BRAZIL

2001

Changes to competition laws and policies, proposed or adopted

Summary of new legal provisions of competition law and related legislation

1. The Brazilian System for Competition Defense is composed by the Secretariat for Economic Monitoring (SEAE) of the Ministry of Finance, the Secretariat of Economic Law (SDE) of the Ministry of Justice, and the Administrative Council for Economic Defense (CADE), an independent tribunal administratively linked to the Ministry of Justice. SEAE and SDE have analytical and investigative functions, while CADE is an administrative tribunal. CADE's decisions can only be reviewed by the courts.

2. Important legislative changes took place in the antitrust field in 2000. On December 21, 2000, Law No. 10.149/2000 was enacted, laying down changes to the Brazilian Antitrust Law (Law No. 8.884/94). In the new law, improvement to the instruments available to antitrust agencies was accomplished on four fronts: i) establishment of a leniency program; ii) adaptation of the principle of territoriality; iii) an increase in available powers and instruments; and iv) raising the procedural fee for examining concentrations acts.

3. The leniency program encourages the exchange of information on anti-competitive practices, ensuring to the collaborator freedom from punishment by antitrust agencies, where the antitrust agencies have no previous knowledge of the illicit practice or a reduction by two thirds of the penalty where investigations are already underway, but without sufficient evidence for conviction. The leniency agreement provides for the elimination of criminal punishment for the crimes established by Law No 8.137/90.

4. The principle of territoriality was adopted so that the agencies would be able to subpoena and give legal notice to foreign companies operating, even though indirectly, in Brazil, thus allowing the agencies to speed up investigation into anti-competitive conduct. The increase in fact finding powers involved greater detail in applying fines for omission, delay and furnishing misleading information, as well as instituting monetary penalties for the unjustified absence of people to make oral depositions to SDE. Also on this point, legal inspection, and the search and apprehension of documents was instituted.

5. Finally, Law No. 10.149/2000 raised the procedural fee for examining concentration acts. The procedural fee, which previously was R$ 15,000, paid solely to CADE, became R$ 45,000, to be shared between the three agencies of the Brazilian System for Competition Defense.

Other relevant measures, including new guidelines

6. **Ministry of Finance and Ministry of Justice's Joint Directive No. 50.** It establishes SEAE's and SDE's Horizontal Merger Guidelines. These Guidelines formally defined a common set of principles to guide economic analysis of horizontal mergers, so to introduce more transparency, security and celerity

to the administrative proceedings. This Directive was jointly issued in August of 2001 and mostly confirms the procedures introduced by SEAE in 1999, through its Directive No. 39.

7. **Ministry of Justice's Directive No. 849.** It came into force on September 22, 2000, regulating the SDE's areas of authority in investigating infringements of the economic order, replacing MJ-Ordinance no. 753/1998. Prominent in its wording is the regulation of the criteria for granting confidentiality of the information furnished by interested parties, guaranteeing a greater degree of legal security in handling information.

8. **Simplified Procedure Regarding Mergers.** On February 2002, a joint document introduced the simplified procedure that SEAE and SDE will adopt for the review of certain categories of mergers, which clearly do not offer competitive risks. The simplified review is employed at the discretion of SEAE and SDE, which will always have the possibility at any point of the analysis to return to the regular proceedings. Similarly, CADE will be able to request at the decision stage, that SEAE and SDE apply the full analysis, whenever the Council understands that the case deserves a more detailed review. The thresholds and the documentation required for merger notification remain the same and only the cases that were submitted with the complete notification questionnaire filled out (Annex I of CADE's Resolution 15) will be eligible for the simplified review.

Government proposals for new legislation

9. During the years 2000 and 2001, at the request of President Fernando Henrique Cardoso, representatives of the three agencies participated in a working group to prepare a draft-bill with a new structure for the Brazilian System for Competition Defense. Among other important changes proposed, the new model gathers SEAE, SDE and CADE into the National Agency for Competition. This agency will be an independent body linked to either the Ministry of Finance or to the Ministry of Justice, and CADE, although within the same structure, will keep its financial independence and will be the final authority, unless one of the parties appeals to the courts. The director of the agency will have a four-year renewable mandate, while the Commissioners of CADE will have a five-year non-renewable mandate instead of a two-year renewable one, as it is now.

10. SEAE, SDE and CADE also participated in the elaboration of a second bill, which will amend Law. No. 8.884 to adapt it to the new conformation of the system and make it more agile and efficient. This proposed amendment introduces also new important features to the law, such as: pre-merger notification system, early termination for simple cases, the participation of prosecutors in the trial representing consumers' interests and the definition of cartel as a per se injury.

11. The draft-bills were open for public consultation during several months, and after most of the proposed modifications were incorporated were sent back to the Civil Cabinet, from where it should be dispatched to Congress.

Enforcement of competition laws and policies

Competition authorities

Anti-Cartel Enforcement

The Alcohol Cartel Case

12. In May of 1999, 181 firms producers of alcohol established an association, the Brazilian Alcohol Exchange ("BBA"), that would sell under exclusivity agreements all the output of its members for three years. These firms produced altogether 85% of all the alcohol in the south, southeast and central-west regions of Brazil, though individually they had under 3% of the relevant market. The BBA would complement the existence of another association, the Brazilian Alcohol ("Brasil Álcool") created to store the members excess capacity which amounted to approximately 15% of their total output. The alleged motivation for the creation of these associations was the deregulation of the sector that drove prices below their average costs of production. This supposedly would be a temporary crisis due to excess capacity that would be corrected in two or three years time with the expansion of the consumption of alcohol.

13. These associations were notified to the SBDC under the Brazilian merger provision (Art. 54 of the Law No. 8.884/94), but were analyzed differently in each of the three agencies. SEAE evaluated the transactions separately, classified the parties conduct as collusion and recommended that the operations notified to the system were blocked. SDE did not consider that the parties were engaged in cartel formation and analyzed the operations separately under the merger provision. SDE, however, recommended that the operation should be blocked and that the Public Attorney should be informed to investigate the case. Finally, CADE did not even evaluate the parties conduct and assessed the operations jointly under the merger provision. The tribunal decided to block the transactions but did not find it necessary to notify the Public Attorney to investigate the case.

The Newspaper Cartel Case

14. On March 6th of 1999, the four largest newspapers in the city of Rio de Janeiro simultaneously raised their prices in 20%. Aside from the coincidence with respect to the date and the percentage of the raise, the four published almost identical notes justifying the price increase. In addition, there was also strong evidence that this concerted practice was made possible through the owners' trade association in Rio de Janeiro, since all the notes explaining the raise mentioned the association.

15. SEAE brought a representation to SDE, which then decided to carry out preliminary inquiries on this matter. The evidence gathered at SDE corroborated SEAE's findings and was the basis for the opening of an administrative procedure to investigate the existence of a cartel.

16. After SDE examination the Secretariat concluded to open an administrative procedure and additionally asked for the SEAE opinion on this matter. The relevant market was defined as the one concerning the largest newspapers in Rio de Janeiro. Although the four newspapers were targeted to different consumers, two of them to the low-end and the other two to the high-end, they competed among themselves. Therefore, a small but significant and non-transitory price-increase would have been enough to divert sales from one to the other. SEAE concluded that the maneuver of proportionally raising prices, had the purpose to maintain the segmentation of the public among them (high-end and low-end), preventing the diversion of the demand from one to the other and allowing each newspaper to keep its market-shares.

17. After analyzing the available data at that moment, SEAE confirmed the preliminary findings of both agencies and verified the existence of a concerted price increase. A suggestion that the four newspapers should be punished for collusive behavior was then issued to SDE, where the instruction and analysis of the case is currently taking place. After the conclusion of SDE the case will be sent to CADE for a decision.

The Airline Cartel Case

18. This administrative procedure began in March of 2000 by SDE after preliminary investigation conducted by SEAE during the second semester of 1999. This preliminary work indicated evidence of collusion among four of the main airlines that operate within Brazil.

19. In August 1999, the presidents of the four major airlines in Brazil met privately in a luxury hotel in São Paulo. Just five days after the meeting, the prices of the flights between central airports of Rio de Janeiro and São Paulo went up, by exactly 10%, for the four airlines whose presidents had met. The price increase, in the same day and by the same amount, affected the most lucrative market in Brazilian air transportation industry. The route between São Paulo and Rio de Janeiro connects the two major cities in the country and serves thousands of business travelers every day. The four airlines had 100% of the market for regular air transportation services in that route.

20. The airlines were asked to explain the motivation for the price increase on that specific day. In response to this request, the companies gave unspecific answers and did not mention the price increase of their competitors or any price matching policy. Also, there was no explanation for the choice of that specific date and amount of increase. Having discarded alternative explanations for the price increase, SEAE saw this case as a price-parallelism with a plus factor, and decided to make a complaint to SDE suggesting the opening of an administrative process against the four airlines.

21. After SDE had initiated the administrative procedure, the airlines changed their defense strategy arguing that the price raise was a result of a frequent conduct in the airline industry, where the leader firm imposes the price increase and the others simply match it. They attributed the uniform increase to the computerized system of the Airline Tariff Publishing Company (ATPCO). This system is a data base of the tariffs charged by the 700 largest airlines around the world. The companies allege that by monitoring it daily, they became aware on August 6th of 1999, of a price increase published by the leading airline, which would become effective three days later.

22. SEAE concluded during its preliminary investigations that although possible, it was highly unlikely that the uniform price increase had motivated by the airlines simply observing the ATPCO system, without previously exchanging information. The supposed leader posted its price and less than one hour later a second airline also informed its 10% increase. According to the airlines themselves, it takes at least 35 minutes to feed the system and in effect, this usually takes much longer.

23. The investigative report submitted by SEAE also detailed other anticompetitive tools employed by the airlines, to exchange information about the planned price increase through the ATPCO system, such as the “first ticket date”. This command allowed the airline to disseminate information about a new price to the other companies, but to withhold this information from the computer reservation systems until three days later. As a result, during those three days, only the competing airlines knew that one of them was planning to increase its prices, but not the customers or the travel agents. With that, in the event that the price increase was not matched by competitors, the first airline could have simply cancelled the price change and no one else would have had any knowledge of these events.

24. SEAE understood that the use of first-ticket dates on ATPCO system is potentially harmful for competition in the airline industry. The system increases the potential risks for market coordination, without reducing the search costs or creating better conditions for comparison shopping by consumers. The report, therefore, recommended that it should be ruled illegal since it limits, restrains and injures open competition, and arguably, is a way to obtain or otherwise influence the adoption of uniform or concerted business practices among competitors. Aside from the immediate prohibition of the "first ticket date" command, SEAE also suggested that SDE should initiate specific investigation about the services offered by ATPCO, to evaluate to what extent other communication tools it made available would facilitate coordination among competitors in the airline industry in Brazil.

25. SEAE's recommendation of the ATPCO system coincides with the international jurisprudence in this area, specifically with the understanding of the U.S. Department of Justice during the investigations carried on from 1988 to 1990. As a result of it, ATPCO signed a consent decree in which they agreed to change their system in a way that competing airlines in the United States would not be able to see future price increases of their rivals before they were available for sale. However, the system was only adapted to comply to U.S. law, so the service to the rest of the world, other than the United States and Canada, continues to be the same as it was before.

26. The administrative procedure returned to SDE, where the instruction of the case will be finalized. Subsequently, the case will be sent to CADE for a decision, which will probably establish an important legal precedent regarding information exchange tools.

The Fuel Retailers Cartel Cases

27. During the past two years, SEAE and SDE have jointly conducted several investigations of fuel retailers in different regions of Brazil. In March of 2002, CADE issued a decision in the Florianópolis investigation. The administrative procedure concerning the fuel retailers of Goiânia was also submitted to CADE and should be decided in the near future. And finally, in February of 2002, SEAE issued a recommendation in the case involving the fuel retailers in the Federal District and sent the administrative procedure to SDE, were the instruction of the case is being finalized. From there, it will be sent with SEAE's and SDE's recommendations to CADE for a decision.

Florianópolis

28. Since the beginning of 2000, consumers in Florianópolis systematically complained about the high prices of gasoline. After several articles in the press comparing the prices charged in other cities of the country and increased dissatisfaction expressed by the people of the city, the House of Representatives of the State of Santa Catarina began conducting public hearings on the matter.

29. After the public hearings, the retailers' trade association held a meeting to decide on a suggested profit margin. Although not many associates were present at the meeting, the majority approved a profit margin of 15.5%. Few days after that, the fuel retailers of Florianópolis started a price-war.

30. During the same period, the office of the Public Attorney of the State of Santa Catarina was already investigating the strong evidence that the retailers' conduct was a cartel. These findings plus the fact that the Public Attorney present at the public hearing had noticed there, that some retailers had resisted the simultaneous price increase, led the office to file for a judicial order requesting the wiretapping of the telephone of the president of the trade association. The recordings showed that he had been an intermediary in the negotiations for the price increases and had threatened some retailers that were hesitant to raise

prices. These recordings corroborated the evidence of collusive behavior and based on them, the Public Attorney's office offered a criminal representation before the state court and submitted a formal representation to SDE, where an administrative procedure was initiated.

31. In the course of the administrative procedure, SDE determined that for 20 days, the fuel stations should charge the price that had been in effect on June 17th of 2000, a few days after the meeting at the trade association. At the request of SDE, SEAE elaborated an economic analysis of the case and submitted a report concluding that the fuel retailers of Florianópolis had entered an agreement that resulted in an uniform price increase after June 21st of 2000. SDE issued its final opinion in 2001, suggesting the condemnation of the retailers by CADE due to the violation of article 20, items I, II, III and IV, for the practice of the conducts prohibited in article 21, items I, II and XXIV.

32. In March of 2002, CADE decided the case and found that the fuel stations had engaged in price-fixing agreements. The condemnation was issued in the following terms: The fuel-stations were fined in 10% of the total revenue of 1999; the fuel-station representatives were fined in 10% of the fine imposed to the fuel-stations; the trade association was fined in R$ 400.000,00 (approximately U$ 167.000,00); and the president of the trade association was fined in 15% of the fine imposed to the trade association.

Goiânia

33. In October of 2000, SDE initiated an administrative procedure to investigate the coordination among the fuel retailers of Goiânia. The alleged collusive behavior had been instigated by Sindiposto, the Union of fuel retailers in Goiânia, and by its president.

34. During the preliminary investigations, SDE questioned the president of Sindiposto and he admitted to having recommended to the gasoline and alcohol retailers that they should have the same profit margin for gas, alcohol and diesel. Based on this admission; on data indicating that the fuel prices in Goiânia were uniform throughout the city; and on an interview given to the press, where the president of Sindiposto talked about an imminent price increase, SDE initiated the administrative procedure to investigate the alleged coordinated behavior.

35. Simultaneously, the Public Attorney of the State of Goiás was also conducting a separate investigation that culminated in a civil lawsuit, where it obtained through a judicial order, the wiretapping of the telephone conversations between the representatives of Sindiposto and the retailers. The transcripts of the recordings as well as all the evidence collected at SDE was sent to SEAE, where the instruction of the case would be complemented.

36. Through the analysis of the data on prices of fuel, assembled by the National Agency of Petroleum (ANP), SEAE examined the indications of uniform price increases, immediately after the representatives of the trade association defended in the press, an ideal price for the litre of gasoline in Goiânia. It is worth mentioning that the same behavior was noticed in January of 2002, despite the preliminary order given by SDE in October of 2000, determining the termination of such practices.

37. In addition, the transcripts of the telephone recordings revealed conversations between the retailers and the trade association representatives where they agreed on fixing prices and profit margins, on common dates for price increases and on how these concerted practices would be monitored.

38. The evidence gathered during the preliminary investigation performed by SDE; the information collected by the Public Attorney's Office; the data assembled in preparation of SEAE's report; along with

the characteristics of the market, led SEAE and SDE to conclude on the existence of anticompetitive practices.

39. In February of 2002, SEAE and SDE submitted their reports to CADE, where it will be decided in the near future.

Federal District

40. After preliminary investigation conducted by SDE, SEAE submitted, in February 2002, its analysis for the instruction of the administrative procedure that investigated Sinpetro-DF, the union of the fuel retailers of the Federal District. The investigation concerned two elements:

- the obstruction of the entry of a competitor in the fuel retail market of the Federal District; and
- the refusal to sell a refined diesel oil in the Federal District.

41. With respect to the first element, SEAE's report remarks that Sinpetro-DF tried to influence the drafting of legislation of the Federal District that blocked the granting of permits to build fuel stations in certain areas, such as the parking lots of supermarkets, hyper-markets and shopping centers. For that, Sinpetro-DF held meetings to discuss the need to pass a law with that specific purpose. As the analysis of the reports of the meetings indicate, the associates were explicitly coordinating to block the entry of a large group of hyper-markets in the fuel retail market in the Federal District. The draft-bill proposed by Sinpetro-DF became law in January of 2000, and since then, supermarkets and hypermarkets have been banned from opening fuel stations in their lots.

42. The sale of diesel oil in Brazil is regulated by the National Department of Fuel (DNC). According to a determination issued by DNC, the sale of the refined diesel oil at the same price of the regular one was compulsory, whenever the regular diesel was unavailable at the fuel station. Reports of meetings at Sinpetro-DF, also indicated that the retailers had agreed on not selling the refined diesel oil, in order not to have to sell it for the same price as the regular diesel.

43. Through the use of economic evidence, SEAE's report examined the conditions of the retail market that facilitated the coordination among competitors, as follows:

- the firms have similar costs, productions and objectives;
- homogeneous product;
- high barriers to entry, specially those related to the regulatory issues in the Federal District;
- inelastic demand; and
- the existence of a trade association with a high level of representation (94,7%) and the ability to congregate the interests of its associates around anticompetitive conducts.

44. Based on the elements mentioned above, SEAE concluded that there was enough evidence of a cartel and submitted the following suggestions to CADE:

- the imposition of fines to Sinpetro-DF, and two chains of retailers in the Federal District;

- that CADE should inform the Municipal Legislative Power of the Federal District about the anticompetitive effects of the law that blocked the entry of supermarkets and hyper-markets in the fuel retail market;

- the initiation of a new administrative procedure to investigate the participation of other retailers associated to Sinpetro-DF, in the collusive practices mentioned above;

- the publication of the decision of CADE in a large newspaper of the Federal District, if CADE decides for the condemnation of Sinpetro-DF and of the two chains of retailers; and

- the creation of an educational program aiming at the prevention of similar practices in the future.

45. SEAE's report was presented to SDE, which will promote the instruction and perform its analisys of the case to finally send it to CADE for judgement.

Other Anticompetitive Practices

Labnew Indústria e Comércio Ltda. (P.A. No. 13002/95-97)

46. According to a representation submitted to the SBDC by Labnew, since September of 1994, Merck S.A. and its subsidiary in Brazil, MB Bioquímica, were selling vacuum tubes to collect blood bellow cost and, therefore, making it difficult for the firm to remain in the business. Labnew also submitted a representation to the Department of Commerce (DECOM) of the Ministry of Science and Technology, requesting an investigation of dumping on imports of the same tubes from the United States. DECOM concluded there was in fact dumping and imposed antidumping duties.

47. CADE defined the product dimension of the relevant market as vacuum blood tubes and adopted the geographic dimension as national. Imports were not considered a viable option, despite its significant presence in the market. According to the analysis provided by SEAE, direct importation does not provide the guarantee of a reliable stock, which is indispensable for laboratories and clinics to be able to operate properly, for reasons such as the 6 months expiration date of the tubes and customs complications, among others.

48. The analysis of the structure of the supply indicated that the market for collecting tubes was significantly concentrated, with practically only four firms in the market (C4:+ - 100%). The traditional entry barriers were also high and no potential competition was identified. Despite that, the market was considered relatively contestable, due to the possibility of uncommitted entry, with no sunk costs, through exports associated to the structure of the local distribution. SEAE regarded this as a viable alternative, since it was already common among all the foreign competitors present in the market.

49. CADE understood that Merck did not have a dominant position in the market, which would allow it to recoup the losses it would have with the alleged predation. In 1994, Merck was only an entrant that imported and resold another firm's tubes. It did not have any participation in the market at that point that would enable it to anticipate its growth and exercise market power in the future. Nonetheless, this fact alone was not enough to dismiss the predatory pricing claim and it was, therefore, necessary to compare costs and selling prices.

50. Since the internalization cost is the direct and variable cost, it was considered the appropriate paradigm to reach the variable average cost and to then evaluate whether Merck was selling bellow cost or not. The comparison between the internalization cost of the collecting tubes (considered as the variable cost of these products) with the prices charged by Merck and MB, indicated that those prices had, in general, positive gross margins and were in many cases, sufficient to at least cover all the commercialization costs. Therefore, those prices could not be considered predatory. And the few transactions bellow cost could not be considered anticompetitive, since those would not be enough to force a competitor with an even greater market-share at that time out of the market.

Companhia Vale do Rio Doce – CVRD (P.A. No. 08012.007285/99-78)

51. The following Administrative Process initiated on 11th August, 1999, questioning the contract terms between Companhia Vale do Rio Doce ("CVRD") and SAMITRI Mineral Company ("SAMITRI"), which has abusive clauses regarding the transport and export of iron ore by the railroad Vitória e Minas-EFVM and by Tubarão harbor, both CVRD properties.

52. Among the conditions set forth by the contract, SAMITRI was prohibited from selling iron ore at lower prices than the ones practiced by CVRD, as well as to refrain from selling in some markets such as England and Italy.

53. CVRD tariff charged from SAMITRI is not related to the executed transport services, but only with the sale price of iron ore in European market.

54. During the investigations, the Secretariat of Economic Law ("SDE") concluded that CVRD practiced price discrimination, as well as other illegal conducts.

55. Although CVRD has a contract for concession and exploration of the railroad services, entered into with the Transportation Ministry, this does not create an antitrust exemption. SDE reaffirmed its jurisdiction to investigate markets submitted to specific regulations, such as the case, and verified that CVRD infringed the Brazilian Antitrust Law, even though operating in a regulated market.

56. SDE reaffirmed the recommendation issued when CVRD was privatized, stating the creation of an independent company from the original ore company, with the specific assignment to operate the railroad. Continuing to operate as a single legal entity, like it's currently been done, the company could easily manipulate accounts, covering possible anticompetitive conducts. The company spin-off is mentioned as a potential remedy in the Privatization RFP (Request for Proposal) and in the national antitrust legislation.

57. SDE issued its opinion on August 29, 2001, suggesting that CVRD effectively practices anticompetitive conducts in the transportation services rendered by the railroad Vitória e Minas.

58. The conclusion, according to the facts exposed, is that CVRD has to be condemned, by the violation of article 20, items I, III and IV of Brazilian antitrust law (8.884/94), for practicing the conducts prohibited in article 21, items V, XII e XXIV of the same law.

Participações Morro Vermelho X Condomínio Shopping Center Iguatemi e Shopping Cen*ter Reunidos do Brasil Ltda.** ***(P.A. No. 08012.009997/98-82)

59. This Administrative Process was initiated on August, 1999, to investigate a clause in the lease contract of the Shopping Iguatemi that prohibited the owners of the stores in that shopping to contract with certain (specified in the contract) Shopping Centers.

60. After the analysis of all information in the process, the Secretariat of Economic Law ("SDE"), under the "rule of reason", concluded that this clause was prejudicial to the competition, hindering competitors and increasing the entry barriers of this market. The relevant market was defined as being the market of commercial lease in high standards Shopping Centers in the west, south, east and central zone of the city of São Paulo.

61. This exclusive-dealing arrangement injures the other Shopping Centers that are already placed, because it decreases the available options of famous stores. In other words, the Shopping Centers that are specified in Iguatemi's contract, are negatively affected because they must operate without some stores that wealthy consumers like and also, indirectly, due to the decreased bargaining power of the shopping centers before the high-standard stores that are not covered by Iguatemi's exclusivity contract.

62. A vicious circle happens, once the famous stores (including the international ones) prefer to install themselves exactly in a shopping that has exclusive stores. From this way it becomes more difficult for the other shopping centers to build a solid image in this market, and to capture the high standard consumer. The exclusivity clauses reflect directly in the revenue of new shopping centers, which are forced to reduce their rental prices as a way to conquer clients, discouraging newcomers.

63. SDE's analysis showed that Iguatemi's clients mostly visit shopping centers where the restrictive clause is imposed. Therefore, SDE concluded that Iguatemi uses this clause against their main rivals (or potential rivals), in an anticompetitive purpose.

64. SDE issued its opinion on 18th of May, 2001, suggesting that Iguatemi effectively practices anticompetitive conducts based on article 20, items I, II and IV, practicing the conducts prohibited by article 21, items IV and V of the Brazilian antitrust law (8.884/94). That Secretariat also suggested the immediate exclusion of this abusive clause.

Microsoft Informática Ltda. X Paiva Piovesa*n Engenharia e Informação Ltda.** ***(P.A. No. 08012.001182/98-31)

65. The legal process began in May 22, 1998, against *Microsoft Informática Ltda* that was accused by the Brazilian software house *Paiva Piovesan Engenharia e Informação Ltda* (hereafter Paiva Piovesan), which developed a financial assistant software (Finance), that competes with Microsoft's software (Money). The software house accused Microsoft for the following conducts: i) tying Money with other softwares such as Word, Excel, etc into the Microsoft Office for Small Business package (MOSB); ii) selling several copies of Money, without public bid, to two large Brazilian public banks: *Banco do Brasil* (250.000 copies) and *Caixa Econômica Federal* (unknown quantity of copies), both of which have distributed the software to their customers for free; iii) restricting access of Paiva Piovesan products to large software resellers; iv) strong subjective consumer inducing to use Microsoft products; v) imposing barriers to Paiva Piovesan to get partnerships with large Brazilian banks; and vi) practice of underselling in the occasion of the launching of data base software Access in the Brazilian market. Additionally, the company pointed out that since the creation of the Office suite several Microsoft competitors have disappeared or were acquired by other companies.

66. Regarding the relevant market definition, the Secretariat of Economic Law understands that the anticompetitive conducts concern the market of financial assistant software developed for Windows operational system to be used by domestic users and small businesses. As to the geographic dimension of the market, the Secretariat understands that given the language constraints and the idiosyncrasies of the Brazilian financial system, the relevant market should be considered the national one.

67. The Secretariat concluded that Microsoft effectively uses the Select contract to illegally sell several Money copies to financial institutions avoiding normal bid proceedings. This practice was considered an abuse of dominant position, since Microsoft caused several damages to the market due to the selling of several copies of its software to official financial institutions, using the contract Select to extend its dominant position from the operational system market to the competitive market of financial assistant softwares.

68. Additionally, although the software Money could be bought separately from the Office package, its distribution with this suite free of extra charges also serves as an instrument to extend Microsoft's dominant position in the market of such packages to the market of financial assistants in the absence of any kind of significant efficiency associated with such tying. This practice is relatively similar to the combination of MS Internet Explorer into the Windows operational system in detriment of other browsers, such as Netscape Navigator.

69. Finally, the Secretariat concluded that Microsoft practices anticompetitive conducts consistent with dominant position abuse according to Article 20, items IV, V and VI of Brazilian Antitrust Law. The procedure was sent to CADE for judgment.

Mergers and Acquisitions

70. Table 1 shows the main sectors in which transactions were communicated to the antitrust agencies. The emergence of transactions involving Internet service providers and portals attracts attention. These transactions are now taking place in increasing numbers, compared with Concentration Acts in other sectors.

Table 1

Main Economic Sectors where CAs Occurred – 1994 to 2000

Setores	1994	1995	1996	1997	1998	1999	2000
Food	2	6	6	9	12	20	20
Auto parts	1	2	3	9	16	28	27
Banking and Finance	0	0	0	0	1	3	14
Energy	0	0	0	0	2	27	10
Pharmaceutical Industry	0	5	1	6	10	10	21
Mechanical Industry	0	0	0	0	1	2	20
Information Technology	0	0	0	4	4	33	33
Metalworking and Steel	3	2	6	10	15	10	26
Paper and Pulp	0	0	0	2	4	1	17
Internet Service Providers and Portals	0	0	0	0	0	0	50

Source: Procedural Sector (SDE) and the Federal Government Official Gazette

BRAZIL

Summary of significant cases.

Banco Finasa de Investimento S/A and Zurich Participações e Representações. (A.C. No. 6762/2000-09)

71. The proposed operation involved two insurance companies, where Zurich Brasil Seguros S/A would acquire 26% of the total shares of Brasmetal Industrial S/A, a holding of the Finasa Group. The relevant market was defined as the national insurance market and the post-merger market-share would be of 1,2%. CADE understood that this operation would not substantially modify the structure of the relevant market and that there were no risks of the new firm exercising market power, either unilaterally or in coordination with the other insurance companies in the market. Therefore, the majority decision cleared the merger.

72. Although apparently simple, this transaction raised fundamental questions regarding the separation of prudential and antitrust regulation in Brazil and it divided the Commissioners of CADE. The majority ruling analyzed two issues in its verdict: whether it was CADE's attribution to examine mergers in the financial system; and if the report of the Federal Attorney's Office, which determines that the Central Bank of Brazil is the organism in charge of any matters concerning financial institutions, was applicable to CADE as well.

73. The majority understood that since CADE is an independent administrative agency that cannot be subject to political or governmental influence, its decisions could not be revised by any other administrative organism. Hence, the report of the Federal Attorney's Office would not bind CADE. The ruling also highlighted the fact that the Brazilian Antitrust Law (Law No. 8.884/94) is applicable to every sector of the economy, and that it does not establish any exceptions for mergers that need not be submitted to CADE. The decision however, stresses that this is compatible with the regulatory role performed by the Central Bank.

74. The central discussion in this case is whether there is a clash between the attributions of CADE and of the Central Bank. The majority ruled that there was not, that the two organisms are in fact complementary to each other: the Central Bank being responsible for the prudential regulation of the financial sector, according to its attributions listed in the Law No. 4.595/64; and CADE having an adjudicative role in the prevention and repression of abuse of economic power, as determined by the Brazilian Antitrust Law. Therefore, the interpretation provided by the Federal Attorney's report had the objective to resolve a conflict that in reality did not exist.

75. The majority decision aims to harmonize the application of both Laws Nos. 4.595/64 and 8.884/94 and establishes that the Central Bank should provide the abstract rules that will set the conditions for competition in the financial sector. The Central Bank would, then, be responsible for a clear *per se* control. This is significantly different than the control that CADE does, where the anticompetitive impact is verified in each case. Consequently, certain behaviors deemed illegal by the prudential regulation may or may not be considered anticompetitive and vice-versa. The majority opinion concludes that every transaction in the financial sector must, therefore, continue to be evaluated by CADE.

76. The President of CADE and the Commissioner to whom the case was initially distributed to dissented in the case. The dissenting vote understood that CADE was not authorized to analyze operations in the financial sector. According to the vote, there was in fact a conflict between the attributions of CADE and of the Central Bank and that, since the Federal Attorney's report was applicable to CADE as well, that the tribunal was not competent to evaluate the acquisition of Brasmetal Industrial S/A by Zurich Brasil Seguros S/A.

E.I. Du Pont de Nemours and Pioneer Hi-Bred International, Inc. (A.C. No. 10266/99-00)

77. This was a worldwide operation that was notified to the SBDC because of its impact in the Brazilian Market. Delta was a firm of the Du Pont group, which produced several agricultural pesticides, that through this operation was incorporated by Pioneer, a firm in the business of soy seed, simple hybrid corn seed and triple hybrid corn seed.

78. SEAE understood that the geographic definition of the relevant market was national and defined the relevant product market as soy seed, simple hybrid corn seed and triple hybrid corn seed. Moreover, SEAE's analysis considered that the horizontal concentration observed was not significantly high to allow the merged firm to exercise market power, either unilaterally or through coordination with its competitors. In addition, the report concluded that there were no vertical relations in the conglomerate that resulted from the operation. Therefore, it recommended that the merger should be approved, without any restrictions.

79. CADE adopted the analysis provided in SEAE's report and cleared the merger, unanimously. The Commissioners, however disagreed with respect to the moment of the celebration of transaction and, hence, on whether the notification was duly presented or if the parties should be fined for late-submission.

80. The majority agreed with the argument presented by the parties, that the merger was concluded on October 1st of 1999, when the shareholders of Pioneer approved the incorporation plan of Pioneer by Delta. Hence, prevailed the understanding that the notification was properly submitted. However, the Commissioner to whom the case was originally distributed, Mr. Leopoldino da Fonseca, and the President of CADE, Mr. Grandino Rodas, considered that the transaction was concluded in March 15th of 1999, which is the date of the Plan of Incorporation of the firms. According to this dissenting opinion, the interference in the business of the firms after this plan was presented was significant enough to change the market equilibrium and to bind the parties from that date on. Therefore, in their view, the notification was not timely and a late-submission fine was due.

New Holland N.V. and Case Corporation (A.C. No. 4901/99-93)

81. Through this operation, New Holland incorporated Case Corporation, originating a new company, named Case New Holland. The merger took place abroad, but since both firms had subsidiaries in Brazil and it had impact in the Brazilian market, the transaction was notified to the SBDC.

82. New Holland was a Dutch company controlled by Fiat, in the business of industrial machinery, particularly tractors, harvesters and other agricultural equipment. Case Corporation was a North-American firm, in the same line of business. The transaction resulted in a horizontal concentration in the relevant markets of tractors, mowers, harvesters and of other construction equipment. Geographically, CADE defined the relevant market as national and indicated several reasons why imports were not a viable option, such as: the importance of technical assistance after sales; the high internalization costs; and the difficulties in financing the equipment, which are rarely paid up front, due to its high costs. There is no independent importation in this market since, even when there is no domestic production, the only firms that bring in products from abroad are those already established in Brazil that are able to provide for technical assistance services.

83. CADE's analysis of the degree of concentration concluded that there was no increase in the market power of the firms in the relevant market for tractors or in the relevant market for mowers, which was considered insignificant for a detailed analysis. In the market for harvesters, aside from the rivalry of the other competitors, the low entry barriers would also prevent the new firm from increasing prices. Finally, in the relevant markets for other construction equipment, CADE understood that the operation

would not result in the increase of the market power of the firms, due to potential competition from non-committed entrants that owned multi-purpose plants in Brazil.

84. Since no anticompetitive risks were identified in the transaction, CADE, unanimously cleared the merger, without even having examined the efficiencies' argument presented by the parties. In the United States and in Europe, however, the market for agricultural equipment is larger and in each plant the firms produce a different product, which increases the profitability of their investment. The European and U.S. antitrust agencies, therefore, determined the divestiture of a number of plants dedicated to the production of specific products, as a condition for the approval of the transaction.

WL Cumbica LLC; Warner-Lambert Indústria e Comércio LTDA.; Kraft Lacta Suchard Brasil S.A. (A.C. No. 08012.012223/99-60)

85. The following case refers to an acquisition by Warner-Lambert of the candy business (except chocolates) owned by Kraft Lacta Suchar, in Brazil.

86. The goods involved in the operation were candies, caramels, bubble gums and chewing gums.

87. SDE verified firms' horizontal superposition only in the markets of industrialization and trade of chewing gum.

88. The definition of the product relevant market defined by the firms, points that the market is the "general market of candies" including caramels, lollipops, bubble gums, chewing gums, chocolates, and others.

89. SDE considered, however, that the firm's market definition was too broad because of the accentuate differences from the demand for products included in this definition, like: taste, chemical reactions on the organism, utility, etc…

90. SDE mentioned that there are significant differences in the supply structure of products (for example, the market of chocolates and chewing gum are more concentrated than the market of candies) and the international case law that also defines separately these markets.

91. The product "chewing gum" has low transportation costs and is a non-perecible product, permitting to be traded all over the country, independent of the factory geographical localization. Thus, all the units that produce chewing gum are situated in state of São Paulo.

92. On the other hand, imports represent a minimum percentage of the internal demand because, for example, of the high importation tax (23%).

93 There was significant concentration resulting from the operation. Considering the acquisition of Suchard, Warner-Lambert chewing gum market share retained about 62,4% considering volume of sales, and 74,3% considering the revenue.

94. Since there is no "acceptable" concentration level or a threshold for the beginning of anticompetitive effects, it was necessary to analyze the attributes of the chewing gum market, like prices, evolution of the players market share, the entry barriers, and others, for a better study of the acquisition results

95. The following factors directed SDE's attention, serving as an indication of non–damage in the competition with the acquisition:

1. analysis of the market showed that Kraft Suchard was losing its share, even with decreasing of its prices in 15,6% and spending, proportionally, more in advertisement than the other players.

2. brazilian relevant market of chewing gum was on decline, reducing the sales to consumers;

3. the scope of the distribution system of the main competitor was extensive and in expansion;

4. most of the chewing gum retailers are served by, at minimum, one of the other players outside Warner Lambert.

96. As exposed, the SDE considered the fact that the firms lost 2, 4 % and 0,6% of market share, in terms of volume and value, respectively, by the year of 1.999 and 2.000.

97. Consequently, the acquisition of chewing gum trade of Suchard, increased the Warner- Lambert market share, but, on the other hand, a firm that was consistently losing its participation, probably because of the obsolete goods, acquired new competitive skills. SDE concluded to clear the operation, considering that competition in the market of chewing gum may be effective by the other player sales, which can offer cheaper products than Warner-Lambert.

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

98. Brazilian law does not grant authority to the antitrust agencies to operate in formulating or implementing other policies. Nonetheless, the antitrust agencies adopt the stance of being the so-called "competition advocate", which consists in being proactive within the government sphere aiming at eliminating rules and policies incompatible with the principles of competition.

99. In this context, SDE, SEAE and CADE have entered into reciprocal cooperation agreements with the main regulatory agencies in the country, such as the Brazilian Electricity Agency, the National Petroleum Agency, and the National Sanitary Inspection Agency. These agreements not only facilitate the exchange of information in order to help the System in assessing cases involving overlapping sectors, but they also lead to greater coordination between the regulatory and antitrust areas.

Resources of competition authorities

Resources overall (current numbers and change over previous year):

Resources Overall

BRAZIL

Annual Budget (in your currency and USD)

Secretariat for Economic Monitoring (SEAE)*	***Secretariat of Economic Law (SDE)****	***Administrative Council for Economic Defense (CADE)***
R$ 1. 951.770,00 (approx. U$813.237,50)	*R$ 8.400.000,00 (approx. U$3.500.000,00)*	*R$ 15.957.707,00 (approx. U$6.650.000,00)*

Number of Employees

Secretariat for Economic Monitoring (SEAE)	**Secretariat of Economic Law (SDE)**	**Administrative Council for Economic Defense (CADE)**
Economists: 45	Economists: 6	Economists: 9
Lawyers: 4	Lawyers: 14	Lawyers: 32
Other professionals: 22	Other professionals: 6	Other professionals: 29
Support staff:148	Support staff:10	Support staff: 73
All staff combined: 219	All staff combined: 36	All staff combined:143

Human Resources applied to:

Enforcement Against Anticompetitive Practices

Secretariat for Economic Monitoring (SEAE)	**Secretariat of Economic Law (SDE)**	**Administrative Council for Economic Defense (CADE)**
SEAE assigns12 professionals for anti-cartel enforcement	17 professionals	CADE does not assign a separate staff for anti-cartel and merger control.

Merger Review and Enforcement

Secretariat for Economic Monitoring (SEAE)	**Secretariat of Economic Law (SDE)**	**Administrative Council for Economic Defense (CADE)**
SEAE assigns 59 professionals for merger control and other anticompetitive practices	6 professionals	CADE does not assign a separate staff for anti-cartel enforcement and merger control.

Advocacy Efforts

Secretariat for Economic Monitoring (SEAE)	**Secretariat of Economic Law (SDE)**	**Administrative Council for Economic Defense (CADE)**
SEAE does not assign a separate staff for advocacy efforts.	SDE does not assign a separate staff for advocacy efforts.	18 professionals

* The amount reserved for salaries of the employees of SEAE is not included in this sum; this expenditure is done through another agency of the Ministry of Finance. Since 2002, SEAE and SDE have significantly increased their resources after both agencies started receiving together with CADE one third of the notification fee the parties pay for merger review.

Period Covered by the Above Information: The year of 2001.

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

100. One of the main initiatives in this regard taken by SEAE in 2001 was the Project "Governmental Politics and Regulation of the Pharmaceutical Drug Market", a study carried out by the Getulio Vargas Foundation and financed by the Fund for the Defense of the Diffuse Rights. This study focused on the main aspects of the debate on the regulation of the pharmaceutical sector, taking under consideration the imperfections of the market. Several elements of the demand for pharmaceutical drugs in Brazil were analyzed and later became important references for the assessment of competition and regulation in the pharmaceutical market. This study was subsequently transformed in a Working Paper by SEAE, with the following main topics:

- asymmetric information in the pharmaceutical drug market and the implications for competition policies;
- regulation of the pharmaceutical drug industry;
- consumer expenditure with pharmaceutical drugs in Brazil;
- review of the empirical literature;
- framework and description of data; and
- conclusions and policy proposals.

BRAZIL

Statistical Annex

Table 1

Total of Cases Submitted to CADE in 2001

Month	M	AP	VA	IF	PI	CON	RE	COM	Total
January	97	5	---	7	1	2	---	---	112
February	28	1	1	8	3	---	---	1	42
March	61	4	---	6	2	---	---	---	73
April	57	1	---	8	1	1	---	---	68
May	71	4	---	5	1	---	---	1	82
June	54	7	---	7	1	---	---	---	69
July	45	5	---	6	---	1	---	---	57
August	52	---	---	1	---	2	---	---	55
September	54	1	---	3	---	1	---	---	59
October	39	1	---	1	---	3	1	---	45
November	41	1	---	2	1	---	---	---	45
December	22	---	---	---	---	---	---	---	22
Total	**621**	**30**	**1**	**54**	**10**	**10**	**1**	**2**	**729**

Source: CADE

M = Mergers
AP = Administrative Procedures
VA = Voluntary Appeal
IF = Infringement Files
PI = Preliminary Investigations
CO = Consultations
RE = Representations
COM = Complaints

Table 2

Total of Cases Decided by CADE in 2001

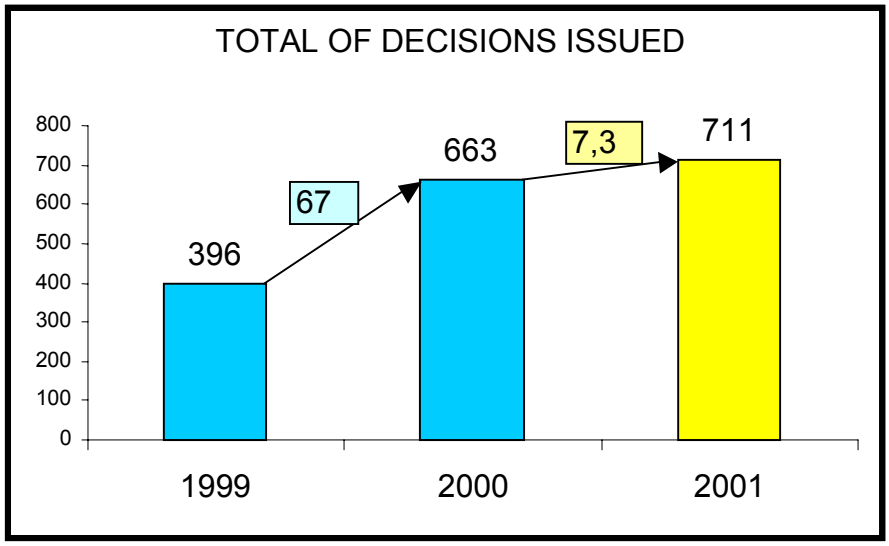
Month	M	AP	VA	IF	PI	CO	RE
January	72	1	---	4	1	2	---
February	50	3	---	4	3	1	---
March	51	8	---	8	6	2	---
April	34	5	---	4	7	---	1
May	60	2	1	10	---	---	---
June	78	7	---	5	7	---	---
July	---	---	---	---	---	---	---
August	---	---	---	---	---	---	---
September	107	5	---	6	---	---	---
October	64	2	---	4	8	---	---
November	51	1	---	1	---	---	---
December	17	---	---	7	---	1	---
Total	**584**	**34**	**1**	**53**	**32**	**6**	**1**

Source: CADE

M = Mergers
AP = Administrative Procedures
VA = Voluntary Appeal
IF = Infringement Files
PI = Preliminary Investigations
CO = Consultations
RE = Representations

Table 3

Comparative Table of Total Decisions Issued by CADE



Source: CADE