.

An early criticism of the BCPS merger review process was that it took too long, especially as to mergers that on their face presented little or no reason for concern under the law. This was, at least in part, an inevitable consequence of the fact that premerger notification is not required, as discussed in Section 2.2.2 above. Nevertheless, an important achievement of the BCPS in recent years has been the implementation of a “fast track” procedure for these “easy” mergers. It began in 2002, when SEAE and SDE informally adopted a streamlined procedure for simple cases, in which each would prepare a simplified short form report within 15 days. The procedure was formalised in 2003 by means of a joint ordinance⁶⁰ that set forth criteria for the selection of mergers for the fast track procedure. In 2004 the two agencies began considering notified mergers simultaneously and sending a joint report to CADE. For its part, CADE streamlined its procedures; more frequently it adopted the SEAE/SDE report as its own, instead of creating a new one.

In 2006 SEAE and SDE issued Joint Ordinance No. 33, which further institutionalised the co-operation between the two agencies and shifted more of the investigative work to SEAE. Most recently, in March 2009 the BCPS made further refinements to its fast track procedure in a formal agreement

among the three agencies and the Attorney General. The reports in such cases had averaged five to seven pages in length. An electronic report form was created, resulting in reports that now are as short as two pages. SDE now usually adopts the SEAE report as its own. In CADE the Attorney General's office had regularly provided its own recommendation in cases, including mergers. The 2009 agreement provided that the Attorney General would make such reports only in limited circumstances, usually when some legal or procedural question arose. At CADE the commissioners now cast their votes on all fast track mergers before them at the same time; if there is no disagreement, all are approved at once.

The result has been steadily decreasing periods required for review of these transactions. It is not uncommon for fast track mergers to be approved in 30 days or less.

These reductions in fast track merger periods, coupled with some reductions in processing time under "ordinary" procedures have brought about substantial declines in the average time of analysis for all mergers.

Table 11. Fast track mergers in BCPS

	2005	2006	2007	2008	2009*
Fast track as % of total	n/a	68%	68%	65%	63%
Days in SEAE	n/a	17	15	20	21
Days in CADE	56	45	43	42	35

* Through September

Table 12. Average time of review - All mergers

	2005	2006	2007	2008	2009*
Days in SEAE/SDE	161	120	105	104	135
Days in CADE	81	64	48	50	45
Total	242	184	153	154	180

* Through October

3.3.1. *The business community and the BCPS merger process*

Private practitioners uniformly praise the BCPS for its new fast track procedures. There are some complaints that investigations of non-fast track mergers still take too long. Of course, as noted above, merging parties lack the incentives to speed the process that they would have in a premerger notification regime. For its part, SEAE complains that sometimes the parties do not fully disclose their analysis until after SEAE presents its report to CADE.

As with conduct investigations, practitioners have no due process complaints; they consider the process sufficiently transparent. There are some complaints, however, that the settlement process is not sufficiently flexible. Settlements will become increasingly important, especially if premerger notification is adopted. CADE has taken steps to regularise its negotiation procedures, as discussed above. Finally, practitioners respect the merger analysis conducted in SEAE and CADE as competent and professional, though it is also said that the quality of the work at CADE is adversely affected by the high rate of turnover there, both at the Council and staff levels.

3.4. Agency resources

3.4.1. Personnel

A notable feature of Brazil's federal personnel system is that a significant number of its employees are hired on a contract basis, and thus are considered to be temporary employees. The number of contract employees is especially high in non-professional support positions. Brazil also has a permanent civil service, however. Some of these employees are qualified in particular careers, which include a classification known as “*gestores*” (Specialists in Public Policy and Management) and another titled Analysts of Finance and Control (AFCs), who are assigned to the Ministry of Finance.⁶¹ These professionals must take and pass a rigorous examination. They can, and often do, transfer among the many ministries and offices in the government. The most capable ones are in demand throughout the government, and offices compete for their services in various ways.

Overlaying this permanent/temporary structure is the “DAS” system. DAS is an acronym for “Direção e Assessoramento Superior,” which translates as “high level management and advising.” DAS authority comes in seven grade levels and was originally designed as a mechanism for hiring non-permanent contract employees to serve as managers. Over the years, the lower DAS grades have come to be used not only to hire non-permanent staff personnel but to supplement the salaries of permanent employees as well. Permanent employees who hold a DAS position receive, in addition to the salary associated with their civil service position, a portion (in most cases 60 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 attract and keep junior-level permanent staff. The Ministry of Planning 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.

All three of the BCPS agencies suffer from a shortage of qualified professional staff and high turnover. At CADE the turnover problem has been especially acute. The 1994 competition law provided for the creation of a permanent staff at CADE, but it was never done. Until 2006 CADE had no permanent positions assigned to it. All of its professionals were either DAS contract employees or were permanently employed at other government agencies and assigned to work at CADE. Staff turnover was high. The turnover was exacerbated by the fact that many of the professionals were assigned to a specific commissioner. The commissioners' term of office was, and continues to be, short – only two years with the possibility for one re-appointment. When a commissioner left office his or her staff usually departed too. The average tenure of a CADE professional has been about three years. This has obvious detrimental effects on the “institutional memory” at the organisation. The legislation pending in Congress, described in Section 4 below, directly addresses these problems.

In 2006 CADE received authority for 27 permanent positions (in late 2009 25 of these positions were filled).⁶² While these positions accounted for less than half of CADE's total civil service employees, the situation there has improved. In years past, many of the professionals who worked there had no special interest in the field, and were ready to move on if an opportunity presented itself. Today, those who occupy CADE's permanent positions have affirmatively selected CADE. They say they enjoy the work, and the prestige that accompanies it. This trend is instructive of what could happen at the agency if the legislation before Congress, which would authorise 200 permanent positions at CADE, is enacted, as discussed below.

SDE, as noted above, has a chronic backlog in investigations, and the perception is that it still takes too long to complete complex investigations. In recent years the agency has focused on reducing its backlog, but it seems that real progress can be made only by augmenting its staff. SDE is making a concentrated effort to attract and retain competent *gestores*. It does so, in part, by complementing their civil service salaries with DAS contracts. One result of this programme is to hold down the total number of employees, as better qualified ones are paid more, but the agency has determined that in the long run it will benefit from having a motivated, permanent staff. Equally, SDE is stressing the qualitative aspects of the work there, as at CADE. In Brazil as in all countries, competition agency professionals find anti-cartel work interesting, even exciting. SDE has remade itself into an anti-cartel unit, one result of which will be to improve its ability to attract and retain good employees.

Table 13 shows employment data for the three agencies (in person years).

Table 13. Employment data for CADE, SDE and SEAE

CADE					
	2005	2006	2007	2008	2009
Professional	51	54	51	48	49
Support	127	111	113	138	137
SDE					
	2005	2006	2007	2008	2009
Professional	35	37	34	28	32
Support	32	35	35	48	27
SEAE					
	2005	2006	2007	2008	2009
Professional	67	80	78	77	78
Support	101	85	77	67	72

Unlike CADE and SDE, whose professional staffs have remained constant in size in recent years, SEAE enjoyed a 16% increase between 2005 and 2009. More of these were civil service employees, as opposed to DAS, and more were specifically assigned to SEAE, as opposed to being temporarily assigned from another government agency. As noted above, SEAE has made great gains in efficiency in its merger review programme.⁶³ Its substantive analysis in mergers is also considered to be competent. The agency reports that for the past three years 99% of its recommendations have been accepted by CADE. Still, staff turnover at SEAE is high. SEAE reports that in 2008 alone it lost 35% of its professional staff (27 of 77), who had to be replaced. SEAE attributes this to the fact that the staff positions have not been created specifically for the agency, that is, requiring qualifications that correspond more closely to the mission of the agency. (The same is true at CADE and SDE.) Most of the professionals at SEAE are qualified either as experts in public policy and governmental management or financial analysts. As such, they are more ready to consider positions at other government agencies when they become available.

The positions shown for SDE are all devoted to its competition policy function. Many in the positions shown for SEAE work in some aspect of its comprehensive advocacy function, described in Section 6 below, and not in competition law enforcement. In any case, the total of 339 people working in competition policy in the three agencies is small for a country of Brazil's size.

3.4.2. Budget

CADE's budget structure differs from those of SDE and SEAE because CADE is an independent body, while the others are part of government ministries. As an independent agency CADE is responsible for some expenses that the others are not because it must pay for building rent, telephone service and other support services that are centrally administered in the ministries. CADE's budget comes from merger notification fees and government allocation. SDE and SEAE also share the notification revenues. SDE is mostly dependent on this revenue, while SEAE also receives a budget allocation from the Ministry of Finance as well as the proceeds of a fee paid by applicants for authorisation to conduct promotional lotteries. Because most of CADE's professional employees are assigned from other government agencies, CADE is not accountable for their salaries in its budget. As noted above, some permanent staff are now directly assigned to CADE, which pays their salaries and also the salaries of contract personnel. In contrast, personnel expenses are not part of the budgets of SDE and SEAE, with the exception of some temporary support personnel at SEAE.

Table 14 shows the budgets for the three agencies (in BRL millions). The data for CADE include some salary expenses, but not all, as explained above, while the SDE and SEAE data do not include salaries. The SDE data are for the Competition Division only. SDE's numbers may be somewhat understated, however, as the Competition Division also has some access to other parts of SDE's overall budget, and some of its functions, such as information technology and press services, are financed at the Ministry level.

Table 14. Budget for CADE, SDE and SEAE (in BRL millions)

	2005	2006	2007	2008	2009
CADE	13.5	10.4	10.3	11.9	13.5
SDE	4.2	2.4	1.8	2.0	1.7
SEAE	8.4	8.4	11.4	12.7	7.3

CADE's budget is also supplemented by grants from the World Bank. The grants, which are part of an umbrella agreement between Brazil and the World Bank, are for special projects, such as the creation of an electronic system for monitoring work flow. The grants are not insubstantial, and have amounted to as much as 20 per cent of CADE's total funding.

3.5. *International aspects of enforcement*

Article 2 of the competition law explicitly incorporates the “extraterritorial effects” test into Brazilian competition law. In this regard, the decision in 2005 by CADE to interpret the BRL 400 million merger notification threshold as applying to revenues derived in Brazil only made the law more consistent with that test. Before that change, it was necessary to notify mergers that had almost no effect in the country. In other respects, in BCPS proceedings foreign firms are treated no differently than domestic firms. The BCPS routinely takes into account in its analyses the impact of international trade. In its merger cases it regularly considers imports or the possibility of them when deciding on market definition, market shares and competitive effects.

The BCPS has entered into bi-lateral co-operation agreements with the United States (2003), Argentina (2003), Portugal (2005), Canada (2008), Chile (2008), Russia (2009) and the European Commission (2009). It entered into a new agreement with Portugal in 2010. The agreement with the European Commission was signed during Brazil’s Anti-cartel Enforcement Day in October 2009, described above in Section 2.1.1.4. That agreement was preceded by a conference on trade and competition involving representatives from the two jurisdictions, held in May 2009. In 2009 the BCPS entered into two memoranda of understanding providing for technical co-operation within MERCOSUR. The BCPS regularly engages in bi-lateral training and consultations with competition officials from other countries. In November 2008 three representatives from the USFTC and DOJ came to CADE to provide a course on premerger notification procedures and in September 2009 two economists from USFTC presented a course on econometrics, with the participation of CADE’s Department of Economic Studies.

BCPS professionals have participated in courses given by experts from the United Kingdom, by the Spanish competition authority, in a course on conducting negotiations at Harvard University for members of the Technical Group on Negotiations in CADE, in a course on regulation at George Washington University in the U.S. and in traineeships abroad at USDOJ and FTC, at DG Comp and at the Canadian Competition Authority. CADE also provides partial funding for language courses for its staff. These co-operative arrangements have borne real fruit. Recently, as described above in Section 2.1.1.3, Brazil, the United States and the European Commission participated in simultaneous dawn raids in those jurisdictions, leading to the successful prosecution in the compressors case.

The BCPS is not only a recipient of technical assistance, however; it is also a provider. In 2006, SDE and CADE consulted with El Salvador, which

had just enacted its first competition law, on anti-cartel techniques. It has also shared its anti-cartel expertise with Chile and Argentina. It assisted Chile's competition agency, the Fiscalía Nacional Económica (FNE), in its effort to convince legislators to enact a leniency programme. In June 2009 two of CADE's commissioners accepted invitations to visit Paraguay to participate in a series of public discussions on a draft competition bill currently in Paraguay's Congress, which would be Paraguay's first. The BCPS is also working with UNCTAD in providing technical assistance to other competition authorities in Latin America. Finally, the BCPS is working with the government of Angola on an informal co-operation arrangement in which the BCPS would assist that country in drafting its competition law and in capacity building.

Also in 2009 the three BCPS agencies created a trainee programme for enforcement officials from Latin American countries, in which professionals spend a month at one of the agencies. The programme takes place twice yearly. The first of these was in July 2009, when CADE, SDE and SEAE hosted representatives from the competition agencies of Chile, Argentina, Peru and El Salvador. The second, in which representatives from eight Latin American countries participated, was held in January 2010. The BCPS was successful in obtaining funding for the travel and subsistence expenses of its foreign trainees from the Brazilian Co-operation Agency (ABC). It is currently in negotiations with the ABC on a memorandum of understanding that would regularise this arrangement.

Brazil is also active in various international forums. It is an observer in the OECD Competition Committee, where it participates actively in all meetings and discussions open to non-members, and participates actively in the annual OECD Global Forum on Competition as well. It and Chile were the first to participate in the OECD's programme to reduce bid rigging in Latin America, described above in Section 2.1.1.4. The BCPS is also active in the ICN. CADE is co-chair of the ICN Steering Group and is also co-chair of the Agency Effectiveness Working Group. It is also a lecturer in the ICN Support System which is currently providing support to the Vietnam Competition Authority. SDE, in turn, is co-chair of the ICN Cartel Working Group Sub-group 1. The BCPS will participate in the WIPO Project on Intellectual Property and Competition, scheduled for the years 2010-2011, and will host the first regional conference organised under the Project, for Latin American countries and the Caribbean, in 2010 in Rio de Janeiro. The BCPS also participates in UNCTAD (the BCPS will host a 2010 UNCTAD seminar), the IDB/OECD Latin American Competition Forum, the Ibero-American Competition Forum, the BRIC (Brazil, Russia, India and China) International Conference, the International Bar Association, the American Bar Association, the annual Fordham conference and the Global Competition Review.

Finally, the BCPS, mostly through SEAE, plays an active role in Brazilian trade proceedings. SEAE participates in discussions in the Chamber of Foreign Trade (Câmara de Comércio Exterior – CAMEX). CADE also participates in CAMEX as an observer. CAMEX is part of the Government Council of the Presidency of the Republic of Brazil, and its mission is to co-ordinate activities and policies relating to foreign trade, including tourism. CAMEX is chaired by the Minister of Development, Industry and Foreign Trade and includes as its members the Ministries of Finance, Civil Matters, External Relations, Agriculture and Planning. SEAE is invited to most of the technical discussions in CAMEX, including those involving tariffs. CAMEX is the forum where the interaction between trade and competition takes place.

SEAE also has an advisory role in antidumping and unfair import competition proceedings. Complaints from private parties alleging unfair imports are investigated by a department in the Ministry of Development, Industry and Foreign Trade, which, after receiving comments from interested parties and other government agencies, transmits its recommendation to CAMEX for decision. SEAE participates with another secretariat in the Ministry of Finance in formulating the ministry's recommendation in these cases. SEAE's role in this regard is to address the competitive effects from the imposition of trade policy duties, which is a topic not ordinarily considered by the investigating agency. SEAE has had some notable successes in such cases. In 2005, for example, it persuaded CAMEX to terminate antidumping measures affecting the Brazilian insulin market, after investigating a merger that had occurred in that market. It also persuaded CAMEX to suspend certain antidumping measures in cement as a means of promoting competition in cement in the north of Brazil. Also, CADE and SDE have, on occasion, made recommendations to CAMEX on trade matters.

3.6. *Enforcement by the states and private parties*

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. 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 the competition law, however, private parties may file their own suits in court for damages arising from anti-competitive conduct. There are no comprehensive data available on the number and frequency of private antitrust actions in Brazil. SEAE conducted one unofficial study, however, that showed a significant increase in such cases between 2005, when about 30 such cases were recorded, and 2008, when there were

about 150. These were cases only in the federal and state courts of appeal, and they tended to be concentrated in certain geographic areas and in the financial services and retail fuel sectors. Also, they were not limited to cases filed pursuant to Article 29 of the competition law, but included others, for example filed under the Consumer Protection Code.

There are two possible types of private collective actions. One is a “public civil action,” which may be initiated by consumer organisations, public prosecutors, unions or other public bodies. Its purpose is to remedy collective or diffuse interests of the public. Plaintiffs may not obtain money damages, but defendants may be ordered to pay damages to a public fund as redress.⁶⁴ A second type of collective action is one for defence of “homogeneous individual rights.” These are class actions to obtain injunctive relief and money damages. As with public civil actions, several types of public and private entities have standing to bring such cases. Such a case was successfully brought by a public prosecutor in the state of Rio Grande do Sul in 2007. After completing a criminal proceeding involving a cartel in the retail fuel market in which five defendants were sentenced to jail terms of 2 ½ years, the prosecutor recovered money damages on behalf of consumers harmed by the cartel.

3.7. *Judicial review*

The BCPS increasingly recognises that Brazilian courts are a critical part of the competition law enforcement process. In competition cases respondents are increasingly willing to challenge the BCPS in court, both with interlocutory motions while an investigation or case is pending and with appeals after a final decision by CADE. The principal effect of this propensity to litigate in competition cases has been delay. Until recently, the great majority of CADE’s orders in conduct cases had not been enforced because of judicial appeals. Moreover, cases of all kinds progress slowly through the Brazilian court system. It is not uncommon for a case to take ten years or more. In 2006 the BCPS confronted the problem, and it has achieved some success, described below, but the underlying problems remain.

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 BCPS agencies must be filed before the court located in Brasilia. The first instance judge has authority to adjudicate most claims, and may also conduct evidentiary proceedings to supplement the factual record. The second level of appeal in the federal system is the Court of Appeals for the geographic region in which the initial judicial decision was rendered. Appeals from the regional courts of appeal go to the Superior Court of

Justice (STJ). 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.

In Brazil the principal of *stare decisis* – the doctrine in common law systems that gives precedential effect – in some cases binding – to prior decisions in the same or higher court – is not formally applicable. Formerly judges were theoretically completely independent and could virtually ignore higher court decisions. That has changed to some degree. Higher court decisions have some precedential effect, especially on constitutional issues. Also, Brazilian courts have traditionally declined to review the merits of decisions by specialised tribunals such as CADE, on the theory that courts of general jurisdiction are not qualified to do so.

Nevertheless it seems that courts are increasingly willing to consider the merits of CADE's decisions and those of other specialised tribunals, sometimes under a theory of abuse of power, or when it is determined that a tribunal's decision is fundamentally at odds with the purpose or goals of the underlying statute. In any case, respondents in BCPS cases regularly challenge the BCPS in court on due process and constitutional grounds.

CADE has achieved notable success in the past few years in one aspect of its activity in court – the collection of fines. In 2006 the CADE Attorney General undertook a review of the status of the fines that had been imposed in conduct cases and it determined that few had been paid. CADE invoked a procedure under Brazilian law that provides for unpaid fines to be converted into "federal collectible debt," which can then be collected in court. The effort produced immediate results.

Table 15. Status of the collection programme and fines collected

	2005	2006	2007	2008	2009*
Fines placed in collection programme (in USD millions)	0.8	50.0	280.6	63.0	15.1
No. of debtors placed in collection programme	14	92	101	95	35
Fines collected (USD millions)	1.4	6.2	16.0	37.1	21.9

* Through September

The number of fines and debtors placed in the collection programme declined in 2009 because the backlog had been mostly eliminated (see [Table 15](#)). In part, the much higher amount of fines collected in 2008

resulted from the fact that two cases were settled, each involving significant fines. Fines are paid by the parties to the Federal Fund for the Defence of Collective Rights, managed by an inter-ministerial commission (in which SDE, SEAE and CADE participate), and are applied to various public projects, including those for consumer, environmental and cultural purposes.

A second part of the Attorney General's more aggressive stance on fines had to do with the fact that when respondents had appealed CADE's decisions to the court of first instance they were often successful in obtaining an injunction against the enforcement of CADE's order. The fines remained unpaid while the case wound its way through the courts, in spite of specific provisions in Articles 65 and 66 of the competition law requiring appellants to deposit their fine with the court or to post a bond guaranteeing payment if they were ultimately required to do so. The Attorney General began successfully arguing to the court that such a deposit was necessary. This has the salutary effect of reducing the incentives for respondents to appeal, if only to avoid paying their fines.

In other respects, the BCPS has a significant caseload in court. Sometimes respondents pose legal challenges during the investigation phase. It is not uncommon, for example, for respondents in dawn raids to seek a judicial order suppressing the evidence on grounds that the search was unlawfully conducted. SDE lawyers have responded quickly and forcefully in these suits. Their rate of success has been high. As a result of SDE's efforts to counter these tactics, the number of these suits has declined substantially; indeed, in early 2010, none were outstanding.

Table 16 shows CADE's litigation case load, which is very heavy indeed.

Table 16. Judicial cases instituted per year

2000	2001	2002	2003	2004	2005	2006	2007	2008	2009*
93	111	186	180	162	193	240	480	338	132

* Through September

CADE attributes some of the increases in 2006-08 to its pro-active effort to collect unpaid fines. The number of those lawsuits declined in 2009, as explained above, and CADE also concludes that part of the 2009 decline can be attributed to its success in persuading courts to require respondents to deposit their fines or to post a payment bond, which has reduced incentives to appeal.

CADE has enjoyed a good rate of success in court, as shown in Table 17.

Table 17. Court decisions output, 2005-2009

	2005	2006	2007	2008	2009	Total
Favourable decisions	8	31	54	49	10	152
Unfavourable decisions	6	14	10	9	5	44
Per cent favourable	57%	69%	84%	84%	67%	78%

Still, CADE understands that it faces formidable challenges in its litigation programme. It has undertaken a re-organisation of the Attorney General's office for the purpose of making it both more efficient and more effective. Formerly, different attorneys had responsibility for a case at different stages; one might handle the case in the administrative stage, another might be responsible for the rejoinder, another for the appeal, and so forth. Now the same attorney or attorneys handle a case at all stages. A better case monitoring system has also been implemented. At the same time CADE intends to become more proactive with judges, making an effort to familiarise them with competition cases through lectures and seminars. Because of its very large caseload, CADE attorneys were not always present in court when their case, or some aspect of it, was being heard. The agency is making more of an effort in this regard; on occasion a member of the Council, including the President, has appeared in court as well.

BCPS attorneys are respected, both by the courts and by the private bar. They are considered to be professional and hard working.

4. The pending legislation

For several years there has been pending in the Brazilian Congress comprehensive legislation that would overhaul the BCPS and remedy many of the problems that have plagued it for so long. The legislation had been stalled many times, but as noted above, at the time of this report there was strong impetus toward its enactment. The country's President had strongly endorsed it; the business community, which had had reservations about some aspects of it in the past, especially about premerger notification, professed support for it. The bill had effective sponsorship in both houses of Congress and the sponsors were optimistic about its eventual passage. Still, manoeuvring in Congress continued; there was urgency to complete the effort within the first half of 2010, otherwise the national election scheduled for later in the year would again put the bill on the back burner. The legislation had been approved in the House of Representatives and was being debated in the Senate. Some changes had been offered in that chamber, which if accepted would require the House of Representatives to take it up again.

Below is a description of what are understood to be the principal provisions of the bill as approved by the House of Representatives.

4.1. *The BCPS structure*

CADE remains as an independent body, now called an “administrative tribunal” and not a “council.” The terms of its commissioners will be for four years (non-renewable), up from two, and their terms are staggered, to avoid simultaneous vacancies and the possibility that a quorum could not be convened. 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 commissioner positions will be recommended alternately by those two ministers. Senate approval of the nominations is still required. In the past, a commissioner’s post was sometimes vacant for a significant period while the President and the Senate considered nominations. The bill permits CADE’s President to appoint a temporary commissioner until the permanent person is confirmed. CADE’s Attorney General and the Chief Economist, both also appointed by the President with Senate approval, will also serve for four year terms. The minimum quorum for the Tribunal is reduced from five to four.

The most dramatic institutional changes in the bill affect SDE and SEAE. SDE’s Department of Economic Protection and Defence (DPDE) is abolished and its investigative and preliminary enforcement responsibilities in competition cases are transferred to a new CADE Superintendency General (SG), composed of a Superintendent General and two deputy Superintendents. The Superintendent 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. SEAE’s role as an advisor in conduct and merger investigations is effectively terminated. Its responsibilities for competition advocacy will continue, however.

An important element in the bill is the provision for 200 permanent positions in CADE. These positions would not require qualifications specific to CADE’s mission, however, but rather their occupants would be drawn from other specialties in the federal civil service.

4.2. *Procedures in conduct cases*

The CADE Superintendency General, as the successor to DPDE, is made responsible for monitoring markets, identifying possible violations and conducting investigations. The bill creates three stages of proceedings

within the SG, the “preparatory proceeding”, the “administrative investigation” and the “administrative procedure,” with time limits applying to each. The first stage is initiated by the SG to assess whether a conduct falls within the competence of the BCPS. The second is the formal investigation stage, while the third is the stage at which a formal record is to be prepared for submission to the Tribunal. Currently there are effectively only two investigative stages in SDE, after a formal complaint is lodged with the agency. A decision by the SG to terminate an investigation in the second stage can be reviewed by the Tribunal. Once the case is before the Tribunal, the only change from current procedures is that the Superintendent General or the Reporting Commissioner may permit participation in the case by any third party who will be affected by the Tribunal’s decision or who has standing to represent the interests of an affected class.

Currently CADE can impose a maximum fine of 30% of a respondent corporation’s total gross revenues. The bill reduces that maximum to 30% of the enterprise’s revenues in the relevant or affected market, but as is true under the current law, the fine may be no less than the amount of harm resulting from the conduct.

The bill makes some changes in the leniency programme. The current rule that leniency is not available to a “leader” of the cartel is eliminated, for two reasons: first, because it is difficult to determine which of the cartel participants was a leader, and second, denying leniency to a leader has the effect of precluding access (at least at the outset) to a party that probably has the most information about the cartel. Further, as noted above in Section 2.1.1.1, a grant of leniency currently extends to criminal liability under the Federal Economic Crimes Act but not to other possible crimes under other criminal statutes, such as fraud in public procurement. The bill broadens the leniency grant to extend to these crimes as well.

4.3. Merger review

The current law lacks an explicit substantive standard for reviewing mergers, though the standards actually employed by the BCPS are the same as employed in many other countries. The bill articulates a standard that is based upon that in the European Commission’s Merger Regulation. Another substantive change in the bill relates to efficiencies. Article 54 currently requires that, if an otherwise anticompetitive merger is to be approved because the efficiencies that it generates outweigh the harm, the efficiencies must be “equitably allocated,” presumably meaning equally allocated, between the merging parties and consumers. The bill requires merely that consumers “share” in the efficiency gains.

There are significant changes affecting merger review procedures. Premerger notification is introduced: merging parties may not consummate their transaction until after CADE has approved it or the expiration of the statutory time period has occurred. Whereas the current Article 54 applies by its terms to agreements that are not formal mergers, the bill applies only to “mergers,” which are defined as transactions in which (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. Notification thresholds have also been changed. The bill provides for minimum size thresholds, expressed in total revenues derived in Brazil, for two merging parties. One party must have revenues of at least BRL 400 million and the other BRL 30 million. Currently there is no minimum size for the second party. The 20 per cent market share test in the current law is eliminated in the bill. The BRL 45,000 notification fee is retained, to be allocated entirely to CADE.

As noted above, under the bill SEAE has no formal role in merger review. Upon receipt of a notification the Superintendency General must, within five business days, publish a summary notice of the proposed transaction. (All time periods in the bill are expressed in terms of business days, and unless otherwise noted, all begin on the date of the notification.)⁶⁵ Within 20 days after notification the SG must either approve the merger or request further information. In the case of approval by the DG, CADE has 15 days from the SG’s decision to review the approval, but it is not required to do so. Also, an interested third party may within 15 days appeal to CADE the SG’s decision to approve. If there is neither a third party appeal nor a determination by CADE to review the SG’s decision the merger is automatically approved after the expiration of the 15 days. This process is the equivalent of today’s “fast track” procedure.

If the SG decides to request supplemental information the Superintendent has a period of 60 days from the date of notification to decide whether to approve the merger or to recommend to CADE that it be rejected or modified. If the SG approves, the same 15 day procedure described above relating to fast track mergers is applicable. Importantly, the issuance of the supplementary request for information does not suspend the running of the 60 day period. This is a potential flaw in the bill, as it presents the obvious opportunity for the applicants to delay their submission of the supplemental information for most or all of the 60 days. One obvious response by the SG in that event would be to recommend denial of the application to CADE. There is another, perhaps more likely option, however, which would be for the SG to declare the merger “complex.”

The legislation provides a separate, and in some ways parallel, procedure for mergers declared by the SG to be “complex.” The SG, must,

in its discretion, make that determination within 50 days of the filing of the notification. The use of this procedure would be another way for the SG to deal with a situation in which the parties have not complied with a 20-day request for information by the 50th day. Of course, the SG could make the “complex” decision within the first 20 days, thereby avoiding the need to issue two supplemental requests.

If the SG declares a merger to be complex it must issue its request for supplementary information within the prescribed 50 day period. The information must be provided within a 90 day period beginning on the date of notification. Upon the expiration of the 90 days the SG has 10 days to decide whether to approve the merger or to recommend denial or approval with restrictions. If the former, the same 15-day procedure described above applies.

If the SG recommends denial or modification of the transaction under either process described above the following procedure applies in the Tribunal. Within 48 hours the case is assigned to a Reporting Commissioner on a random basis. Within 20 days from the SG’s decision not to approve the merger the Reporting Commissioner must either order the case to be scheduled for trial or, if more information is deemed necessary, order the SG to issue another request for information. If more information is requested, the Reporting Commissioner must schedule the case for trial within 30 days of the receipt of the information. There is no prescribed period for the trial, but the bill does set out a deadline within which a final decision in the case must be made, which is 240 days from the date of notification. These 240 days can be extended in two circumstances: (1) if the applicants request a 60 day extension, or (2) if the Tribunal orders a 90 day extension. Thus, every merger case must be decided by CADE within a maximum period of 330 days from the date of notification.

The right of a third party to appeal against a decision by the Superintendency General to approve a merger is new. The appeal is lodged first with the SG, who has five days either to reverse his decision or forward the appeal to the Tribunal. If forwarded, the Reporting Commissioner makes a determination (subject to review by the Tribunal) whether to “admit” the appeal. If admitted, the appellant then takes the role that the Superintendency General would otherwise play. The SG, however, retains authority to participate as a party to defend its position. If an appeal by a private party is admitted but ultimately rejected, the Tribunal must impose a fine on the party ranging from BRL 5000 to BRL 5 million (USD 2815 to USD 2.8 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 Superintendency General is empowered to negotiate a settlement agreement for a notified merger at any time before the matter is lodged with the Tribunal as a contested transaction. Once negotiated, the agreement must be published for at least 10 days of public comment, after which the SG may choose to re-negotiate the proposal before transmitting it to the Tribunal for final disposition.

5. Limits of competition policy: exemptions and special regulatory regimes

The competition law, 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 (Article 15).” The BCPS takes the position that the law 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 the law for reasons of federalism. The law 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, described below. Commercial enterprises owned by federal or state governments are clearly covered. Described below are the regulatory regimes and the interaction between competition law enforcement and regulation in selected sectors.

5.1. Telecommunications

This sector was liberalised in 1997. State-owned firms were privatised and the National Telecommunications Act enacted in that year created a new sector regulator, the National Telecommunications Agency (ANATEL). Unlike the situation in most other regulated sectors, the Telecommunications Act was specific about the relationship between regulation and the competition law. The Act provided for the application of the competition law to that sector, and authorised both ANATEL and CADE to enforce it. Article 7 of the Act provides that “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.” Further, Article 19 provides that ANATEL “shall have the 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].” Thus, conduct and merger cases may be considered by either ANATEL or CADE, or both. The Telecommunications Act created a special regime for mergers. Prior notice of telecommunications mergers must be filed with ANATEL, the only circumstance currently in Brazil in which there is premerger control.

CADE and ANATEL have developed a co-operative 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. ANATEL states that it follows the merger analytical process employed by the BCPS. While the BCPS would welcome input from ANATEL on any merger in that sector, it concludes that the process would be more efficient if the investigation were conducted solely by the BCPS, which is the case in all other regulated sectors. This issue was the subject of debate within the Congress as it considered the new legislation, but by early 2010 it had not been resolved.

With respect to conduct cases, 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. CADE regularly considers both merger and conduct cases in the telecommunications sector, some of which are described above in Section 2.1.4. The two agencies have operated under a series of co-operation agreements, which are time limited. The two do not work together particularly closely, but they have collaborated in such areas as cable and pay television and have jointly developed rules relating to methodology for competition analysis.

5.2. Oil and gas

The Hydrocarbons Law of 1997 created a new regulatory agency to oversee the natural gas and petroleum markets, the National Petroleum Agency – ANP. This law also explicitly referred to the interaction between the regulator and the BCPS. ANP is required 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).⁶⁶

The sector continues to be dominated by Petrobras, which held a legal monopoly until 1997 and which is still controlled by the government. It accounts for by far the greatest share of exploration, production, transportation, refining and distribution of oil and refined products in the country.⁶⁷ Its dominance in natural gas (which accounts for a relatively

small part of Brazil's energy consumption) is even greater. It controls over 90 per cent of the country's gas reserves and operates the country's interstate gas pipeline system.⁶⁸ ANP exerts its regulatory authority in various parts of the oil and gas sector, notably exploration and transportation. Retail prices of oil and gas derivatives are no longer controlled.

CADE regularly considers conduct cases in the oil and gas sectors, though none have directly involved Petrobras' dominant position in the past several years. CADE has prosecuted cartel cases in retail automotive fuel, noted above. It prosecuted local cartels in liquid petroleum gas in 2008 and 2004 and a cartel in diesel fuel in 2004. It has also evaluated mergers in these sectors from time to time. One of these involved a joint venture between Petrobras and a firm called White Martins for the production of liquefied natural gas (LNG). Petrobras was a monopolist in natural gas transportation, as noted above, and it also was dominant in the production of liquid petroleum gas (LPG), an alternative to LNG for many applications. Petrobras did not produce LNG, however, nor had White Martins, which was a leader in the production of non-energy industrial gases (such as oxygen and nitrogen.). CADE identified vertical concerns in the transaction stemming from Petrobras' control of natural gas, the necessary input. The parties argued that the joint venture would generate significant efficiencies, however, which CADE accepted. It permitted the transaction but imposed a remedial order requiring the parties to make their prices and contracts transparent, thereby making it easier to identify and prosecute future unlawful conduct.⁶⁹ More recently CADE approved without conditions a merger between two distributors of LPG.⁷⁰

5.3. *Electricity*

The regulator for this sector, the National Agency for Electrical Energy (ANEEL), was also created in 1997, and its law also requires that effect be given to competition principles where possible. The bulk of the country's electrical generation capacity is hydroelectric, but hydro's share has fallen from 83% in 2001 to 72% in 2009, in favour of thermal generation. There are also small nuclear and wind components. About 70% of total generation capacity is publicly-owned, by both federal and state governments. The former state-owned monopoly, Eletrobras, continues to control about 40%. There is competition at the generation level through an auction process. Transmission assets are mostly controlled by federal and state governments. About two-thirds of distribution assets are privately operated; there are more than 60 distribution companies.

ANEEL and CADE have a formal co-operation agreement, and in recent years the two agencies have developed a close working relationship. Their representatives meet regularly and exchange a variety of information. CADE regularly considers mergers in the sector, which may involve mergers of distributors or acquisitions of small producers. CADE consults with ANEEL on these transactions, virtually all of which it has approved without restrictions. Recently CADE considered the creation of a consortium of three thermal generation plants that successfully bid in an ANEEL auction to supply power to the grid. ANEEL had approved the formation of the consortium, and the parties argued that this deprived CADE of jurisdiction in the matter. In its decision CADE rejected this argument, but it nevertheless approved the transactions, while imposing a fine for failure to file timely merger notifications.⁷¹

5.4. *Surface transportation*

The National Agency for Surface Transportation (ANTT) was created in 2002⁷² and vested with responsibility for regulating railway and road services. There is little passenger rail service in Brazil except for that within urban areas, which, because it does not involve interstate service, is regulated by the states.⁷³ ANTT regulates network access and freight tariffs by means of a price cap system. In the late 1990s the poor condition of some of Brazil's roads prompted the government to enter into concession agreements with private contractors, who would build and maintain sections of the interstate highway system in exchange for the right to charge tolls, the level of which would be regulated. A second concessioning stage was completed in 2007. As discussed below, SEAE had an important advisory role in designing these second stage concessions.

ANTT also regulates interstate passenger bus transportation. In some countries long distance bus transportation is lightly regulated, if at all, but in Brazil this service is important to many citizens, and as such may be subject to a constitutional requirement for oversight of "public services." ANTT grants licenses to operate certain routes by means of a bidding process, the terms of which include tariffs and frequency of service. The agency regularly faces the problem of unauthorised providers operating on more popular routes. Changes in tariffs are subject to ANTT review, although operators are free to offer "promotional" fares as long as they are not predatory (especially difficult to determine in this industry) or otherwise involving an "infringement of the economic order."

Both CADE and SEAE have co-operation agreements with ANTT. SEAE often interacts with transportation regulators, as described below, CADE much less so. CADE occasionally considers cases in the rail sector.

The Vale/CSN merger described in Section 2.2.3 above was one of its most important merger cases in recent years. The ALL case also described in Section 2.2.3 was another merger in the sector.

5.5. *Civil air transport*

Until recently civil aviation in Brazil was under the control of the Department of Civil Aviation (DAC), which was within the Brazilian Ministry of Defence. The Director of DAC and some of its employees were military personnel. The stated rationale for the relationship between civilian and military aviation was that both sectors share some facilities, including airports and the air traffic control system. In 2006, however, the National Civil Aviation Agency (ANAC) was created as an independent regulator for the sector. It is responsible for regulating safety and security matters, personnel licensing, operations and airports. Prices and entry have been deregulated, which brought about significant restructuring within the industry. Currently the sector is highly concentrated, featuring only two major carriers controlling about 90% of the market, but two other firms have recently entered and are gaining market share.

Not long after ANAC was created it faced what was called the “aviation crisis,” which was triggered by Brazil’s most deadly aviation accident. The air traffic control system and the fact that 67 of the country’s largest airports are operated by INFRAERO, a state-owned company, came under heavy criticism. While ANAC announced a series of corrective measures, the various issues generated by the crisis are still under debate.

One entry barrier in Brazil, as in some other countries, is the need for landing and take-off slots at the country’s busiest airports, notably the downtown airports in Sao Paulo and Rio. In 2008, CADE considered the proposed acquisition by GOL, one of the two largest airlines in the country, of VARIG, which was once Brazil’s leading international airline but whose fortunes had declined precipitously since deregulation and was then near bankruptcy. The competition issue most closely examined by CADE was the transfer to GOL of VARIG’s slots at Congonhas Airport in Sao Paulo. It ultimately decided to approve the transaction, however.⁷⁴ Until the recent emphasis on cartel prosecution by the BCPS a 2004 case against four airlines (the case was instituted in 1999) for fixing prices on the Rio–Sao Paulo route was one of CADE’s most important cartel cases. There was only circumstantial evidence of an agreement, consisting of simultaneous and identical changes in prices by the respondents. CADE nevertheless found that an agreement had existed, and fined the respondents the statutory minimum, 1% of their 1999 revenues on the Rio – Sao Paulo route.⁷⁵

5.6. Health

Brazil has a public health service, as noted above, but there is a large and growing private health insurance sector, to which as many as 42 million Brazilians subscribe. Until 2000 this sector was mostly unregulated, but in that year a law created the National Supplementary Health Agency (ANS), giving it some authority over prices.⁷⁶ There are two basic types of health insurance: collective – that which is provided to a group, usually by employers – and individual.

The initial prices of insurers entering the market (and those that existed at the inception of regulation) are not controlled, though ANS determines, on an actuarial basis, that they are sufficient for the financial stability of the entrant. Subsequent increases in individual policy prices (but not collective ones) are subject to regulation by ANS. There are as many as 1,400 insurers providing private health insurance of some kind, but 48 of them account for about half of the market.

Beginning in 2000 the prices of pharmaceuticals were also regulated. Since 2003 they have been subject to price cap regulation conducted by the Drugs Market Regulation Chamber (CMED), which is an inter-ministerial body on which the ministries of Health, Finance, Justice, Development, Industry and Foreign Trade are represented. As noted above in Section 2.1.4, at about the same time that pharmaceutical prices came under regulation the Congress referred to SDE several instances of possible abusive pricing by drug companies. To date none of these have resulted in a finding of illegality, however.

The competition law applies fully to the health sector, in which the BCPS has regularly considered both conduct and merger cases, as described above.

5.7. Banking

There are about 161 banks, including commercial banks and savings banks, in Brazil.⁷⁷ The sector is concentrated. The ten largest banks account for about 90% of total assets and the CR4 is about 68%. There continue to exist both federal and state owned banks, though the number is gradually declining. Publicly owned or controlled banks currently account for about 36% of the market. Bank of Brazil, the largest in the system, is federally controlled, though its shares are publicly traded. In the early 2000s there was entry by some large foreign banks, though many of them subsequently departed. Recently there has been something of a bank merger wave in Brazil. In 2007 ABN Real was acquired by Spain's Santander, marking the first time that a foreign player directly challenged the local leaders. In 2008,

Itaú, the second largest Brazilian bank, acquired Unibanco, vaulting it to number one. Bank of Brazil responded by acquiring savings and loan institutions, including two that had been owned by important states (São Paulo and Santa Catarina), thus regaining the top position.

Banking is the one regulated sector in which the competition law has not been fully applicable. The Central Bank – BACEN – had long maintained that it should have sole jurisdiction in this sector for “prudential” reasons – the security of the financial system. In particular, the Bank has asserted 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 the competition law, 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 the competition law (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. The issue came before the courts in an appeal from a CADE decision fining two banks, Bradesco and BCN, for not notifying their merger to CADE. The court of first instance and the appeals court ruled in CADE’s favour, but the case is on appeal in the Superior Court of Justice.

Nevertheless, in 2005 CADE and BACEN entered into a co-operation agreement providing for the exchange of information. The two collaborated on a set of merger guidelines for the banking sector, which were based on the SEAE/SDE merger guidelines. A bill resolving the jurisdictional dispute was sent to Congress in 2003, approved by the Senate in 2007 and now is pending before the House of Representatives. The bill provides that the Central Bank shall have exclusive competency for reviewing mergers that involve a risk to the overall stability of the financial system (an issue that would be determined by BACEN). CADE and BACEN would share authority to review all other merger cases. Authority for handling conduct cases in the banking sector would remain exclusively with the BCPS.

In 2008 CADE and BACEN reached agreement providing for joint review of bank mergers and also providing that both agencies would work toward enactment of the legislation described above. (That agreement led the Superior Court of Justice to postpone the hearing that had been set in the Bradesco/BCN case described above.) Pursuant to the agreement, bank mergers are notified to both agencies. The Unibanco/Itaú merger, described above, was one. It was approved by BACEN but the case continues in

CADE. BACEN has never formally disapproved a proposed merger, usually upholding them on the grounds that they create efficiencies and benefit competition.

5.8. *The omnibus bill for sector regulatory agencies*

In 2003 a bill was introduced in Congress that would, among other things, standardise the relationships between sector regulators and the BCPS. (Under sectoral laws, regulators are already required to promote competition in the sectors subject to their oversight.) Regulators would be required to monitor their industries for compliance with the competition law, report suspected violations and provide technical reports on request to 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. The bill also revises procedures for comment by SEAE on proposed regulations. 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.⁷⁸ The bill remains in the House of Representatives, and there does not seem to be much momentum for its passage.

6. Competition advocacy

Competition advocacy has two dimensions. The first reflects the competition agency's role as consultant to the government and to sector regulatory agencies concerning legislation and regulations that implicate competition policy. The second is as proponent for increased public understanding and acceptance of competition principles.

SEAE is very active as competition advocate to other parts of government and to regulators. There are historical and structural reasons for SEAE's prominence in this field. As described above, until the mid-90s there was heavy regulation of the economy and the Ministry of Finance, of which SEAE is a part, was a central player in that scheme. SEAE was what might be called the national think tank in matters of this kind. When economic liberalisation began in 1994, but before sector regulators were created, the Ministry of Finance had the responsibility for monitoring "public service prices." A 1995 law implementing the Real Plan provided:

*As of July 1, 1994, increases and reviews of public sector prices and public service tariffs will be determined ...according to acts, rules and criteria to be defined by the Ministry of Finance.*⁷⁹

A subsequent decree vested SEAE (recall that its full name is Secretariat of Economic Monitoring) with important tasks in this oversight, including conducting technical analysis of price changes, “expressing its opinion” on regulatory decisions and privatisation of state-owned companies, “monitoring the development of sectors and programmes,” “represent[ing] the Ministry of Finance in interministerial activities,” and “fostering co-ordination with public sector entities, the private sector and nongovernmental organisations” that are also involved in these tasks.⁸⁰

A structural feature that fosters SEAE’s prominence as intra-governmental competition advocate is the fact that policymaking in several parts of the economy is in the hands of a council or committee on which sit representatives of various ministries. Such councils exist in surface transportation, health, civil aviation and energy, for example. The Ministry of Finance participates in virtually all of them, and SEAE, by virtue of the law cited above, is the ministry’s representative. It must be pointed out, however, that SEAE’s strength – being part of a powerful government ministry – is also a potential weakness. Its advocacy in various matters could be more susceptible to political influence than would that of an independent agency. SEAE states, however, that since at least 2004 it has not been subject to any political influence in its competition advocacy function. It considers itself to be able to operate independently in this sphere.

It is not possible to list SEAE’s extensive contributions in this advocacy role in detail. Below is a general description of its activity in recent years in some sectors:

- Land transportation: SEAE participates in meetings of the Brazilian Growth Acceleration Programme, a Presidential initiative, that has an active role in the formulation of transportation policy. SEAE reviews rail transportation tariffs and comments on the regulatory structure (price caps). It has advised ANTT on its process for the tendering of road concessions, described above. Its recommendations had a prominent role in the lowering of prices as much as 46% below the base price. It has also advised ANTT on the structure of its formulas for passenger bus tariffs.
- Ports: SEAE participated in a task force charged with developing efficient contracting procedures for dredging. In 2008 it prepared a study on regulation and competition in ports employing international experience in the sector. In the same year it and SDE participated in the development of a decree, known as the Port Decree, that set out policies and guidelines for the development of Brazil’s maritime sector.

- Civil air transport: SEAE participated in deliberations resulting in the creation in 2006 of ANAC, the new regulator for the sector. It provided recommendations on the process for allocating slots at congested airports, which received widespread public attention, though not all of them were ultimately adopted. SEAE sits on various technical committees that formulate policy in the sector. It responded to the aviation crisis, described above, with several recommendations, all designed to introduce more competition in the sector.
- Telecommunications: SEAE has made several contributions in public consultations sponsored by ANATEL, the telecommunications regulator. Among them were comments on: (i) changing the methodology used to account for productivity gains in fixed line services in regulated tariffs; (ii) efficient use of the radio frequency spectrum for the purpose of reserving parts of it to new entrants; (iii) a General Plan for the Update of the Telecommunications Regulation (PGR); (iv) proposed revisions to the delegated areas for fixed local voice services, facilitating entry by providers operating in other areas. SEAE also participated in the creation of legislation now in Congress that would alter the pay TV market. The legislation would establish technological neutrality in this service, improving competition and allowing new entry, especially by telephone companies.
- Health: As noted above, part of the private health insurance market is subject to price regulation by ANS, the sector regulator. The applicable law requires that annual adjustments to insurance premiums be submitted to SEAE for approval before becoming effective. To date SEAE has not disapproved any such changes. Prices for pharmaceuticals are also regulated (by means of price caps) by a separate inter-ministerial agency, on which sits the Ministry of Finance, represented by SEAE.
- Banking: In 2006 SEAE, SDE and the Central Bank formalised a co-operation agreement leading to a detailed study of the credit card market in Brazil, which was completed in 2009 and published. It contained several recommendations and, among other things, led to the decision by Visa and MasterCard to abandon the exclusive arrangements that they had with their respective processing networks, described above in Section 2.1.2. In 2007 the Central Bank and the Ministry of Finance, including SEAE, worked together to develop a series of rules issued by the Bank governing bank service charges.

- Urban transportation: Urban mass transit is regulated at the state and local levels. The role of the federal government, established in the constitution, is that of elaborating guidelines for these services. SEAE participated in drafting a set of rules for this purpose. In 2007 a bill was introduced in Congress that would permit municipalities to adhere to this programme; the legislation is pending.
- Other markets: SEAE participates in the General Co-ordination for Competition Defence (COGDC), which has oversight responsibilities in various regulated markets, including some that are regulated at state and local levels. SEAE has participated in studies of taxi services, driving schools and funeral homes. In driving schools, for example, a price fixing investigation revealed that some state traffic departments had issued instructions setting maximum and minimum prices for this service. They had done so for the purpose of ensuring sufficient quality of service, but SEAE convinced them that that goal could be met by means other than setting prices, and the practice was ended.
- Review of legislation: An amendment to the Consumer Defence Code was proposed that would require a supplier of goods and services “of a continuous nature” to “extend the conditions offered for adhesion of new consumers to contracts already in effect.” SEAE concluded that while the bill articulated a valid concern, that of providing equal treatment to consumers, it could harm consumers in other ways, for example by discouraging promotions that could ultimately benefit all buyers in the market. SEAE recommended that the bill not be enacted.
- Trade: SEAE participates actively in the formulation of trade policy and has an advisory role in trade cases, as described in Section 3.5 above.

CADE and SDE also participate in various ways in intra-governmental competition advocacy. As noted above in Section 3.1, in a recent reorganisation CADE created a Technical Group on Regulated Markets, whose purpose is both to better inform the Council in matters in regulated industries and to develop relations with sector regulators. The Group has conducted a series of meetings with ANEEL, the electricity regulator, and is working on co-operation agreements with ANEEL, ANP (oil and gas), ANATEL (telecommunications) and ANAC (aviation). An agreement between CADE and ANTT (surface transportation) was signed in 2006. SDE has also participated in inter-agency projects, notably the credit card study, described above. It also participates as the representative of the Justice Ministry in CMED, the pharmaceutical price regulator. CADE and

SDE joined with SEAE in signing a co-operation agreement in 2009 with ANS (health) for the purpose of studying competition in the private health insurance market.

All three agencies are active in the second aspect of competition advocacy, promoting public awareness and support for competition policy. SDE's extensive activity in the anti-cartel area is documented above in Section 2.1.1.4. CADE publishes its *Competition Law Journal* containing papers in the field. The journal is in its 33rd volume. CADE also publishes a *Practical Guide on Competition Defence in Brazil*, which is a bilingual publication with information on relevant legislation and major decisions by CADE. The 3rd edition was issued in 2007. CADE has entered into agreements with various educational institutions in Brazil for the purpose of promoting the study of competition policy.

The three agencies have academic exchange programmes. Twice each year university students spend about one month at the agencies, where they have an opportunity to work with academics and experts in the field. At the end of the programme they may submit a final paper which is monitored by a professional. The programme has proved to be a useful recruiting tool. Several of its participants later came to work at the agencies. In 2006 SEAE, in partnership with a Brazilian university and the World Bank, created a cash award for monographs on competition and regulation. In the first competition 154 papers were presented. CADE has a similar programme.

Representatives of the three agencies regularly participate in conferences and seminars on competition policy. The three agencies each maintain informative web sites.⁸¹ SEAE's and SDE's include sections in English, and CADE intends to create sections in both Spanish and English in 2010.

7. Conclusions and recommendations

7.1. Strengths and weaknesses

The 2005 Report⁸² detailed the progress that the BCPS had made since the beginning of the decade, and the system has continued to build on those achievements. Of its several accomplishments two stand out. The BCPS anti-cartel programme, almost non-existent in 2000, is now both active and effective. Particularly notable is the criminal enforcement component. Brazil is like most countries in which cartel conduct can be prosecuted criminally, in that separate criminal laws apply to the conduct apart from the competition law. These laws are enforced by government prosecutors, not

the competition agency. If a criminal programme is to be successful there must be close co-operation between the prosecutors and the competition agency. Brazil has made significant progress in this regard. Also, the BCPS, notably SDE, has made great strides in developing its cartel investigatory skills; it makes full use of the tools available to it – dawn raids, the leniency programme, inspections (visits to business offices with notice) and computer forensic techniques. In Latin America Brazil is widely considered the leader in prosecuting cartels, and its neighbours regularly consult with it in this area. SDE's advocacy programme in cartels is innovative and successful.

The BCPS' second signal achievement is its implementation of the fast track merger review process. The system had been bogged down by inefficient merger review procedures, which consumed up to 70% of the system's resources and caused undue delays. The fast track programme now applies to as many as 70% of the mergers notified to the BCPS, freeing resources for other work, notably the anti-cartel programme, and benefiting the business community by speeding the approval of their transactions. The fast track process has another beneficial effect, that of paving the way for premerger notification. Most of the business community is on record as supporting premerger notification (with the important caveat that the BCPS be given sufficient additional resources to operate it efficiently), but this support probably would not exist if the BCPS had not shown that it can process mergers quickly. In other respects the BCPS has administratively improved the merger notification process by interpreting the BRL 400 million size threshold as applying only to Brazilian revenues, by limiting the application of the 20% market share threshold and by clarifying, to some extent, the definition of the trigger date that begins the running of the 15 day notification period.

SEAE continues to have significant access within the government and with sector regulators as competition advocate. In other respects the BCPS is an effective advocate for competition in the public arena, and it is an active participant in the international competition community in various ways. The BCPS is respected in other parts of government, by the courts and by the business community.

The BCPS continues to confront several problems, however. Foremost among them is the high rate of staff turnover in all three agencies. At CADE the problem has been particularly acute. There were at least two reasons for it: the short length of the commissioners' term – two years – and the fact that until recently all professionals working there were either contract employees or permanently assigned to other government agencies. The turnover problem is exacerbated by the fact that the agencies are understaffed to begin with. This is especially true at CADE and SDE. One

result of this resource problem is the continuing backlog in conduct investigations at SDE and the length of time that it takes for the average conduct case to be resolved. While there have been substantial improvements in the merger review process it continues to suffer from the lack of premerger notification. The result is longer review times for non-fast track mergers and greater obstacles to the imposition of structural remedies by CADE when mergers are found to be anticompetitive.

Judicial review of competition cases has emerged as an important issue for the BCPS. Many of CADE's decisions imposing sanctions or remedies have been appealed to the courts. Courts have issued injunctions suspending the implementation of CADE's orders, and because a typical court case can take ten years or more if appealed to the highest level, the effect is effectively to frustrate the enforcement process. CADE has been more proactive in court in recent years with some success, especially in collecting fines, but there are limits to what the BCPS can do on its own.

7.2. Recommendations calling for legislation

7.2.1. Enact the legislation in Congress to amend the competition law.

The following recommendations are addressed in the proposed legislation, described in Section 4 above. They were also made in the 2005 Report.

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

The BCPS has made the best out of what once was a highly inefficient system. The duplication of effort between SDE and SEAE has been eliminated. Both have become proficient in their areas of responsibility, conduct investigation at SDE and merger review and competition advocacy at SEAE. Still, there are inefficiencies stemming from the three being in separate agencies, and sometimes there is a lack of communication. The 2005 Report points out that the single-agency model has proved successful in many jurisdictions, and given the proper resources there is no reason to think that it could not work in Brazil.

The legislation would transfer SDE's investigative responsibilities to a new CADE Superintendency General. SEAE's merger review function would also be transferred to the Superintendency General, while SEAE would retain its competition advocacy mandate. Such a restructuring is not

without its challenges, however. It will be important to preserve the proficiency that has developed in SDE and SEAE, while improving efficiency.

7.2.1.2. Create CADE career positions and provide adequate resources to hire and retain a sufficient number of qualified professional staff.

This is critical. The 2005 Report identified inadequate staffing and high turnover as the number one problem in the BCPS, and so it continues today. Among other things, business support for premerger notification is contingent upon there being sufficient resources in the agency to administer it efficiently.

The bill provides for 200 permanent career positions at CADE. It is understood that these positions would not be “competition” career positions, that is, created for CADE, requiring qualifications specific to its mission, but rather they would be permanent positions assigned to the agency that would be filled by federal civil servants. The former is preferable, as likely to result in an even more qualified cadre of professionals as well as reducing turnover, but the creation of a permanent staff of this size is nevertheless highly important.

7.2.1.3. Extend the terms of the commissioners and other politically appointed senior officers, including the Superintendent General, to at least four years and make the terms non-coincident.

The short two year term for CADE commissioners with the possibility for one reappointment contributes to the high rate of turnover in the agency and it adversely affects its institutional memory. It also enhances the opportunity for the exercise of political influence through the appointment process. The government has the ability to completely remake the Council in as little as two years. It also creates an incentive for sitting commissioners to adjust their decisions in order to win re-appointment, if they desire it. The 2005 Report recommended that the length of the term be a minimum of four years and expressed a preference for five years, thereby making it impossible for the national President, whose own term is four years, to completely replace the Tribunal in one term.

The bill does extend the terms of the commissioners to four years, non-renewable, and it staggers their beginning and ending dates, thereby lessening the danger of there being so many vacancies on the Tribunal that a quorum cannot be constituted, which happened as recently as 2008. It also provides for four year terms for the Attorney General and the Chief

Economist. Presently, however, the term of the Superintendent General as provided in the bill is two years, with the possibility for reappointment for one term. This is a highly important post; the Superintendent controls the agency's investigative agenda. That term too should be extended to four years.

7.2.1.4. Fix the required quorum for CADE's Tribunal 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.

This was another recommendation designed to avoid a lack of a quorum on the Council. It would seem to be less important if the other steps affecting the commissioners' terms described above are taken. Further, the proposed legislation apparently also gives the President of the Tribunal the power to appoint a temporary commissioner in the event a vacancy is not filled for a period of time. In any case, the bill does reduce the necessary quorum to four.

7.2.1.5. Modify the merger notification and review process to

- 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.

These are well-documented shortcomings in the merger notification process, which are discussed fully in Section 2.2.2. The proposed legislation corrects these problems as recommended.

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

As discussed above, the BCPS has largely succeeded in doing so by administrative means. The proposed legislation institutionalises the process, as described in Section 4.3 above.

7.2.1.7. Establish formal settlement procedures for merger cases.

Again, in recent years the BPCS has more frequently negotiated merger settlements under the powers given it in Article 58 of the current law. The proposed legislation changes those procedures somewhat, vesting settlement

powers with the new Superintendent General and providing for a formal comment period and final approval by the Tribunal.

7.2.1.8. Adopt an explicit standard for the review of the competitive effects of a merger.

The current law lacks an explicit substantive standard for reviewing mergers, though the standards actually applied by the BCPS are commonly employed elsewhere. The bill articulates a standard that is based upon that in the European Commission's Merger Regulation.

7.2.1.9. Modify the leniency programme to eliminate exposure of leniency participants to prosecution under criminal laws other than the Economic Crimes Law.

The BCPS leniency programme is proving to be quite successful, having generated several applications. The programme provides that individuals who receive leniency also receive immunity from criminal prosecution under the Economic Crimes Law. Currently they do not receive immunity from prosecution under other criminal laws that may apply to the conduct, however. This may inhibit some from coming forward to apply for leniency. The bill remedies this problem by extending the immunity to those other laws.

The following recommendations do not depend upon enactment of the bill in Congress, but their implementation will be affected by whether it is enacted.

7.2.2. *Enact the bill providing for enforcement of the competition law in the banking sector.*

There had been a dispute between CADE and the Central Bank over which agency had the power to review bank mergers. The bill, which both agencies support, would vest exclusive authority in the Central Bank to review mergers that involve a risk to the overall stability of the financial system, while the two agencies would share jurisdiction in all other bank mergers.

7.3. *Other recommendations*

7.3.1. *Reduce the backlog of conduct investigations and cases within the BCPS and shorten the time required for the final disposition of an investigation or case.*

While there has been some progress in recent years in this area the problem is still significant. The new resources provided in the proposed legislation will make a substantial contribution toward solving it, but the BCPS, whether or not the bill passes, should examine its procedures for possible efficiencies. Just as merger review was made more efficient by creating the fast track procedure for mergers that could quickly be identified as non-problematic, a similar process might be established for conduct investigations. A complicating factor might be that under the current law CADE must approve SDE's decision to close a preliminary investigation, which generates the need for a report by SDE and a formal decision by CADE. The BCPS should look for ways to streamline this process, consistent with due process requirements for interested parties under Brazilian law.

Consolidating the process in CADE, as the bill would do, should help in this regard. The Superintendent General would make the final determination on whether to close an investigation in the preliminary stages. On its face the bill also causes some concern, however, because it seems to create a new, third formal stage in the investigation process (see Section 4.2 above). To the extent that formal procedures within the Superintendency General are considered necessary for the progression of an investigation through these stages it could slow the process down. The process should be made as efficient and non-bureaucratic as possible, again consistent with due process requirements.

7.3.2. *In merger cases, strive to impose structural remedies as opposed to behavioural ones, where possible.*

CADE has regularly imposed behavioural remedies in merger cases. It might be useful to conduct a study of the efficacy of the remedies in some of these cases. Experience in other countries, however, has shown structural remedies to be more effective than behavioural ones and easier to administer. If the bill passes, premerger notification will enhance CADE's ability to require structural remedies, which it should do when it is possible.

7.3.3. Continue efforts to enhance communication and co-ordination between the BCPS and federal and state prosecutors, especially in cases and investigations initiated by the prosecutors.

Criminal prosecution is an important component of Brazil's anti-cartel programme. These cases are conducted by federal and state prosecutors, not by the BCPS. The BCPS and the prosecutors have developed good working relationships, especially in investigations initiated by SDE. Prosecutors have the power to initiate cases independently of the BCPS, however, and it is not uncommon that they do so. Prosecutors often consult the BCPS in cases that they initiate, but they are not required to do so. It would be useful to implement a programme requiring prosecutors at least to consult with the BCPS before bringing a case that also involves a violation of the competition law. Such co-ordination would help to prevent the institution of inappropriate cases, including those that may not be appropriate for criminal prosecution or those that may not be sustainable under relevant competition principles.

One benefit of enhanced co-ordination of this kind would be to develop better data on criminal cases, including the number of convictions and the number and length of jail sentences imposed. Such information is of more than academic interest. When compiled and publicised it contributes to the strong deterrent effect that criminal prosecution provides.

7.3.4. Develop a competition advocacy capacity in CADE, but importantly, avoid duplication with SEAE in this field.

SEAE's contributions in competition advocacy are significant (see Section 6 above). Nevertheless, CADE has rightly decided to enhance its capacity in economics, one purpose of which is to develop a competition advocacy function. It will have to communicate with sector regulators when it has cases in their sectors. Its cases may generate proposals for regulatory actions that should be communicated to the regulator. On occasion, hopefully rare, CADE and SEAE may disagree about an important advocacy position. The importance of developing some regulatory expertise will likely be greater if the bill is enacted, a result of which will be to completely divorce SEAE from competition law enforcement. At the same time, CADE must not duplicate SEAE's advocacy function; the two agencies should co-ordinate their work in this field. They could work together in a matter if it is efficient to do so.

7.3.5. Continue to strive for a more effective litigation programme in court. In the longer run, consider proposals for changes in the judicial system that could help to expedite competition cases.

The BCPS now understands that this is one of its most important challenges. Indeed, if the bill is enacted, correcting the several problems enumerated above, this will likely be its biggest. It has begun to focus on the issue, giving more emphasis to enforcing CADE's orders in court, reorganising its case handling procedures, strengthening its litigation skills and reaching out to judges in order to acquaint them with competition cases and the special issues that they present. These efforts should continue and to them should be added, if the bill is enacted, more resources.

Unfortunately the underlying problem, inherent delays in court cases, is mostly beyond the BCPS' control. The BCPS and other interested parties could begin to think about changes in the system that could speed the review of competition cases. The 2005 Report recommended that there be consideration of designating specialised judges and appellate panels to resolve competition law issues. To a follow-up question the BCPS responded that CADE had been in contact with the Federal Judges Association in order to assess the feasibility of this proposal. One response from the judges was that the number of competition cases is too small to justify specialised judges. It should also be noted that since all appeals from CADE decisions are made to the court of first instance in the Federal District, that court over time will become more comfortable with these cases.

In any case, the problem of inordinate delay would remain. A solution might be to create special rules that apply to appeals from specialised tribunals like CADE, for example, bypassing the court of first instance and lodging the appeal directly in a second level appeals court. There might be others that Brazilian legal experts could devise.

7.3.6. Take advantage of procedures for settling both conduct and merger cases, thereby promoting efficiency and avoiding costly and lengthy judicial appeals.

Procedures for settling both conduct and merger cases exist, and CADE has begun to use them more often. It recognises the importance of the settlement tool and has created a unit that will specialise in settlement negotiations. If the bill passes and premerger notification is established the incentives for merging parties to settle problematic mergers will change; they will be more willing to settle in order to be able to consummate their transaction quickly. If respondents in conduct cases perceive that they can

unreasonably delay the imposition of CADE's sanctions by appealing to the courts they may still prefer that alternative. CADE is making the right response by vigorously asserting its right to require respondents to deposit their fine with the court or post a bond guaranteeing payment. Either alternative can be expensive over time. In any case, CADE is encountering a willingness on the part of participants in international cartel cases to settle, if only to eliminate uncertainty.

A strong caveat in any settlement endeavour is that the agency must not settle too cheaply. In the long run that practice will have a pronounced negative impact on enforcement.

Notes

1. OECD, *Competition Law and Policy in Brazil: A Peer Review* (2005), available on the OECD/Competition web site at www.oecd.org/competition. The OECD first studied the Brazilian competition policy system in 2000, which also resulted in a report on the topic, published as *Competition Law and Policy Developments in Brazil*, OECD Journal of Competition Law and Policy, October 2000, vol. 2, No. 3.
2. See, Competition Policy International, *Trustbusters, Competition Policy Authorities Speak Out*, 38-42 (2009).
3. Section 2.
4. Article 3.
5. Article 4.
6. Interestingly, however, the laws of two of Brazil's neighbors, Argentina and Chile, also combine these different forms of anticompetitive conduct in a single statutory provision.
7. Article 21 further elaborates on the methodology for evaluating possible abusive pricing: "For the purpose of characterising 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-à-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.”

8. Article 15.
9. On a few occasions CADE has calculated a fine based solely on the affected market, however, for purposes of fairness and proportionality (for example, when one respondent in a cartel case had total revenues that were much larger than those of its co-conspirators).
10. Article 24. If a firm has been subject to a final administrative decision of abuse of economic power, inscription in the SISCOMEX registry of importers and exporters can be denied, pursuant to an ordinance of the Ministry of Foreign Trade; however, this power has not yet been used in competition cases.
11. Article 25.
12. Three manufacturers of flat rolled steel products raised their prices simultaneously after having informed SEAE that they intended to do so. Their reason for notifying SEAE was that until 1992 steel prices were controlled, and SEAE had responsibility for monitoring them. SEAE promptly responded to the producers that it was now unlawful to agree to raise prices, but shortly thereafter the prices were increased. The producers denied that they had reached agreement to do so, and there was no direct evidence of agreement. Still, CADE concluded that the agreement could be inferred from the totality of the evidence, and fined the producers the minimum permitted by the law, 1% of the previous year's gross turnover of each firm, which amounted to about BRL51 million, plus fines of BRL5 million for supplying false information. The respondents appealed the decision to the courts, and the case remains unresolved on appeal.
13. Law 10149/00.
14. For a detailed presentation of this programme, see Brazil's contribution to the Latin American Competition Forum (Chile, September 2009) at: <http://www.oecd.org/dataoecd/33/48/43536874.pdf>, also available on Odis as DAF/COMP/LACF(2009)7. Contributions from other Latin American countries can also be found at www.oecd.org/competition/latinamerica.
15. Ministry of Justice, Secretariat of Economic Law, *Brazil's Leniency Programme*, 2008, available on the SDE website at www.mj.gov/sde in Portuguese and English.
16. Law 8137/90.

17. It seems that the likelihood of prosecution for one of these other crimes in cases in which there is a leniency agreement is small. As described below in section 2.1.1.3 the BCPS works closely with federal and state prosecutors, who would institute such cases, with the result that they seldom if ever work at cross purposes.
18. Ministry of Justice Ordinance No. 04/2006.
19. This six month period can be extended for an additional six months if there is no other candidate for leniency in the investigation.
20. All are available on the SDE website, *supra*, n.15.
21. Law 11482/07.
22. CADE Ordinance No. 51 (2009).
23. Law 8137/90.
24. The same article also prohibits other types of anticompetitive conduct, including “abuse of economic power,” “exploitation of monopoly power by increasing prices without justification,” “sales below cost to hinder competition,” and certain forms of price discrimination. To date, criminal prosecution for these other types of conduct has been rare or nonexistent.
25. Law 10446/02.
26. Whirlpool, S.A., et al. (2009).
27. Peixoto, Brazil: Cartels and Leniency, in *Global Competition Review, Antitrust Review of the Americas 2010*, available on the GCR website at www.globalcompetitionreview.com.
28. In another settlement involving an international cartel in marine hoses three respondents did agree to provide co-operation.
29. Sociedade dos Mineradores do Rio Jacuí Ltda. (Smarja) (2008).
30. Rota-Sul Empresa de Vigilância Ltda., (2007).
31. SINDIPEDRAS, *et al.* (2005).
32. SDE Ordinance 51, 2009.
33. For further information on the subject, see the OECD Guidelines for fighting bid rigging available at www.oecd.org/competition/bidrigging.
34. Coopanest-GPA (2006).
35. Shopping Iguatemi (2007); Center Norte S/A (2007).
36. Supply side substitutability is also sometimes considered at this stage. (In some other countries supply side substitutability is considered when identifying the firms competing in the relevant market.)

37. “Gross revenues” means the total pre-tax revenues of the parties in all markets.
38. CADE *Súmula* (precedent) No. 01 (2005) issued pursuant to CADE Resolution No. 39 (2005).
39. Approved in Resolution No. 45.
40. The power was first authorised by Resolution 28, adopted in 2002, which was superseded by Resolution 45, issued in 2007.
41. In 2007 CADE issued Ordinance No. 44, which provided guidelines on calculation of these fines. Relevant criteria include the size of the transaction and of the parties, whether the merger was ultimately subject to a remedial order or disapproval by CADE and whether the parties did provide notification spontaneously, if late. The fine is doubled in repeated offences.
42. In a recent judicial decision CADE’s concept of the trigger date was challenged by a party who contended that under the law only a complete consummation of the transaction would begin the running of the 15 days. The Supreme Court sided with CADE’s definition. *Sonaeimo vs. CADE* (2009).
43. *Súmula* No. 2 defined the circumstances in which the notification of an acquisition of minority shareholdings by existing majority shareholders is not mandatory. *Súmula* No. 3 applied to situations in which the sole objective of an agreement is to take part in a public procurement procedure for the grant of a concession.
44. CADE challenges these transactions when the non-compete clause exceeds five years; this period has been settled in the Brazilian Civil Code as the default period. CADE has accepted longer periods in some cases, however, mainly in the case of joint ventures or when involving R&D activity.
45. América Latina Logística S.A. (“ALL”), Brasil Ferrovias S.A. (“BF”); Novoeste Brasil S.A. (“NV”), No. 08012.005747/2006-21 (2006). In a recent merger involving vertical restraints in the retail fuel sector, *Petrobras /Ipiranga* (2009). CADE chose to require the elimination of exclusivity arrangements between fuel wholesalers and retailers rather than to require divestitures of retail outlets, which it had done in an earlier, similar case.
46. *Coca Cola/ Leão Junior SA* (2009).
47. *DBG/Chinaglia* (2009).
48. *Saint-Gobain/Owens Corning* (2008).

49. The transaction was challenged in the United States by the Federal Trade Commission and settled by a consent order requiring Owens Corning to divest its North American continuous filament mat (CFM) business. See, USFTC press release, October 26, 2007, available on the USFTC web site at www.ftc.gov.
50. CVRD, et al. (2005).
51. CADE was represented in court by its Attorney General, who in 2008 was appointed President of CADE. His confirmation as President by the Senate was slowed (but ultimately approved), reportedly because of opposition by certain business interests. Among them, it was said, was Vale. See, Global Competition Review, *The Prizefighter*, available on the GCR website at www.globalcompetitionreview.com.
52. Article 5.
53. Law 8.884, Article 52.
54. Article 38.
55. Law 9021.
56. Article 42.
57. CADE Resolution 45.
58. SDE/SEAE Joint Ordinance No. 33/2006.
59. Resolution 15 has been superseded by Resolution 45, but the two annexes continue to be in effect. Also, in 2007 the BCPS undertook to create a system for electronic notification of mergers. The project has proved to be technically difficult, however, and the BCPS is now in the process of identifying outside IT contractors who might be able to complete it.
60. SEAE/SDE Joint Ordinance No. 1.
61. Lawyers assigned to the Attorney General are another career position.
62. Again, however, these are not positions requiring qualifications specific to CADE's mission.
63. SEAE's professional staff shown in Table 13 includes all who work in merger review, regulation and competition advocacy. The number who work in mergers is relatively small compared to the total. In 2009, for example, 17 of 78 professionals conducted merger review.
64. See, Peixoto, *Brazil: Cartels and Leniency*, in *The Antitrust Review of the Americas*, 2010 (2009).
65. The Superintendency General may determine that the notification is deficient in some respect and return it to the parties for amendment. The

parties have 10 days to do so. If they do not correct the deficiencies the merger is not reviewed. One effect of the SG's decision to require an amendment is to extend subsequent periods, as set out in the law, by 15 days – the five day period for the SG to decide if the notification is complete and the ten day period for the parties to amend.

66. Law 9478/97, Art. 10.
67. Brazil has become one of the largest producers of biofuel (ethanol) in the world, and is the world's largest exporter of the product. Petrobras is active in this market as well. See, United States Energy Information Administration, *Brazil Country Analysis Brief* (2009), available at <http://www.eia.doe.gov/emeu/cabs/Brazil/pdf>.
68. In 2009 a long anticipated Gas Law was passed in Brazil, a central purpose of which is to facilitate competition in the sector.
69. White Martins/Petroleum Brasileiro (2006).
70. Ultragaz/Shell Gas (2008).
71. Petróleo Brasileiro S.A., et al. (2008).
72. Regulation was previously in the hands of the Transportation Ministry.
73. There is a proposal for high-speed rail service between Sao Paulo and Rio de Janeiro. Studies are underway, but there is no timetable for completion.
74. GOL, et al. (2008).
75. Viação Aérea Rio-Grandense, et al. (2004).
76. Law 9,961/2000.
77. According to data as of September 2009 published by the Brazilian Central Bank, at www.bacen.gov.br.
78. Compliance with this 30 day deadline does not affect whether the proposal goes forward.
79. Law 9,069/1995, Art. 70.
80. Decree No. 1849/1996, now Decree No. 6531/2008, Art. 12.
81. CADE: www.cade.gov.br/; SDE: www.mj.gov.br/sde; SEAE: www.seae.fazenda.gov.br/.
82. See endnote 1.