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ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN BRAZIL

-- 2009 --

*This report is submitted by Brazil to the Competition Committee FOR DISCUSSION at its forthcoming meeting to be held on 16-17 June 2010.*

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## Executive Summary

1. The Brazilian Competition Policy System (BCPS), comprised by the Council for Economic Defence (CADE), the Secretariat for Economic Law (SDE) of the Ministry of Justice and the Secretariat of Economic Monitoring (SEAE) of the Ministry of Finance, has been through several changes within the years, always aiming to improve competition and the enforcement of competition law in Brazil. For that reason, the BCPS has focuses all its efforts in approving the Bill 06/09 in the last two years. Major achievements have been reached, but there is still a long way to go.

2. In 2009, the BCPS continued to suffer the same problems of scarcity of financial, human and material resources faced in 2008. Notwithstanding, substantial efforts were made to advance the BCPS's recognition as a transparent and efficient system, working in harmony with the strategic planning of the Federal Government.

3. Investments on staff capacity building continued to be one of the BCPS strengths. The staff was benefited with a wide range of training opportunities, from permanent training programme with graduate courses to participation in international courses and internships.

4. CADE's Project Management Office (PMO) was responsible for implementing and encouraging permanent staff to get involved in the implementation of institutional key projects such as "Intranet"; "Paperless Dockets"; "Reference Library on Antitrust"; "Ombudsman"; "Stakeholders Opinion Research"; "Centre of Statistics"; "CADE's Monthly Bulletin"; "Súmulas" (understanding briefs).

5. CADE's Attorney General Office continued to obtain significant results before the Judiciary. Therefore it is recognised as one of the best Attorney General's Office of Brazil, counting on an extremely qualified staff.

6. As a response to the increasing judicial review of CADE's decisions, CADE's advocacy before the Judiciary has been strengthened. Before 2006, litigation was not a priority for CADE's Attorney General (Chief Attorney) Office. Since then, CADE's Legal Service has become more proactive, by proposing an increasing number of lawsuits - either to require the payment of fines imposed by the Plenary, or to obtain a judicial order for the compliance of remedies imposed by CADE. Furthermore, the follow-up of judicial procedures involving CADE has become a priority, and frequently CADE's attorneys go in person before courts to explain the merits of the decisions. Such initiatives contribute to strengthen the relationship among judges, the legal community and CADE, as well as promote an increasing recognition and respectability in relation to the work performed by CADE.

7. In 2009, Brazil requested to be submitted to a Peer Review conducted by OECD Competition Committee, whose assessments and conclusions were discussed during the last Global Forum on Competition, on February 18<sup>th</sup>. The report recognised BCPS achievements, but strongly recommended the approval of the Bill which is expected to 2010.

8. SDE's strategy of focusing the scarce resources on cracking cartels rather than on merger review has been proven successful. The number of investigations of anticompetitive practices, leniency applications and dawn raids were substantially increased. One clear indication that anti-cartel enforcement in Brazil is already effective and well viewed abroad is not only the relatively high number of executed leniency agreements (15), but also the fact that in many cases where there is a leniency in place in other jurisdictions, the parties also presented themselves to the Brazilian authorities.

9. SDE has been also devoting especial attention to strengthening the co-operation with the criminal authorities, in order to increase the impact of its anti-cartel enforcement policy. In Brazil, cartel is both an

administrative infringement and a crime, punishable with criminal fines or prison terms that may range from 2 to 5 years. SDE as the chief administrative investigative authority has steadfastly emphasised the importance of securing conviction and jail sentences to optimise deterrence of cartel conduct. Presently, there are more than 100 executives – both Brazilian and foreign – facing criminal proceedings in Brazil suspected of cartel activity which affected the Brazilian territory. In the past years, at least 34 executives were found guilty by criminal courts for cartel involvement, and one of the prison sentences was superior to the 5 year maximum term provided by the law, due to the imposition of aggravating circumstances under the Criminal Code of Justice.

10. Furthermore, major efforts were taken in the field of competition advocacy: The second edition of the “*National Anti-Cartel Enforcement Day*” - celebrated on October 8<sup>th</sup>, 2009 - was attended by the Brazilian President Luiz Inácio Lula da Silva, Vice-President Jose Alencar and other important national and foreign authorities, as further explained below. The event also comprised advocacy actions in 8 Brazilian airports, in which brochures and materials were handed out to disseminate the competition culture and the relevance of fighting cartels. Additionally, during that two-day event the Anti-Cartel Brazilian National Strategy was triggered. The conference congregated 200 prosecutors and police officers from 26 Brazilian states to discuss the implementation of the country’s criminal anti-cartel laws. Finally, at the end of the event, the main administrative and criminal authorities direct or indirectly involved with cartel enforcement signed the “Brasilia Declaration”, in order to enhance and reaffirm the co-operation among these authorities (English version available at [www.mj.gov.br/sde](http://www.mj.gov.br/sde)).

11. In 2009, SEAE has continued its efforts in enhancing its competition advocacy role. Several efforts were undertaken in 2009, which are listed with more details in the item 3 of this report. Among them, it is worth to highlight the following: (i) the implementation of a high speed train in Brazil (TAV), a 350km/h high speed railway line connecting the cities of Rio de Janeiro, São Paulo and Campinas. During the last year, especially in the second semester, SEAE has been participating in most discussions on the proposed model, together with National Land Transport Agency (ANTT), Ministry of Transportation, Brazilian Development Bank (BNDES) and the Presidential Staff Office, (ii) concerning the sector of interstate and international highway passenger transportation (TRIIP), in 2009 SEAE participated in meetings with ANTT in order to discuss points related to competition advocacy and creation of mechanisms designed to stimulate efficiency in the providing of TRIIP services based on the still to be concluded sectoral model proposed by ANTT, for the processes of tendering the awarding of concessions, (iii) SEAE’s manifestation regarding energy industry in the Public Hearing to discuss the auction rules on contracting of energy reserve, an auction specifically designed to wind power producers, (iv) Payment Cards – report about the payment cards industry in Brazil, Central Bank of Brazil, Secretariat for Economic Monitoring of the Ministry of Finance, Secretariat of Economic Law of the Ministry of Justice, (v) SEAE, that is the Brazilian co-ordinator of the Technical Committee on Competition n° 5 of Mercosur, jointly with SDE and CADE, have been giving all assistance concerning guidelines and methodology for analysing mergers and cartels.

12. In regards to its competition defence role, it is important to stress the implementation of the new opinion model (an electronic form), in March 2009, for the fast track procedure, simplifying it in order to maximise the efficiency of SEAE and SDE’s internal work and, thus, reducing the time of analysis for these cases.

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

### ***1.1 Summary of new legal provisions of competition law and related legislation***

13. In 2009, CADE undertook several initiatives to become more efficient and increase the quality and excellence of its activities. In May 2009, the approval of Ordinance No. 52, which restored the

monitoring function of CADE's Attorney General Office, promoted a significant change in the time required to reach a final decision, allowing a more fast and efficient application of several administrative and judicial instruments of execution, by means of increasing the technical knowledge of collection and the elimination of redundant and bureaucratic stages, rationalising the scarce human and material resources of the Council.

14. Furthermore, CADE issued the Resolution n°. 51, of February 04, 2009, which created a Commission composed of civil servants working at CADE for the purpose of negotiating cease-and-desist commitments in administrative cases. One of the goals of this initiative is to promote specialisation and increase efficiency in the negotiation of settlement proposals and their conclusion.

15. In September 2009 CADE took another great step towards greater enforcement issuing Ordinance No. 53. It created formally inside the autarchy a department specialised in economic studies (Department of Economic Studies – the DEE). Headed by two PhDs with specialisation in econometric issues, the DEE was created to assist the Commission's decisions by forging in the use of econometric as well as other quantitative methods. The position of Chief Economist was created along with rules that regulate the structure and responsibilities of the DEE.

16. The main activity of the DEE is to provide economic assistance to the Commissioners. The DEE is often asked to provide reviews of experts' documents in mergers and conduct cases. The DEE also provides technical knowledge to the Commissioners' offices to help with cases analysis. Last, but not least, the DEE can prepare background papers on sectors of the economy.

17. On December 9<sup>th</sup>, 2010, four new *sumulas*<sup>1</sup> (understanding briefs) were issued:

- Sumula No. 7, which states that: actions, in whatever form manifested, which obstruct or create difficulties for doctors who are members of a co-operative, when providing services outside the scope of the co-operative, constitute an infraction against the economic order, if the co-operative holds a dominant position.
- Sumula No. 6: taxation according to Law 9.781/99 is due upon filing of the merger review or consultancy, and shall not be waived in case of desistance.
- Sumula No. 5: it is lawful to establish a non-competition clause with the maximum of a five-year term from the selling, as long as it is entailed to the protection of the stock in trade.
- Sumula No. 4: it is lawful to establish a non-competition clause during the period of a joint venture, as long as it remains directly related to its object, and it is restricted to the markets of operation.

18. In 2009 SDE issued two Ordinances, in order to improve transparency and predictability:

- SDE's Ordinance No. 51: On July 3<sup>rd</sup>, 2009, SDE released its Guidelines for the Analysis of Complaints Involving Public Procurement, together with a recommended Model Certificate of Independent Bid Determination (CIBD), in order to help procurement agents fight bid rigging in public procurement and to encourage them to take steps to reduce the risk of collusion in the procurement process.

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<sup>1</sup> The *sumulas* contribute greatly for the consolidation of jurisprudence and increase stability and predictability in the implementation of the Brazilian competition law and policy.

The Guidelines clarify the limits of the application of Brazilian competition law in public procurement proceedings, and also indicate how the Secretariat will analyse cases of anticompetitive conduct by bidders, such as bid rigging, facilitating practices by trade associations and some kinds of bid consortia. CIBDs, will assist procurement agents to increase deterrence of bid rigging.

Based on this SDE's initiative, on September 17th, 2009, the Brazilian Ministry of Planning published the Regulatory Instruction No. 02 of 2009 that obliges participants in federal public bids to present the CIBD. The Ministry of Planning is responsible for regulating the bidding processes in federal level as well as operating the ComprasNet, which is the e-procurement unit for the Brazilian government.

- SDE's Ordinance No. 48: On March 4<sup>th</sup>, 2009, SDE issued an Ordinance that revokes the article 9 of the Ordinance No. 14/2004, which stated that SDE might suggest to CADE that the penalties might be reduced whenever the respondent firm has a Compliance Programme. The Ordinance No. 14/2004 established the main guidelines for designing a compliance programme, defining the requirements and conditions for SDE to issue the corresponding Compliance Certificate. The Compliance Certificate is in fact a 'quality seal' from SDE that will be issued if the programme is in line with the legal directives described in the Ordinance. In summary, this certificate attests that the company has a competition compliance programme in force, and that the senior management has set certain directives to promote a competition culture and environment within the company's market. It is worth mentioning that its main goal is to encourage companies to establish in-house competition policies that address specific needs of the companies.

19. On March 25<sup>th</sup>, 2009 SEAE and CADE issued the Joint-Ordinance No. 01, which establishes co-operation between them in order to discipline external propositions that may limit or hinder free competition or free enterprise.

## **1.2 Other relevant measures, including new guidelines**

20. In August 2009, the SDE issued the Public Consultation No. 16 in order to discuss a new regulation on the Secretariat of Economic Law procedural rules in competition matters (Ordinance No. 04, of 2006). The main objective was to propose necessary amendments to incorporate learning from experience, especially concerning improvements to the Brazilian leniency programme. SDE received comments of a number of stakeholders, including the American Bar Association, the International Bar Association, Brazil's Bar Association/SP and the Brazilian Institute of Studies on Competition, Consumer Affairs and International Trade - Ibrac. As a result, on March 15<sup>th</sup>, 2010, Brazil's Ministry of Justice issued the Ordinance No. 456, that replaces the Ordinance No. 04 issued in 2006.

21. Furthermore, as a result of the enhanced co-operation between the competition and the criminal authorities, in October 2009 the SDE signed an agreement with the Secretariat of Public Security of the State of Paraná (*Secretaria de Segurança Pública do Estado do Paraná*) focusing on anti-cartel enforcement. Furthermore, in December 2009, two other dedicated criminal anti-cartel units were established (in the Brazilian States of Rio de Janeiro and Paraíba, following São Paulo's experience) with the financial support of the SDE. These co-operation agreements established monetary resources to equip those units with a forensic laboratory for cartel cases. The main objective is to help those authorities to gather digital evidence of cartel through the analysis of electronic data.

22. Concerning bid-rigging prevention and repression, in 2009 SDE signed co-operation agreements with the Brazilian Federal Court of Auditors (*Tribunal de Contas da União – TCU*) and with the Office of the Comptroller General (*Controladoria-Geral da União – CGU*). TCU is the body of the National

Congress responsible for external auditing. The work with the TCU has focused on outsourcing and has enabled SDE to better investigate possible collusive practices in this sector. By its turn, CGU is responsible for preventing and identifying corruption on the Federal Executive Branch. The work with the CGU has focused on using existing methods for detecting fraud and corruption in public procurement to help identify possible bid rigging conspiracies (as bid rigging can occur when these other crimes occur). In addition, SDE has used the CGU's Public Expense Observatory (which was originally designed to detect fraud and corruption) to help identify bid rigging. It has enabled SDE to conduct sophisticated investigations of public tenders with the aid of electronic data.

23. On March 04, 2009 SEAE, SDE, CADE and PROCADE signed a Technical Co-operation Agreement aiming to bring more organisation to the activities of the agencies of the BCPS, avoiding redundant overlapping of functions between them and aiming a greater efficiency, speed and rationality in the Brazilian competition policy, adopting some initiatives specifically related to merger reviews.

24. On March 06, 2009 SEAE, Secretariat of Economic Policy (SPE) and Institute of Applied Economic Research (IPEA) signed an additive term to their Technical Co-operation Agreement in order to include SEAE as a participant of this agreement that, jointly with SPE, will co-ordinate, follow, evaluate and implement the actions arising from the researches and studies resulting from this agreement.

25. In June 02, 2009 SEAE, SDE, CADE and National Agency of Supplementary Health (ANS) signed a Technical Co-operation Agreement to facilitate exchange of information and technical expertise in their respective areas, to promote sector studies, events and seminars and, based on their analysis and studies, to elaborate normative proposals aiming to solve merger reviews and anticompetitive cases in health sector, among other initiatives.

26. In June 03, 2009 SEAE and National Civil Aviation Agency (ANAC) signed a Technical Co-operation Agreement aiming to promote a joint operation between them in the advocacy and competition defence areas and also to promote a collaboration between these two agencies concerning the definition of the regulatory framework of the Brazilian civil aviation sector.

### ***1.3 Government proposals for new legislation***

27. Bill 06/2009 was approved by the House of Representatives in December 17, 2008, and is currently subject to the successive analysis of five specialised Committees in the Brazilian Senate. This Bill will promote and significantly contribute to the increase of efficiency and excellence of the Brazilian competition system, under three major pillars.

28. Firstly, both CADE and SDE will be unified under a single competition authority, in contrast with the three currently existing agencies comprising the Brazilian Competition Policy System (BCPS) - namely, CADE, SDE and SEAE. SDE is nowadays focused on the investigation of anticompetitive practices (mainly cartels), while SEAE is mostly dedicated to merger review. CADE is the administrative tribunal in charge of the adjudication of both mergers and anticompetitive practices. Upon the approval of the Bill, SDE will be merged with CADE into a single autonomous agency, which will concentrate the functions of merger review, investigation of anticompetitive practices and adjudication of cases. SEAE will have its role redefined to focus on competition advocacy and regulation. This structural unification has already been adopted by countries which have a mature competition system, such as Portugal, Spain and more recently France, and will contribute for the rationalisation of resources and a significant increase of efficiency.

29. Once passed, the Bill will also enable the BCPS to increase its technical staff, as well as to create a permanent staff. Currently, CADE lacks a permanent qualified staff and depends on the allocation of staff from other government agencies and is subject to their approval. This not only limits the number of qualified staff on the agency but also does not allow CADE to build an institutional memory. The average time of stay of the non-permanent staff in CADE is 3 years, and the professional staff is currently limited to approximately 54 people. All authorities of the BCPS are using their human resources in their full capacity. The Bill will enable the BCPS to expand its current capacity of investigation and decision-making process to a higher number of cases as well as to develop an institutional memory.

30. Thirdly, a pre-merger analysis in administrative procedures submitted to the Brazilian competition system will be established, in contrast to the existing post-merger system. Nowadays companies are allowed to submit a merger notification to the BCPS until 15 working days after the merger is completed, which brings considerable insecurity to business environment in Brazil. The implementation of a pre-merger analysis will increase the security of business transactions for economic agents as well as bring more efficiency to the system.

31. The Bill has received huge support from the media, which recognises the importance of such modifications to take the BCPS to the next level on development and excellence.

32. The modernisation of the BCPS is in line with the best practices adopted by countries with well-developed competition systems and follows the Recommendations of the OECD in the 2005 Peer Review of competition law and policy in Brazil.

33. For this reason, CADE has been putting all of its efforts on the approval of the Bill 06/09, which will provide to Brazil a more modern legislation, compatible to the best international practices. The Bill has three main objectives: (i) unify the administrative structure of the Brazilian Competition Policy System – as they have recently made in Portugal (2004), Spain (2006), and France (2007) – which will allow an increase in the rationalisation of the administrative process, eliminating eventual redundancies and onerous administrative stages; (ii) create CADE career positions and provide adequate resources to hire and retain a sufficient number of qualified professional staff. The approval of the Bill is expected to 2010.

## **2. Enforcement of competition laws and policies**

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

#### *2.1.1 Summary of activities of:*

##### a) Competition Authorities

34. In 2009, SDE made substantial efforts to increase the impact of its enforcement actions, mainly concerning cartels. The number of leniency agreements executed by SDE is increasing substantially. 15 agreements were signed since 2003, including many with members of international cartels, and many others are currently being negotiated. A few reasons can be pointed for that: (i) the increasingly higher fines applied by CADE on previous years; (ii) the establishment of cartel prosecution as a major priority for SDE; (iii) increased co-operation with criminal State and Federal Public Prosecutors, and, (iv) increased transparency of the Leniency Programme.

35. Considering the success of the Leniency Programme and the closer co-operation with criminal authorities, the number of search warrants served has significantly increased in Brazil. From 2003 to 2005, 11 warrants were served; in 2006, 19 warrants were served; in 2007, 84 warrants were served; in 2008, there was a record of the number of search warrants served to obtain evidence of cartels: 93. In 2009, 29

search warrants were served under 4 joint operations undertaken with the Public Prosecutors Office and the Federal Police (please note that the number of investigations which originated the search warrants in 2007, 2008 and 2009 do not differ substantially).

36. *The first joint dawn raid with foreign authorities.* In February 2009, the SDE took part for the first time in a joint dawn raid with foreign antitrust authorities. After a company came forward and signed a leniency agreement, SDE and Brazil's Federal Police launched the first simultaneous dawn raid in connection with an international cartel investigation, together with the United States Department of Justice and the European Commission (compressors case). This is striking evidence of the maturity of the Brazilian Anti-Cartel Programme.

37. *Increased Criminal Prosecution of Cartel Conduct.* In 2009, the SDE continued to spend its resources to ensure that criminal authorities would enforce Brazil's Economics Crime Law. Although such law dates from 1990, it was only after SDE started to draw the attention of police and public prosecutors to the importance of fighting cartels, that the statute started to be duly enforced.

38. The close co-operation the SDE established since 2007 with the Federal Police and the Public Prosecutor's Office of 23 Brazilian States (out of 27) culminated in the "*National Anti-Cartel Strategy (Estratégia Nacional de Combate a Cartéis – ENACC)*," launched in October 2009 as a part of the second national Anti-Cartel Enforcement Day. Two hundred prosecutors and police officers from 26 Brazilian states gathered to discuss the implementation of the country's criminal anti-cartel law and policy. ENACC also provides for a permanent forum for co-operation and exchange of expertise and information. At the end of the 2009 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 (English version available at [www.mj.gov.br/sde](http://www.mj.gov.br/sde)). The second ENACC reunion will take place in June 2010.

39. Also, as stated above, in 2009 two other dedicated criminal anti-cartel units were established (in the Brazilian States of Rio de Janeiro and Paraíba, following São Paulo's experience) with the financial support of the SDE.

40. As recently recognised by the OECD (Feb. 2010), "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." Since SDE's co-operation with the criminal authorities 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. As of late 2009, 100 executives were formally charged with a crime or were under investigation for criminal cartel activity. The increased criminal prosecution of cartel activity has a positive effect in the number of leniency application received every year by the SDE.

41. *Competition Advocacy.* Advocacy also plays a major part in the SDE's work as it is deemed especially important in a jurisdiction like Brazil, which only very recent has been introduced to an open market. As recognised by the OECD (Feb. 2010), the authority "*has been especially active in creating public awareness of its anti-cartel programme.*"

42. In 2009 the second edition of the Anti-Cartel Enforcement Day was attended by the Brazilian President Luiz Inácio Lula da Silva, Vice-President Jose Alencar and other important national and foreign authorities, such as the Minister of Justice; the European Commissioner for Competition, Ms. Nellie Kroes; the US Antitrust Division's Deputy Assistant Attorney General, Mr. Scott Hammond, and the Head of Portugal's Competition Authority, Mr. Manuel Sebastião. Similarly to 2008, the two-day event comprised advocacy actions in 8 Brazilian airports, in which half-million brochures and materials were handed out to disseminate the competition culture.



43. During the event, a nationwide campaign was launched via advertisements in the major 4 weekly magazines in Brazil and postal cards were sent to key executives of 1000 companies in the country. The main objective of this initiative is to prevent companies from engaging into cartel activity as well as to raise awareness of the evilness of cartel behaviour and the ways it affects the lives of consumers.



**"Companies that participate in cartels get dirty"**

44. DE and CADE 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. The idea is to introduce concepts of business ethics exploring the example of a lemonade cartel and target those who are the future of the country, the children. Experiences conducted in environmental education proved that children also educate parents. Not only will children grow up with those ideas in mind, but they will also bring them home to discuss with their parents what they have learned.



45. Also, the SDE published in 2009 three new issues of its full colour *Brochures and Folders Series*: “Fighting Cartels in the Fuel Retail Sector”, “Fighting Cartels in Trade Associations”, and the English version of the brochure “Fighting Cartels and Leniency Programme” (this last one jointly with CADE), in order to give transparency to the Brazilian Leniency Programme, considering the increasing number of foreign leniency applicants.



“Fighting Cartels in Trade Associations”



“Fighting Cartels in the Fuel Retail Sector”



“Fighting Cartels: Brazil’s Leniency Programme”

46. *The OECD Project to Reduce Bid Rigging in Latin America and the Roadshow: “Fighting Bid Rigging in Public Procurement”*. The two-year Project was launched at the “Latin American Competition Forum” in 2007 with pilot projects in Brazil and Chile. This assistance programme has undoubtedly contributed to enhance the Brazilian enforcement against bid rigging behaviour.

47. As per described in the Project’s Note by the Secretariat<sup>2</sup>, fighting cartels is a high priority within SDE. Currently 75% of SDE’s resources are devoted to cartel investigations. In 2007, a special unit was established within SDE for the specific purpose of fighting bid rigging in public procurement. Throughout this Project, the Public Procurement Unit worked closely with the OECD.

48. Within the Programme, in 2008 and 2009 the OECD prepared several briefs for SDE on a variety of topics. For example, a short brief was submitted to SDE in February 2008 examining several proposed amendments to the procurement law which may impact the construction industry. Based in part on this brief, SDE submitted a report to the Presidency of the Brazilian Republic in March 2008 proposing significant modifications to the amendments, particularly in regards to rules that facilitate the identification of bidders at early stages of the procurement processes and bid bonds and collaterals. In April 2009, a modified version of the report was sent to key congressmen involved in the Bill.

49. An important result of the Project was to establish a close working relationship among SDE officials and representatives of key public bodies involved in public procurement in Brazil, such as the Ministry of Planning, the Office of the Comptroller General and the Federal Court of Auditors. In addition to these efforts, there was a significant increase in outreach to front-line public procurement agents during the Project, which might contribute to preventing bid rigging practices and, consequently, promoting more effective competition in public procurement.

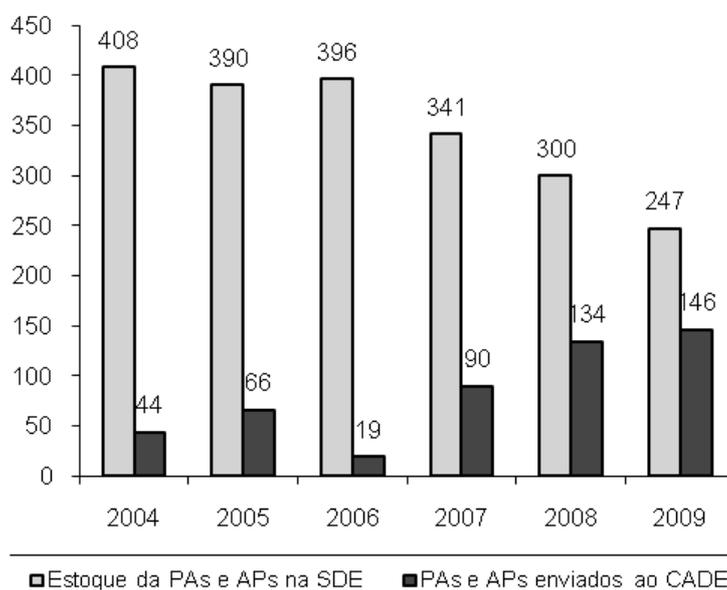
<sup>2</sup> The OECD Project to Reduce Bid Rigging in Latin America – Note by the Secretariat – DAF/COMP(2009)10.

50. In July 2009, this Project was concluded with the event “Fighting Bid Rigging in Public Procurement”, which took place in five cities: Recife in the Northeast, Brasilia in the Center-West, Belem in the Northern Region, São Paulo in the Southeast and Curitiba in the South. The events consisted of two training sessions: one for procurement officials and another for criminal investigators responsible for fighting bid rigging in the criminal area. A senior-economist of the OECD Competition Committee also participated in the Road Show, which helped SDE to spread to prosecution and procurement authorities a valuable amount of knowledge, founded on the significant international experience in fighting bid rigging worldwide. Over 600 public procurement agents and criminal enforcement officials attended the event and highly complimented the initiative. More than 2,500 copies of the “Guidelines for Fighting Bid Rigging” were distributed. After that, a number of presentations in other cities were requested and provided by the SDE.

51. *Computer Forensic Laboratory.* In September 2009, the SDE’s Computer Forensic Laboratory started operating. The main objective is to help the authority to gather digital evidence of cartel through the analysis of electronic data.

52. *Major effort to reduce backlog: Record in the number of closed investigations.* One major result achieved in 2009 was the conclusion of a record number of investigations: 146 cases were sent to CADE for final judgement. Since 2007, the SDE has been focusing its resources in reducing backlog, in despite of the reduced staff and increasing number of reports of anticompetitive conduct. The figures below show a consistent gain of performance of SDE Competition Division in the last three years: 370 cases were sent to CADE from 2007 to 2009, as opposed to 129 in the 3 preceding years. This result was possible through priority setting and task forces.

**Figure 1: Backlog and Investigations Closed, Yearly, 2004-09**



53. Regarding merger review, CADE only imposes remedies in some exceptional cases, when it is necessary some kind of intervention.

Figure 2

Years	Cleared mergers	%	Cleared with restraints	%	Blocked mergers	%
2000	490	96,6%	15	3,0%	2	0,4%
2001	559	97,9%	12	2,1%	0	0,0%
2002	474	97,7%	11	2,3%	0	0,0%
2003	484	98,6%	7	1,4%	0	0,0%
2004	574	92,9%	43	7,0%	1	0,2%
2005	345	90,3%	37	9,7%	0	0,0%
2006	352	94,6%	20	5,4%	0	0,0%
2007	490	93,0%	37	7,0%	0	0,0%
2008	550	90,3%	58	9,5%	1	0,2%
2009	437	95,6%	19	4,2%	1	0,2%

In 2009, YTD Dec/2009.

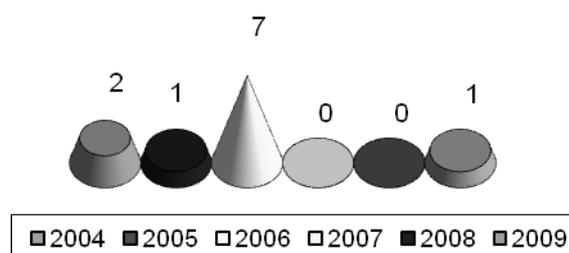
54. Some of these remedies are reached by a bilateral agreement, similar to North-American consent agreements, called, in Brazil, Performance Commitment Terms or Plea Agreements on Merger Cases (“PCT” or, in Portuguese, “TCD”). From 1995 to 2008, 32 TCDs have been signed between parties and the BPCS.

55. TCD’s are the natural outcomes of the Brazilian post merger analysis system for merger reviews cleared with restraints. Such agreements establish parameters and duties to be accomplished by the merging parties as an alternative to the full block. Whenever TCDs are breached, the operation is fully challenged and the parties shall desist (if there has been no merger yet) or divest.

56. However, BCPS’ experts have also forged a legal mechanism that may prevent or soften post merger inconvenient by means of negotiating an agreement with the merging parties right after the case is filed. Said mechanism is the so-called Agreement to Preserve the Reversibility of the Transaction (APRO). APROs offer two main incentives for the private parties: they are clear means to show will to co-operate with the authorities and may be the least costly alternative whenever the risk of antitrust intervention is high.

Figure 3

APROs/year



Source: www.cade.gov.br

57. As for merger review, in 2009 the SDE reduced even more the average review time per transaction, from 16 days in 2008 to 11 days in 2009.

58. The BCPS continued being benefited of an increasing international insertion, by the exchange of experience and information with its foreign counterparts. All the three agencies, twice a year, sponsor a 4-week internship programme to acquaint university students with competition law and BCPS functioning. The programmes have been offered to an increasing number of law, economics and business school students, allowing them to experience the agencies' daily work as a means to provide the interns a broader knowledge of competition topics. In 2009, SDE was pleased to receive as interns two members of the *Fiscalía Nacional Económica* del Chile, which is the competition authority of that country, while CADE welcomed a representative of INDECOPI, the competition authority of Peru, and a member of the competition authority of Argentina. By its turn, SEAE hosted another representative of the competition authority of Argentina and a representative of the competition authority of El Salvador. In the last Latin American Forum on Competition, which took place in Santiago, Chile, several competition authorities demonstrated interest in the traineeship programme of the BCPS. Moreover, in order to make the participation of competition authorities from Latin America in the BCPS traineeship programme feasible, the BCPS has sought and obtained financial support from the Brazilian Co-operation Agency (BCA), an institution belonging to the Brazilian Ministry of Foreign Trade, for the flight expenses from the countries of the representatives of the authorities to Brazil, as well as a daily allowance during the whole duration of the July edition of the traineeship programme. In order to institutionalise the support received from the BCA and co-operation between this institution and the BCPS, the latter has proposed and is currently negotiating a memorandum of understanding with the BCA. As a result, it is expected that co-operation between the BCPS and BCA increases and that support for the participation of Latin American competition authorities twice a year is provided on regular basis. In the meantime, the BCPS has already obtained from the BCA a confirmation that the latter will provide financial support to allow the participation of Latin American authorities in the January edition of the traineeship programme.

59. CADE's most recent example of technical assistance is the acceptance of an invitation sent by Paraguay to participate in a series of debates among the government, congressmen and the civil society of Paraguay, which took place on November 09 and 10, 2009, for the purpose of demonstrating the importance of the approval of a draft competition Bill currently under analysis before the Congress of Paraguay, in order to provide the country with its first competition law. CADE was represented by one of its Commissioners, which demonstrates the commitment of the authority towards the development of competition in neighbouring countries.

60. Furthermore, the active participation of CADE in relevant international forums, such as the OECD, ICN and UNCTAD, among others, has showed to be a very useful tool for fomenting debate and lessons to be learned from the experience of other agencies.

61. CADE's efforts to develop and maintain a close and positive interaction with some major foreign competition authorities also propitiates the development of joint projects for capacity building and exchange of experiences. It is noteworthy the interchange of CADE's technical staff to others competition authorities during 2009, when we have sent three representatives to training programmes at the DG-Competition, Escola IberoAmericana de Competencia and the Competition Bureau of Canada. This kind of exchange, between our staff and from that of other countries, contributes greatly to comparative analysis on how other authorities operate in competition policy, becoming an important channel to evaluate our work and foresee new scenarios and tendencies.

62. In August 2009, CADE in a joint initiative with the Brazilian Institute of Studies on Competition, Consumer and International Commerce (IBRAC) organised a small conference on European Union

Competition Policy, in CADE's Plenary, opened to the public in general, with the Professor Richard Wish, an illustrious specialist in European Community merger law.

63. It is noteworthy that CADE has had a leading role, in Latin America, in organising conferences and traineeship programmes in competition policy. In 2009 there was the First International Conference of the Brazilian Competition Policy System, in Sao Paulo, Brazil. This conference was an important event, being a useful instrument to promote the competition culture in Brazil. Moreover, worldwide recognised names in competition policy, such as William E. Kovavic, Bernard Phillips, George Priest, and Nuno Pires, participated in this conference as speakers.

64. As mentioned previously, CADE has a traineeship programme which is open, twice a year, for representatives from other Latin American competition authorities. In 2009, CADE received representatives from 8 different countries: Peru, México, Panamá, Colombia, Paraguay, Uruguay, Guatemala and El Salvador. The Brazilian Competition Traineeship Programme has the financial support of the Brazilian Agency for Co-operation (ABC) that covers all the costs of the selected applicants. Thus, CADE is becoming a reference in competition policy in Latin America.

65. Undergraduate and also graduate (master and PhD) students, from different fields and from eleven different Brazilian States took part on the Programme. The selected interns received a World Bank scholarship, which covered costs of transport to Brasilia, and also accommodation and living expenses during the Programme. Now every student, regardless of her economic means, may apply to the Programme even if she cannot economically afford spending one month in Brasilia. This action was particularly aimed to exclude non-meritocratic aspects during the Selection Process. With the support of World Bank every selected student receives round-trip tickets to Brasilia and also a sufficient amount of money to finance her sojourn along the Internship Programme.

66. In 2009, CADE's traineeship programme underwent great improvements including: (i) the new structure of the programme with the Applied Course on Antitrust, the production of a paper and the experience of working inside the offices; (ii) the establishment of a transparent, fair and objective selection process; (iii) the increase of disclosure of the Programme in Universities, Institutes and Research Centers - nationally and internationally; and (iv) the increase of diversity of Brazilian States represented at the Programme, the participation and the number of applicants and also the qualification of participants selected (three of them were graduate students); (v) the creation and development of the official website Programme ([www.cade.gov.br/pincade](http://www.cade.gov.br/pincade)) and banners, as below:



67. Concerns with better decisions have also move the BCPS authorities across borders. Thus, CADE, SDE and SEAE have signed co-operation covenants with EU's DG-Competition, MERCOSUR's

competition authorities, the Competition Authority of Portugal and the Federal Antimonopoly Service of the Russian Federation (FAS).

68. Another important achievement of 2009 was the execution of a joint resolution between CADE and its Public Prosecutor Office which proposed a common effort to mitigate the time of analysis of processes filed at CADE by means of speeding up the procedural progress and eliminating recurrence of opinions. Concomitantly, a project entitled “CADE without paper” has been fostered in order to standardise an electronic procedural progress of administrative procedures within the BCPS, aiming at increasing the agility and publicity of the procedural acts by allowing simultaneous views of the file to different procedural parties.

69. In 2009 CADE created a specialised commission and charged it with the mission of negotiating all of CADE’s plea agreements (settlements) in conduct cases (before 2009 every plea agreements were negotiated between the investigated firm/individual and the Commissioner in charge of the case). Each negotiation is assigned to three or more members of the Technical Group on Negotiations (“TGN”) to compose a committee with the responsibility of achieving the best possible agreement.

70. Once an agreement has been reached, it is submitted to the consideration of the seven Commissioners, which may approve or reject it. Although it has been instituted only a few months ago, the Group has already engaged in five major negotiations, of which three are still running and therefore subject to strict confidentiality rules.

71. The grounds for the development of studies, courses and preparation of CADE’s staff for negotiations of plea agreements is provided by CADE’s Technical Group on Negotiations, created in 2008. The Group is composed of ten members, all recruited among CADE’s technical and legal staff, and is supervised by one of the Commissioners. In order to improve its negotiation skills, the members of the Group participate in several courses on the subject and meet regularly to discuss the state of their respective negotiations. By November 2009 this Commission had successfully completed two agreements and three more were in negotiation.

72. Finally, another recent initiative that promotes a further improvement in the allocation of resources is the implementation of agreements with SDE and SEAE to determine competences and avoid the duplication of efforts in different fields, such as procedures and competition advocacy. The goal is to anticipate some of the efficiencies that the BCPS will gain with the approval of Bill 06/2009.

#### b) Courts

73. In the past 5 years, several changes in CADE’s Attorney General Office (ProCADE) took place in relation to its role before the Judiciary. CADE started to have a more proactive role in judicial cases brought against its decisions, which contributed significantly to make the coercive measures established by CADE more effective.

74. In regards to the modification of its role before the Judiciary and of the working structure of the Attorney’s Office, two major aspects should be stressed.

75. Firstly, in the last few years there has been a substantial change in the case law of the Regional Federal Court of the 1st Region in regards to the judicial deposit of fines or the offer of a suitable guarantee to suspend CADE’s decision until the issuance of a decision by courts. Previously, the Judiciary suspended CADE’s decisions through the concession of injunctions, without requesting any counterpart from the interested undertakings. This was in frontal violation of articles 56 and 66 of Law No. 8884/94 (Brazilian Competition Law).

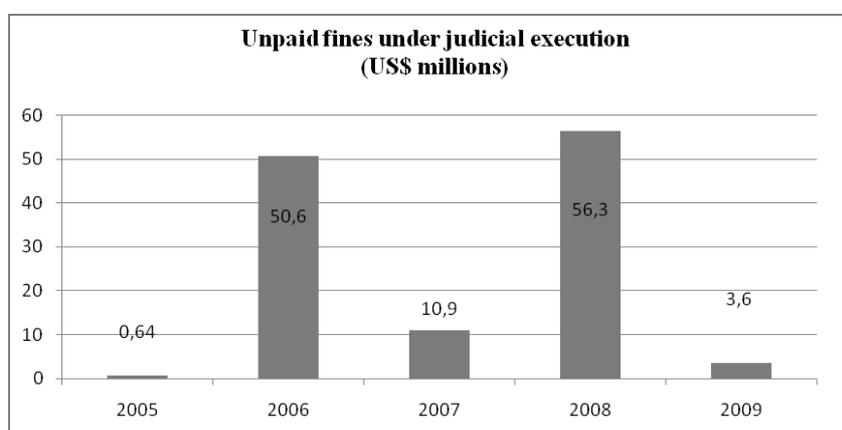
76. Nowadays, as a result of competition advocacy made by ProCADE before judges, injunctions which suspend the liability of the penalties and decisions adopted by CADE are conditioned to the judicial

deposit, by the undertaking, of an appropriate amount before courts. This decreases the company's incentive to litigate against CADE, therefore favouring the effectiveness of antitrust policy.

77. Secondly, a substantial shift in the Attorney General Office at CADE working structure has taken place. Each case started to be assigned to a specific attorney for as long as it endures. This system prevents different attorneys to handle the same case in different stages, which might compromise the strategy of the case and the efficiency of the Office. Previously, attorneys from the Attorney General Office at CADE were responsible for providing a feedback to specific judicial demands. It was possible that several attorneys were acting in the same case, against the same company, in different procedural moments: an attorney would be responsible for the rejoinder, while another for the bill of review, and a third for the appeal. In 2006, the Attorney General, currently President of CADE, Arthur Badin, coined the "responsible-attorney" system<sup>3</sup>.

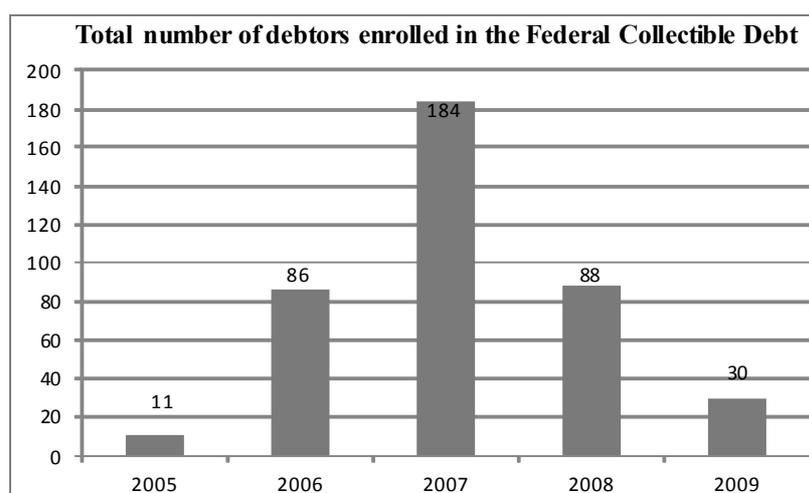
78. CADE has carried out an internal audit to identify credits of unpaid fines pending to be executed by the Brazilian government.

**Figure 4**



\* Until October, 2009

**Figure 5**



\* Until October, 2009

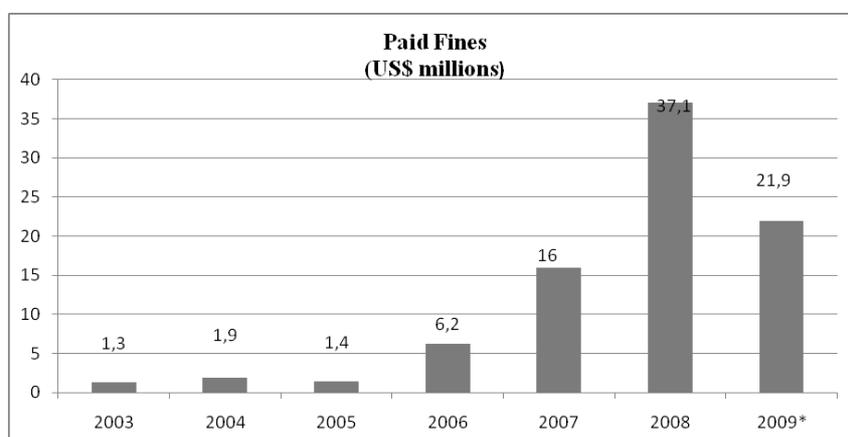
<sup>3</sup> According to Art. 6 of DOC 64 - Service Order n°. 06.

79. As it can be noticed in the two graphics above, 2006 was marked by a raise in the number and amount of judicial execution of unpaid fines and in the number of debtors enrolled in the Federal Collectible Debt. This increase has occurred because of an internal audit made by CADE’s Attorney General Office which assessed all previous pending fines, followed by the judicial execution of the pending unpaid fines and the enrolment of pending debtors in the Federal Collectible Debt.

80. In regards to the decreasing numbers related to the year 2009 in both graphics, they are due to the fact that, from 2006 to 2008, all liabilities of previous years have been submitted to judicial execution and no pending fines were left unattended. Therefore, in 2009 the Attorney General Office has been able to enrol and seek the execution of current fines only, right after the moment they become executable.

81. The increase in the value of fines imposed by the Plenary of CADE, as well as the close follow up of unpaid fines, resulted in a significant increase in the amount of paid debts - an increase of almost ten times - from R\$ 2,913,928.00 (USD 1,303,770.91) in 2003, to R\$ 27.693.861,48 (USD 16.034.891,71) in 2007, R\$ 64.114.659,78 (US\$ 37.122.725,83) and R\$ 25.409.518,18 (US\$ 14.712.244,91) until June 30, 2009.

**Figure 6**



\* Until October 30, 2009

82. It is worth mentioning that “the strengthening of CADE’s decisions during reviews by the Judicial Branch” was pointed out as one of the key achievements of CADE, according to the Rating Enforcement 2008 of the Global Competition Review.

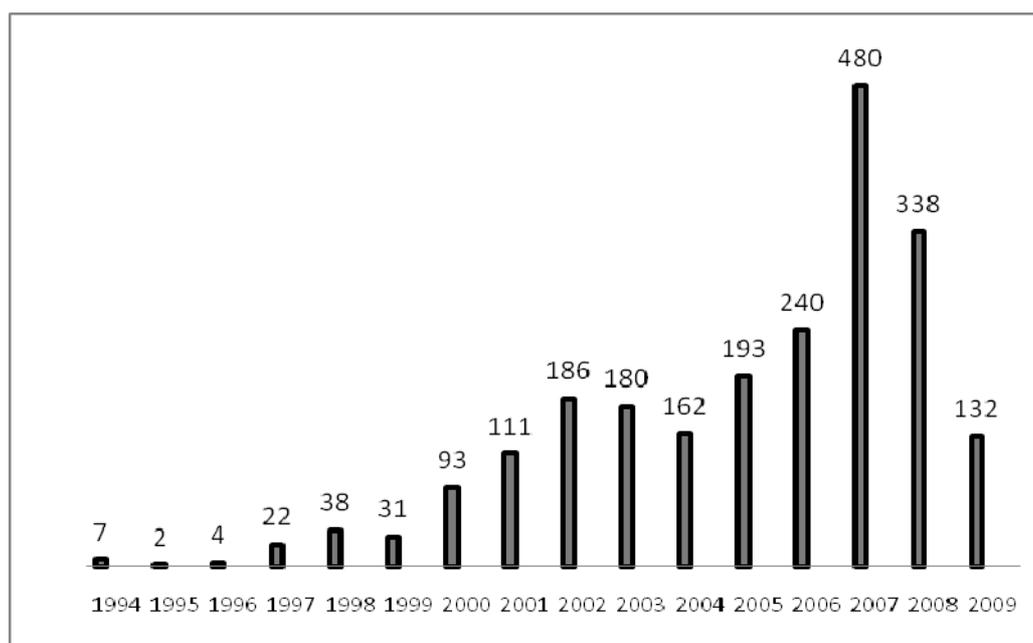
83. The collected fines are directly deposited by the parties in the bank account of the Federal Fund for the Defence of Diffused Rights, managed by an inter-ministerial commission, and are applied in the areas of environmental and consumer protection, competition policy and national cultural heritage.

**Box 1: Co-operation Agreement ProCADE/SDE**

The co-operation agreement was designed from two premises. Firstly, there is a lack of human resources at SBDC. Secondly, there was a certain work overlapping in SDE’s and ProCADE’s manifestations (the manifestation of a juridical character, approached the same aspects). Therefore, in order to reduce redundant stages in the examination of the summary monopolistic acts (simplest ones), SDE and ProCADE signed an agreement to join efforts for the procedural examination. SDE, agreeing with SEAE’s opinion, would be limited to adopt its fundamentals in standard manifestations, pursuant to Art. 50, 1st paragraph, of Law No. 9784/99. ProCADE shall examine specific points listed in the agreement (Second Clause, item 3). This would end with the redundancy of manifestations. It resulted in a faster examination of the simplest monopolistic acts, thus enabling the bodies to concentrate greater efforts in more complex cases. In order to examine in more detail, please refer to the “whereas” in the agreement.

84. In the last years, it has become clear that the decisions of the BCPS are increasingly being submitted to judicial review. In this sense, competition issues are leaving their original *locus*, CADE, and becoming increasingly subject to appeals before the Judiciary. This circumstance poses new challenges to CADE and, in particular, to CADE's Attorney General Office, the body responsible for the judicial enforcement of CADE's decisions.

**Figure 7: Judicial review before Brazilian Courts (number of law suits per year)**



85. The considerable raise in the number of law suits in the graph above in the years of 2006-2008 (mostly in relation to 2006 and 2007) is due to the increasing number of law suits for judicial execution of fines submitted by CADE before Courts during these years (please see question 23 above for further information). In 2009, the explanatory hypothesis for the decreasing number of law suits, which are lower in comparison to the years 2001-2004, is the improvement of the pro-active work of CADE's Attorney General Office before Courts, as the judicial deposit of the amount of the total fines determined by CADE in its decisions started to be demanded by its Attorney General Office and took out the incentive of some parties to appeal against CADE's decisions before Courts.

86. As a response to the increasing judicial review of CADE's decisions, CADE's advocacy before the Judiciary has been strengthened. In 2008, CADE's Attorney General Office became even more proactive, by proposing an increasing number of lawsuits - either to require the payment of fines imposed by the Plenary, or to obtain a judicial decision or order for the compliance of remedies imposed by CADE. Furthermore, the follow-up of judicial procedures involving CADE has become a priority, and frequently the President or the Commissioners, accompanied by CADE's attorneys, go in person before courts to explain the merits of the decisions.

87. The major challenge of CADE and its Attorney General Office, in regards to judicial review of CADE's decisions, is to bring awareness to the Judiciary in the sense that the merits of CADE's decisions cannot and should not be reviewed.

88. The Brazilian Constitution forbids interference of one of the Powers in the competence of the others. Due to this reason, only in situations of illegality the Judiciary may review the merits of administrative decisions; this rule also applies to CADE. A key argument against judicial review of the merits is the highly technical nature of CADE's decisions. The re-evaluation of the decision by an isolated judge, or by a Court, would hardly be technically superior in comparison to the decision issued by a technical body composed by seven Commissioners who are specialists on antitrust and are assisted by specialised technical staff.

89. However, there are judges who question technical issues determined by CADE, such as market power and market share. Expert evidences have been granted by the Judiciary, in order to replace the understanding of the seven members of CADE's Plenary (namely, the President of CADE and CADE's Commissioners, the majority holding a PhD in Economics or Law) for the technical opinion of a single expert consultant determined by the court.

90. In order to overcome such challenge and maintain the merits of CADE's decisions unaltered when these are questioned before the Judiciary, it is necessary that CADE further improves its mechanisms of dialogue with judges. Events and lectures on competition law and policy organised by CADE should be intensified. Also, CADE recognises the importance of the practice of constant presence of its attorneys and technical staff members in courts, in order to explain its cases to judges.

91. Such initiatives contribute to strengthen the relationship among judges, the legal community and CADE, as well as promote an increasing recognition and respectability in relation to the work performed by CADE.

92. Another challenge faced by the Attorney General Office is to maintain its database constantly updated, as well as to promote and present the collected aggregated data in such a way to allow its easy understanding.

#### 2.1.2 *Description of significant cases, including those with international implications.*

##### a) Cartels

- Administrative Proceedings No. 08012.000820/2009-11

**Complainant:** Secretaria de Direito Econômico *ex officio*

**Defendants:** Whirlpool S.A.; Brasmotor S.A., Whirlpool Unidade Embraco - Compressores e Soluções de Refrigeração; Danfoss A/S; Tecumseh do Brasil Ltda.; ACC – Appliances Components Companies S.p.A.; Panasonic Electric Works Co., Ltd., Gerson Veríssimo; Paulo Frederico Meira de Oliveira Periquito; Ernesto Heinzelmann; Gilberto Heinzelmann; Ingo Erhardt; Laércio Hardt; Dário Gert Sleb; Dailson Farias; José Roberto Leimontas; Mike Inhetvin; Valter Taranzano; Lars Snitkjaer; Nilson Effting, Walter Sebastião Desiderá; José Aluizio Malagutti; Mauro de Carvalho Mendonça; José Celso Lunardelli Furchi; Januário Domingos Soligon; Michel Jorge Geraissate Filho; Kaisha Masuda

**Summary:** In February 2009, SDE, the Brazilian Federal Police and GEDEC (the special unit within the Sao Paulo State Prosecutor's Office to investigate cartels) carried dawn raid in five premises after a leniency agreement signed with one company involved in cartel activities related to the hermetic compressors for refrigeration market. It was the first simultaneous dawn raid in connection with an international cartel investigation, together with the US Department of Justice and the European Commission. In September 2009, CADE entered into a settlement (Termo de

Compromisso de Cessaç o – “TCC”) with Whirlpool, Embraco, Brasmotor and all its executives except for Ingo Erhardt and Jos  Roberto Leimontas to suspend an administrative proceeding opened to investigate that alleged international cartel. The TCC provided for an admission of guilty and the payment of a pecuniary contribution in six annual instalments. The case is moving forward against the other defendants.

b) Abuse of Dominant Position

- Administrative Proceedings No. 08012.003805/2004-10

**Complainant:** Primo Schincariol

**Defendants:** Companhia de Bebidas das Am ricas - AmBev

**Reporting Commissioner:** Commissioner Fernando Furlan

In 2004, the Secretariat of Economic Law initiated an Administrative Proceedings against AmBev, a company which detains the main brands of the commercialised beers in Brazil, to investigate if its loyalty programme called “T  Contigo” could produce anticompetitive effects in the market.

In accordance with the advertisements of the Programme, the sale shops could earn points, depending on the amount and type of beers acquired, and they could later be exchanged for gifts. Thus, in a formal point of view, the Programme “To Contigo” would be a simple linear programme of awarding. However, inspections and market researches showed that AmBev demanded exclusiveness of the sale shops as a requisite to participate in the Programme.

At the end of the investigation, SDE concluded that the Programme “T  Contigo” had an anticompetitive potential, as it reduced the degree of contestability of the market and artificially increased the barriers to entrance. Thus, in March 2007, the process was sent to CADE with suggestion of conviction for abuse of dominant position.

After some complementary instructions, in July 2009, CADE convicted AMBEV for the practices appointed in articles 20, I and IV, and 21, IV, V, and VI, of Law No. 8,884/94. It was imposed, among other sanctions, a fine of 2% of companies’ gross revenues of 2002, in the value of R\$ 352.693.696,52, which is recognised as the biggest fine in the Council’s history.

## 2.2 *Merger and Acquisitions*

### 2.2.1 *Statistics on number, size and type of merger notified and/or controlled under competition laws.*

93. In 2009, SEAE presented 481 merger reviews to CADE. From those, 31 were recommended the approval with restrictions (6.44%), 3 were recommended the block of the operation (0.62%), 2 gave up the operation before its judgment (0.42%) and 445 were recommended the approval without any conditions (92.52%). From the total of SEAE’s merger reviews in 2009, 65% were assessed through the fast track procedure and 35% were assessed through the regular procedure. In 98.8% of these cases, CADE’s decisions agreed with SEAE’s recommendations. The average time of all these merger reviews in SEAE was 88.63 days, 19 days as fast track procedures and 220 days as regular procedures.

94. In addition to the changes imposed since 2006 by the Joint Directive SEAE/SDE 33/2006, that eliminated overlapping activities in the mergers analyses between the Secretariats, there was another change in the administrative procedure relating to fast track procedure. In March 2009, the two

Secretariats, in agreement with CADE, changed the opinion model previously used for the fast track procedure. Rather, an opinion on a fast track procedure has an average of 5 to 7 pages. Since adoption of the new model, it was created an electronic form and included within the flow system of processes and documents – Sistema Littera. This new form, once completed by the technician, creates an opinion of, on average, 2 pages. There are cases that the SEAE opinion is submitted to SDE after two days after its entry in the SEAE's system.

95. The markets with more merger cases assessed by SEAE in 2009 were: (i) infrastructure essential services, (ii) IT and telecommunications sectors, (iii) storage and transport services, (iv) pharmaceuticals and cosmetics industries and (v) chemical and petrochemical industries.

### 2.2.2 *Summary of significant cases*

#### **Box 2 - DGB / Chinaglia**

The DGB Logistics S.A. – Distribuição Geográfica do Brasil ("DGB") - is a company controlled by Grupo Abril S.A., which operates in editorial publishing. The Fernando Chinaglia Distribuidora SA ("FC") is a family business engaged in the distribution of publications, and it's not part of any economic group. In terms of the relevant market, referred to horizontal overlapping, the case has considered two relevant markets, both with national dimensions: direct distribution of publications and indirect distribution of publications. This specification of the relevant markets was based on consultations with those agents active in the Brazilian market, international jurisprudence and academic studies in Brazil. In the first market, the market share of the two companies did not exceed the 20% stipulated in the Horizontal Mergers Guidelines to allow the unilateral exercise of market power. With regard to the market for indirect publications, the operation has attempted in monopoly, since the DGB had a participation of 70% and Fernando Chinaglia Distribuidora S.A. the remaining 30% stake in Brazilian market.

The formation of this monopoly has led the SEAE's analysis for the analysis of the barriers to entry and the entry conditions. With regard to barriers to entry, it was found, with the help of international jurisprudence, that: (i) A necessary and sufficient condition for the entry in the market for publishing is a nationwide distribution network; (ii) the market of editorial distribution requires contracts with some editors which ensure economies of scale and scope in order to make an entry viable; (iii) the ideal scale for a distributor is associated with a mix of publications (quantity and variety) and there are sunk costs of intelligence and logistics.

For the assessment of the entry conditions, SEAE has calculated the necessary and sufficient conditions for the entry of a new company. With regard to the necessary condition, sales opportunities were estimated and then compared with the minimum viable scale submitted by the applicants and also by the pool of editors that made up the interested third party. The goal with this part was to investigate whether there were sales opportunities of which the incoming distributor could appropriate. The result of this exercise has proved to be ambiguous because under certain conditions the entry could be considered likely, in others it couldn't.

The condition of sufficiency of entry (the entrant can effectively take possession of the sales opportunities available) was checked based on the calculation of three performance levels: (i) the level of efficiency that the DGB has distributed the Editora Abril's publications;(ii) the level of efficiency that the DGB has distributed the publications of other publishers and (iii) the level of efficiency that Fernando Chinaglia has distributed publications. It was found that the level of efficiency of the DGB for the distribution of its own publications is higher than the level of efficiency of the DGB for the distribution of other publications that, in turn, is above the level of Fernando Chinaglia's efficiency.

Based on the levels of efficiency it was found the sufficiency of entry considering two scenarios: (i) the DGB would remain with all the contracts from publishers after the operation and (ii) the publishers who distributed with Fernando Chinaglia would constitute a new distributor after operation. In the first case, it was found that the entry is not sufficient with any level of efficiency considered, that is, the remaining volume of sales that can be generated by the DGB is far greater than the sales opportunities on the market. Similarly, the entry in the second case is not sufficient, since there are no economic incentives for publishers to coordinate and form a national distributor.

Additionally, it was observed an increase on the pre-existing vertical integration between publishing and indirect national distribution, resulting in the possibility of foreclosure of the market for the upstream segment (publishing).

As the SEAE's conclusion was that there was no possibility of entry in the segment of indirect distribution of publications at the national level and as there is no reason to speak of rivalry (because the operation generated a monopoly), the analysis has proceeded to the analysis of efficiencies generated by the operation.

Based on the work of efficiencies presented by the applicants, SEAE has concluded that the efficiencies generated in the operation could not be considered "antitrust efficiencies", since they might be obtained via other ways than the acquisition of the only competitor in the market. The benefits of unification of the operation do not justify the potential losses caused by the absence of rivalry in the Brazilian publishing market. Therefore, SEAE has recommended the rejection of the operation.

On August 26th 2009 CADE voted unanimously for the approval of this operation subjected to the execution of a "Performance Commitments Term" under the terms of the Reporting Commissioner's vote. The Performance Commitments Term provides a set of structural and behavioural measures which address the publisher's concerns, in order to ensure the existence of an Abril's Group autonomous distribution structure, and also some transition rules for such publishers to reorganise their distribution activities.

### Box 3 - Unimed-HCAA

Unimed Santa Maria offers health plans and medical and hospital services in Santa Maria, RS. The Charity Hospital Dr. Astrogildo de Azevedo (HCAA) is active in the medical and hospital services and supplies health plans (Carimed) in the same city. In this city, both parties dominate almost all the relevant markets affected. The operation between the parties produced structures close to monopoly in some of the relevant markets affected, as shown in the table below. Moreover, the operation has also promoted a vertical integration between them.

Market Shares (%): Santa Maria, RS - 2006

Parties	Individual/family health plan (%)	Collective health plan (%)	Medical and hospital services (%)
Unimed Santa Maria	77,3	87,8	----
HCAA	21,0	9,4	75,1
Unimed Hospitals	---	---	24,9
Total	98,3	97,2	100,0

Source: BCPS, 2009.

The first issue examined by SEAE was the elucidation of the operation, since the information produced by the parties in the application form had several mistakes. Based on a new methodology for defining the relevant market in the health plans sector, and also in the health care sector, it was possible to demonstrate the possibility of the exercise of market power in those affected sector by this operation. This methodology is a redefinition of the product dimension and the geographical dimension, as set out in the Working Document #46/SEAE/MF – "Determination of the Relevant Markets in the Health Insurance Sector."

Furthermore, with the introduction of a new methodology to investigate the likelihood of the exercise of market power, in which were stressed some necessary conditions for effective rivalry, it was found that this probability was not negligible.

Therefore, SEAE has assessed some issues related to the possible economic efficiencies generated by the operation, and it concluded these did not exist, according to information provided by applicants, and also that the efficiencies could be achieved otherwise than by operation under the new methodology.

On this operation, SEAE suggested some sanctions against the parties for various offenses committed by them.

On July 22, 2009, the Council agreed to disapprove the operation and to punish the parties for deceitfulness, following the new methodology established by SEAE. According to CADE, "The resulting high concentration, difficult entry into the sector, the absence of rivalry in the markets affected, and also because it did not generate any efficiency, it imposes the disapproval of the concentration act."

#### **Box 4 - Cimpor-Supermix Case**

The case is about the acquisition by Supermix Concreto S/A of assets used by Cimpor Cimentos S/A in the region of Capivari de Baixo/SC. The operation generated horizontal overlaps in the relevant market for concrete services between two integrated cement producers, which resulted in a high market concentration and also two vertical integrations: between cement and concreting services and gravel and concreting services.

The significant market concentration observed in the relevant market for concreting services raised concerns with the exercise of unilateral market power. From the competition perspective, the vertical integration did not raise concerns, since there was no possibility of supply foreclosure from cement to concreting (and other way round), neither for gravel to concrete (and other way round). For the analysis of the exercise of unilateral market power in the relevant market for concreting services, SEAE considered traditional studies of entry and rivalry. These studies were not enough to ensure the operation would not generate problems in the competition. With regard to entry, it was found there were not sales opportunities available to be appropriated by an entering firm. Regarding the rivalry, it was found that the market setting after the operation (integrated and non-integrated concrete producers) was not sufficient to guarantee the market conditions previously observed, especially prices.

Finally, the efficiency studies presented by the plaintiffs was not sufficient to ensure that the efficiencies generated in the operation were antitrust ones, since it has not been proven or demonstrated how these efficiencies would be achieved. In this case, it was recommended an integral fail of the operation.

#### **Box 5 - Sanofi-Medley**

It was the acquisition of 100% of Medley S/A's equity by Sanofi-Aventis Comercial e Participações Ltda. and Sanofi-Aventis Industrial e Participações Ltda., Sanofi Aventis group companies in Brazil.

It was found that in the private market, there is the possibility of exercise of market power in the relevant markets (Anatomical Therapeutic Classification Level 4 – ATC 4 published by IMS) A03F0; A10H0; A12A0, A15A0; B01C2; C03A2; D07A0; G01A1; G01A2; M01A1; N06D0; N07E0; R01B0 and co-ordinated exercise of market power in the relevant market D07B1.

As for the entry, the minimum viable scale estimates informed by the consulted firms by SEAE were not complete in order to estimate them efficiently and then compare them with sales opportunities. It was also concluded that the entry was not timely in the relevant markets analysed.

As for the rivalry, it was found there were multipurpose plants with idle capacity and the presence of rival laboratories in the relevant market capable to deter any exercise of market power by the applicants.

Concerning the exercise of co-ordinated market power, it was found that certain factors hindered this exercise by the players of the medicinal products for human health sector, such as: the same drug can lead to several drugs, which, in turn, still may be sold in different forms and packages, and there are multipurpose plants, which allow companies to change its supply in certain relevant markets according to the market conditions. Therefore, the operation was recommended by SEAE to its approval without restrictions.

#### **Box 6 - Itaú-Unibanco**

It was the merger of operations for banking market of Itaú and Unibanco. As a result of this operation, the former owners of Itaú and Unibanco would hold the shared control of the resulted company of this merger.

It is worth noting that, in relation to cases involving the banking industry, petitions were submitted to SBDC analysis to exam the competitive aspects of the non-financial services. The analysis was made by considering the applicants answers in each case and the General Attorney (AGU) Opinion # GM-20 (approved by the President and published in the official press on Jun 17th, 2002 and clarified by the Opinion of Ministry of Finance General Attorney # 2643 of Dec 7th, 2009).

It was found horizontal overlap in the following activities: Insurance (property, cars, people, transportation, health, liability and hulls); Private Pension; Capitalization; Insurance Brokerage; Management Consortium. Also it is a vertical integration between the activities of insurance and insurance brokerage, but it was already pre-existing and the brokerage market is sprayed. Its market share was above 20% only in these markets: property insurance, liability insurance, hull insurance and retirement plans).

As for the entry, there was no likelihood of entry into the relevant markets analysed. Regarding the rivalry, it was found, by analysing the market share evolution, that the changes in the market share indicated rivalry between key players, which makes difficult the exercise of market power by applicants after the operation. Still, there was, in general, in each of the relevant markets analysed, the possibility, by the market players, to address any demand deviation, equal to or greater than 10% of the market, whenever there was an increase in the price charged by any competitor. Therefore, SEAE recommended that this operation would be approved with no restrictions.

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

96. Brazilian competition authorities play an important role on issues that come out as a consequence of the interface between the application of Brazilian Antitrust Law to all economy sectors and the enforcement of rules issued by the regulatory agencies (sectoral regulators), as well as the measures related to trade and industrial policies.

97. Co-ordination and consistency between sectoral regulators and the competition authorities are made through co-operation agreements, participation in regulatory fora and competition advocacy initiatives, especially by BCPS's commentaries on regulations proposed for adoption by regulatory agencies.

98. Brazilian competition authorities play an important role on issues arisen from the interface between the application of Brazilian Antitrust Law to all economy sectors and the enforcement of rules issued by the regulatory agencies (sectoral regulators), as well as on the measures taken related to trade and industrial policies. Co-ordination and consistency between sectoral regulators and the competition authorities is made through co-operation agreements, participation in regulatory forums and competition advocacy initiatives, especially by the BCPS's advices on regulations proposed for adoption by regulatory agencies.

99. The Secretariat for Economic Monitoring – SEAE – is the BCPS entity mainly devoted to follow up regulated markets since among its task is enhancing competition. Since 2004, SEAE has been structured in five co-ordination segments that, among other activities, seek to stimulate competition: COGTL (transportation and logistics), COGEN (energy and petroleum), COGSA (health plans and medicines), COGCM (telecommunications, audiovisual, postal services and the financial system) and COGDC (basic sanitation, water resources, mining and regional regulated sectors). The major efforts undertaken in competition advocacy in 2009 by SEAE in all of its various areas of activity are discussed below.

- **COGTL**

100. As regards the regulation of transportation activities, SEAE operates in various sectors through its unit Transportation and Logistics Co-ordinating Staff - COGTL, always with the objective of implementing public policies that generate greater competition and efficiency for the government and for society, issuing technical position statements on normative acts that deal with regulation models and management developed by the regulatory agencies and by sectoral ministries in the transportation sector.

101. The Secretariat also monitors regulatory policies, including increases and reviews of public service tariffs and public sector prices in the area of transportation, as well as tender processes involving privatisations, particularly transfers of public services provided by the federal government to private companies. SEAE also participates actively in public hearings and consultations carried out by regulatory agencies. Among the areas covered, it is important to highlight the following: urban transportation; interstate and international highway transportation of passengers; air transportation; highway concessions, the port sector and waterways.

102. A summary of the main activities related to the legal mandate of SEAE which have been jointly carried out by the Secretariat and the regulatory agencies in the field of transportation and logistics during 2009 is presented below.

- **Land Transportation**

103. In road transport, the current concessions include the first and second wave of road concessions as well as existing rail concessions. It should be stressed that SEAE continued to act in the area of highway concessions in 2009, analysing the draft of the notification and concession contract of Highway highways BR-040/DF-GO-MG (segment Federal District – Juiz de Fora), BR-381/MG (Belo Horizonte – Governador Valadares) and BR-116/MG (border between BA and MG - border between MG and RJ). The concessions involve execution of services of recovery, maintenance, conservation, operation, implementation of improvements and expansion of these highways. The model used for these concessions presents a new methodology for verifying economic-financial equilibrium for future reviews that will incorporate calculations based on the current flow of vehicles and market prices at the moment in which the contracted work is carried out, as well as a mechanism of tariff offsetting related to compliance with predetermined quality parameters. A number of SEAE employees participated in the hearings of the rules for these public bids carried out in ANTT in Brasília<sup>4</sup>.

104. Considering that the competitive process in the sector of highway concessions occurs at the moment in which the choice of the service provider is made (in which the position of advocating competition prioritises competition for the market), it becomes necessary to establish rules governing the tender process, making it possible to attract the largest possible number of competitors, discourage collusion among participants and generate results with lower initial tariffs for users and/or higher bids by the participants. In this context, SEAE has sought to develop rules that encourage competition in tender processes.

105. Thus, SEAE presented a series of recommendations with the aim of further completing the tender notification and contract presented by the Agency. These recommendations, among others, highlights the following aspects: (i) definition of the value of the contract as a function of the sum total of investments made during the entire concession period, instead of defining it on the basis of total forecast revenues; (ii) demand that the net worth of each participant in a consortium be equivalent to its participation in the consortium multiplied by the total net worth demanded of the consortium, according to a Decision taken by the Federal Court of Auditors - TCU; (iii) with regard to technical qualification, corroboration would not be necessary that the company has, within its permanent staff, professionals with certificates demonstrating their experience in performing or managing or supervising highway projects and operation, in this case as a way of withdrawing an item that tends to restrict competition from the tender process; (iv) forecast of the discount factor (factor X) at the time of tariff reviews, in order to make it possible to transfer to consumers hypothetical gains in efficiency on the part of the company or sector involved. Until March 2010, the bid processes for the above mentioned highways was under the exam of the Federal Court of Auditors - TCU.

- **High speed train – “TAV”**

106. In 2008, the Inter-American Development Bank (IDB) commissioned Halcrow Group Ltd and Sinergia Estudos e Projectos Ltda (acting jointly as a “Consortium”) to prepare a feasibility study for a 350km/h high speed railway line connecting the cities of Rio de Janeiro, São Paulo and Campinas in Brazil. The findings of this study were discussed in detail throughout the second semester of 2009. TAV will represent a major transport infrastructure investment in Brazil of international significance. TAV will

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<sup>4</sup> National Land Transport Agency (Agência Nacional de Transportes Terrestres – ANTT) is the regulatory agency charged with enforcement and responsible for implementing policy. The guidance on the policy framework should be provided by CONIT (the National Committee on Transport Infrastructure, which had the first meeting since its creation in 2001 in November 2009. ANTT is in charge of regulating the rails and roads conceded to the private market, freight transport, multimodal transport and interstate and international passenger road transport. ANTT oversees the exploitation of the railway infrastructure and the leasing of the corresponding assets. ANTT is also in charge of registration and authorisation for enterprises providing charter services.

be the first high speed rail service in Latin America and the first in the Americas on a dedicated alignment. It will benefit from mature high speed rail technology and once operational will have the potential to run at the highest current commercially available top speed of 350km/h. There will also be opportunities for major architectural land mark stations at Campo de Marte and Barão de Mauá.

107. The estimated capital cost of building TAV (including rolling stock and project contingencies at 30%) is R\$ 63.4 billion (2009 prices). Despite its high costs this equates to R\$ 121 million per track km or € 41.4 million per km (based on an exchange rate of 3.0 R\$/€) and is close to the average benchmarked cost per km for high speed railways. The Consortium has undertaken detailed studies as follows: Demand and Revenue Forecasts; Alignment Optimisation; Finance and economics including concessioning; and Operations and Technology.

108. SEAE has been participating in most discussions on the model, together with ANTT, Ministry of Transportation, BNDES and the Presidential Staff Office. Several meetings and discussions took place particularly in the second semester of 2009 and during the first four months of 2010.

- **TRIIP**

109. It is also worth mentioning that several meetings on interstate and international passenger transport have occurred in 2009. ANTT is in charge of regulating the supply of interstate and international passenger transport; its responsibilities also include application of penalties, proposal of new granting of licenses, and analysis for tariff revisions. The agency is responsible for supervising the interstate and international collective transport, and for avoiding non-authorized passenger transport. The right to operate a line is earned through a bidding process, managed by the agency. Economic ex ante assessment of the viability of the line may be performed by ANTT for approval, or the interested party may themselves have to present such a feasibility study.

110. In the sector of interstate and international highway passenger transportation (TRIIP), SEAE has been active since 2005 in discussions on alteration of the tariff adjustment formula suggested by the National Land Transportation Agency - ANTT. The increase was based on a spreadsheet of costs generalised for all of the companies providing this type of service and resulted in regulatory uncertainty for the Public Administration and for those providing the services. With the implementation of a new adjustment formula based on widely distributed price indices published by institutions of renown, an effort was made to reduce these uncertainties and generate greater stability for the sector and for its users.

111. SEAE expressed its position regarding the methodology proposed for calculating tariff increases. In that particular case, aside from reinforcing the recommendation calling for regulation by incentives or, in other words, through utilisation of the mechanism of price caps, SEAE presented suggestions as alternatives to the parametric formula currently used by the ANTT, composed of specific price indices intended to reflect variations in the prices of the sector's major inputs (fuels and lubricants, labour, vehicles, parts and accessories). SEAE emphasised that utilisation of the parametric formula implied a series of disadvantages, including excessive dependence on information provided by the concessionary companies themselves, thus further aggravating the problem of asymmetric information and perception risks; the difficulties involved in determining the basis of adequate earnings; and the lack of incentives to efficiency. Also as regards the choice of price indices, the Secretariat warned as to the phenomenon known as price feedback, which means the possibility of an interstate and international passenger transportation concessionary company interfering in the data collection process, which is carried out by research institutes and involves collecting product and service prices that reflect the costs of the sector and become part of the calculation of the parametric formula proposed by the ANTT. After analysing the choice of price indices, various recommendations were put forward with the intention of correctly incorporating the efficiency mechanisms present in price cap tariff regulation. Particular mention should be made of the recommendation for reviewing hypotheses dealing with market behaviour found in the definition of the

sector's operating parameters. These are: annual average distance covered - PMA; passenger index per kilometre - IPK; standard achievement index - IAP; average utilised capacity of the fleet and the order reduction factor.

112. Considering that these parameters continued to be used by the proposed methodology, the need for improving the calculation methodology was emphasised, to the extent that such parameters should reflect market dynamics. Since it does not assume specifications of cost and demand functions as known parameters, the price cap system allows one to re-evaluate the degree of competition in specific segments, hypotheses regarding new participating companies and the possibility of serving new markets.

113. Finally a recommendation involving short-term measures was also put forward, including development of a new mechanism for revising tariffs, substituting the current tariff spreadsheet, while avoiding utilisation of values measured for all the companies involved - a system that obviously rewarded inefficiencies - and consideration of hypotheses on market behaviour. Regarding the hypothesis of opting for utilisation of a tariff spreadsheet in processes of tariff review, the Secretariat stressed the need for developing methodologies for calculating depreciation, rates of earnings on vehicles and other assets and the carrying out of studies that incorporate regional specificities and incentive mechanisms for generating accessory revenues.

114. In 2009, SEAE participated in meetings with ANTT with the objective of discussing points related to competition advocacy and creation of mechanisms designed to stimulate efficiency in the providing of Interstate and International Highway Passenger Transportation services based on the still to be concluded sectoral model proposed by the National Land Transportation Agency - ANTT, for the processes of tendering the awarding of concessions.

115. The process of competitive bids for passenger transport by interstate and international buses, however, is expected to occur in 2010 and the model has not been finalised the ANTT.

- **Port Sector and Waterway Transportation**

116. SEAE participated in the process of defining the content of regulatory proposals referring to the dredging of Brazilian ports in 2009. Acting through the Growth Acceleration Programme (PAC) Monitoring Situation Room in the Port Sector, in which SEAE is one of the representatives of the Ministry of Finance, the Secretariat participated in the federal government task force constituted with the objective of collaborating with SEP/PR in elaboration of the first notifications and contracts for international tender processes involving result-based dredging, as instituted by the Dredging Law, in the framework of the National Dredging Programme - PND, which is one of the PAC activities. Participation of SEAE in the task force took the form of a pursuit of economic efficiency and defence and advocacy of competition, as required by the Secretariat's legal responsibilities. These activities took the form of countless contributions aimed at improving the documents analysed. For instance, SEAE made recommendations regarding the adequacy of the value of the guaranties and requirements demanded for economic-financial qualification of the participants in tender processes. More specifically, SEAE elaborated an analysis regarding the Economic-Financial Indices to be adopted in tender notifications in the framework of the National Dredging Programme - PND. In 2009, there were bids for dredging activities in the ports of Recife, Rio Grande, Santos, Aratu, Salvador, Rio de Janeiro, Natal, Angra dos Reis, Vitória, Itaguaí, Suape, São Francisco do Sul and Cabedelo.

117. Within the framework of PAC, SEAE has monitored part of the process of construction of the waterway of Tucuruí (a US\$ 500 million project), which will guarantee the navigation in the Tocantins river, blocked by the Hydroelectric Power Plant of Tucuruí. Monitoring included a visit to the construction.

- **Air transportation**

118. As regards the suggestion on altering the airport infrastructure management and financing model, a study was elaborated in 2008 on the stages required for granting Airport rights, as well as participation in the PAC Situation Room on concession of the São Gonçalo do Amarante Airport in the state of Rio Grande do Norte. SEAE participated in the workgroup responsible for evaluating the feasibility studies of the undertaking, formalisation of the business model and elaboration of the notification and concession contracts for that airport during the year of 2009. The bid process for this airport may start by the middle of 2010.

119. In 2009, SEAE has issued a series of recommendations to the Brazilian Congress suggesting that the draft laws under exam in the legislative power in order to allow an increase the authorisation of foreign investment in Brazilian airlines. Currently, this authorisation is limited to 20%. SEAE has suggested that the limit increases to 49%. Generally speaking this increase may promote competition among airlines, may increase the level of investments and promoted consumers welfare in air transportation. The final law has not been approved in the Congress until March 2010.

- **COGEN**

120. Regarding to the energy industry regulation, the Draft Bill no. 16/2009, proposed in order to establish the rules on interconnection of the Isolated System with the Interconnected System, had an article that could lead to discrimination among power generators who act under the same regulatory environment. SEAESEAE manifested this concern during the discussion of the law.

121. Another SEAESEAE's manifestation regarding energy industry was in the Public Hearing to discuss the auction rules on contracting of energy reserve, an auction specifically designed to wind power producers. SEAESEAE manifested concerns about one of the habilitation criterions to the auction which required that the participant must provide a historic wind measure of the site, for at least 12 months after December 2003. SEAESEAE's argument was that it could prevent new entrants to compete in the auction, once up to that moment potential entrants did not have enough confidence in the market to invest in research on potential wind generation due to uncertainties regarding wind power contracting. Then, this criterion could bias the auction in favour of the incumbents. SEAESEAE also mentioned that as the auction rules already impose a penalty to energy not delivered, this habilitation criterion could be removed from the public notice without any harm.

- **COGSA**

122. In 2008, SEAE and the Brazilian Agency of Supplementary Health (ANS) signed an co-operation agreement to develop technical studies on health insurance regulatory issues. In 2009 those studies were finished. One of the studies, elaborated by SEAE, investigates the sustainability of the Brazilian health insurance system. The study provided key information to the Agency's ongoing revision of the price regulation model.

123. Also in 2008, SEAE joined the Executive Group for the Health Industry Complex (GECIS). The GECIS was created under the Productive Development Policy (PDP) agenda to enhance the Brazilian health-related industry production. In 2009, SEAE worked with GECIS to avoid proposals that could harm competition. For example, the Group proposed changes to the government's acquisitions regulation in order to use its purchase power to buy health-related items. The initial propose could result in harm to competition, but as SEAE manifested its concern with the issue, the proposal was reformed in order to prevent harms to competition.

- **COGCM**

124. In 2009, COGCM contributed in SEAE's competition advocacy role with the activities cited below.

125. In February of 2009, SEAE contributed to ANATEL's public consultation concerning the proposal of new terms for licensing the Multichannel Multipoint Distribution Service (MMDS), which included the possibility of spectrum rearrangements. SEAE advised that the regulatory agency should implement rearrangements consistent with international recommendations and standards made by the ITU. Later in 2009, SEAE elaborated a contribution to ANATEL's public consultation no 31, which included several modifications on the rules about spectrum utilisation in the ranges 2,170 MHz to 2,182 MHz and 2,500 MHz to 2,690 MHz, which includes the MMDS service. The proposed regulation follows international recommendations. A new authorisation regime was established and the spectrum frequencies were rearranged among market agents. Besides the alteration the competitive environment, SEAE supported the new proposed regime because it is aimed at increasing spectrum bands for mobile providers, which can contribute to more competition in the mobile broadband market.

126. Anatel's public consultation n° 12 proposed a modification in the method that calculates the Telecommunication Services Index – IST, which is used to adjust fixed telephone tariffs. Recommendations were to maintain for longer periods the structure of weights of associated indexes; and to avoid time lapses between the revisions of price indexes and participation percentages of reference costs.

127. Another major activity was the publication of the Report on the Payment Card Industry in Brazil, which was prepared by a Working Group composed by the Central Bank, the Secretariat for Economic Monitoring and the Secretariat of Economic Law. The Group collected and analysed an extensive set of data on the credit and debit card markets, studied the international experience and also the theoretical literature available on the functioning and economics of these markets. The objective of this work was to identify potential market failures arising from the structure and/or market practices, giving the regulators the necessary technical and economic information about the industry. The Report brings a fairly complete diagnosis of the market for payment cards in Brazil, describing the organisation of industry, its players, its main characteristics and the conducts that raise competition problems. In addition, the Report also presents some recommendations, pointing out modifications that, in the Group's opinion, are necessary or desirable to improve competition and efficiency. Some of the conclusions presented in the Report are: (a) High concentration at the card platform (Brand) and acquiring levels. (b) High vertical integration on the activities of acquiring, payment gateway and processing, which raises expressive barriers to entry. Therefore, the Report concludes that the separation of these activities is desirable. (c) Exclusive contracts between card platforms and acquirers also create important barriers to entry of new firms in the acquiring market. The Report recommends that they should be prohibited based on the Antitrust Law. (d) Non-interoperability of the POS terminals, which imposes more cost to merchant as they have to have contracts with multiple acquires if they want to accept different cards. (e) No-surcharge rule creates distortions to the market in detrimental of the consumers welfare and it strengthens the market power of card companies. (f) The fact that the issuers banks are the owners of the two main acquirers, in addition to the high barriers to entry, creates an incentive to increase the interchange and the discount rates. Although no direct regulatory intervention has been implemented so far in the market of payment cards, the opinions brought by the Report were interpreted as a regulatory threat and some important modifications are being observed in the industry. Mastercard has announced the termination of its exclusive contract with the acquirer Redecard. Visa has announced its exclusive contract with Visanet will also be terminated, effective June, 2010. Santander and some important companies such as TSYS have already announced their intentions of entering the Brazilian market as acquirers and/or processors, which should improve the competitive environment. Interoperability of the POS machines is expected to occur very soon, since the firms are already advertising it. Also, the industry announced the development of a self-regulatory code that aims to improve the conduct of its members and their relationship with consumers.

128. SEAE had also participated in the discussions that preceded changes made in 2007 by the Central Bank of Brazil in the rules governing financial services. In general, the modifications sought to deter unfair practices, to lower the switch costs for consumers changing banks and to improve the quality of information available to consumers. Following that, SEAE decided for the creation of a bulletin on bank

services fees. The monthly publication presents information about 20 services, featuring average, maximum and minimum fees charged by major commercial banks for individual and corporate clients.

129. SEAE also participated in the Interministerial Group for Modernisation of the Brazilian Post & Telegraph Company. The goal is to transform this public enterprise into a Brazilian international holding, named Correios do Brasil, which would participate in several markets, from logistics to correspondence banking. SEAE expressed concerns that this entry has the potential of distorting market prices, since Correios do Brasil, being a publicly held company, is exempt from the payment of several taxes. SEAE also discouraged cross subsidies between activities, and suggested that entry in any pre-existing markets should be preceded by a detailed analysis of economic viability and impact on competition.

- **COGDC**

130. In 2009, SEAE had an intensive participation in this field. For example, the Secretariat, such as last year, after the development of a market study with SDE about the main aspects of the market for taxi services, is receiving several requests from city councils to help them to study and reform their taxi market regulation to promote the competition and improve the quality of the service in the mentioned market. The main issues analysed by SEAE in the taxi regulation are: (i) the current number of taxi licenses and if that number is restricted by the city; (ii) the tariff policy (usually, the Secretariat suggest the establishment of only a maximum fare with the permission of discounts by the taxi divers); (iii) suggestion to the city council to allow the publicity of the taxi fares and the discounts offered; (iv) mechanisms to stimulate the creation of taxicabs enterprises; and (v) verification of whether the legislation allows taxi drivers to get passengers in any point of the city or if there are restrictions about it.

131. Another example of activities in competition advocacy that deserves to be mentioned is the Denatran/Detrans cases. Since 2006, the Secretariat was receiving several accusations reflecting the existence of cartels in the driving school market. Nevertheless, during the investigation, we discovered that some regulatory bodies were, at the request of the driving schools, issuing regulation on prices. First, it was the Federal Regulatory Body, called Denatran, which fixed maximum prices. And afterwards, some State Regulatory Bodies (Detrans), based on the Federal Regulation, issued regulation fixing minimum and maximum prices. The reason alleged for the price regulation was the assurance of the quality of the services rendered by driving schools. As a matter of fact, also in 2006, SEAE elaborated a study in which we demonstrate that price regulation would not be adequate to assure quality. And also demonstrated that such regulation was not needed since there was already provisions in specific statutes guaranteeing quality. After finishing the study, we held several meetings with Denatran and with the Federal Department of Justice. Through these meetings we convinced Denatran to eliminate the price regulation. In despite of the communication of Denatran to the State Regulatory Bodies to eliminate all the price regulation, even in 2009, some Detrans (State Regulatory Bodies) still fixing prices in the matter of assurance the quality of the service. Because of that, the SEAE is realising separated studies for each case. These documents are been sent to the Detrans and to the Denatran. After that, we will await for the state regulation to be complete eliminated. If our efforts towards Denatran and Detrans would not have been successful, we would use the Department of Justice to litigate the regulation in Court.

- **COGCI**

132. Regarding the role of SEAE in trade and competition, these policies have the common goal of removing competition barriers, no matter they pursue it in different ways. Competition policy intents to protect consumer interest by maximising the economic efficiency (which includes efficient prices, higher quality of products and innovation) while trade policy focuses on market access, by reducing tariffs or eliminating quantitative restrictions and barriers to foreign direct investment. Competition from imported goods is further relevant in markets with high barriers to entry (such as economies of scale, sunk costs and technology reliance), for it curbs the exercise of market power by dominant firms.

133. In the scope of trade policy, imports can be affected by protection instruments such as antidumping duties, safeguard measures and subsidies, with the purpose of shielding domestic industries from foreign competition. In the view of competition policy, imports are essential to ensure market contestability. Moreover, there are impacts to be considered by competition policymakers as long as the instruments of trade policy may impose additional costs to consumers as well as to more efficient exporters.

134. Concerning the contact with trade policymakers, it happens mainly through the participation of the Secretariat for Economic Monitoring (SEAE) of the Ministry of Finance (MF) in the Chamber of Foreign Trade (Câmara de Comércio Exterior (CAMEX)). CAMEX is an institution which is part of the Government Council of the Presidency of the Republic of Brazil and aims at co-ordinating and formulating activities and policies related to foreign trade of products and services in Brazil, including tourism. CAMEX is presided over by the Minister of Development, Industry and Foreign Trade (MDIC) and includes in its membership the Ministries of Finance; Civil Matters; External Relations; Agriculture; and Planning. SEAE is invited to most of the technical discussions of CAMEX, especially those concerning tariff policies on import and export. CAMEX is the forum where both the competition advocacy and the interface between trade and competition take place.

135. SEAE plays an advisory role in Brazilian trade proceedings dealing with dumping and unfair import competition. Complaints from private parties alleging unfair imports are investigated by the Department of Commercial Defence (DECOM) of the MDIC. DECOM prepares a preliminary opinion, which is exposed to comments filed by the parties and interested government agencies. Thereafter, DECOM transmits a recommended decision to CAMEX for final action.

136. The opinion of the Ministry of Finance in antidumping cases is formulated jointly by SEAE and the Secretariat for International Issues (SAIN). SEAE's function is to analyse the degree of economic injury caused by the imports at issue and assess whether the relief proposed by DECOM is commensurate with the damage. SEAE may also comment on the competitive dynamics of the affected market and the economic viability of predatory prices, which are topics not ordinarily addressed by DECOM.

137. In several occasions, final decisions of CADE about anticompetitive practices or mergers recommended reductions in import tariffs or suspension of antidumping measures to CAMEX, in order to improve the competition in relevant markets analysed. Also as a matter of competition advocacy, several regulatory or legal aspects positively affecting entry barriers (investments barriers) has been publicly appointed by CADE, SDE and SEAE in their respective decisions or instructions, as well as in several public rule-making hearings conducted by federal agencies.

138. In Mercosur, SEAE is the Brazilian co-ordinator of the Technical Committee on Competition nº 5, the so-called CT-5. Mercosur is a customs union established by Brazil, Argentina, Paraguay, and Uruguay, in 1991 (Venezuela recently signed a protocol of accession to the bloc, presently pending approval by the parliaments of the current members). The main role of CT-5 is to facilitate co-operation on competition policy matters. For instance, in 2007 Uruguay had its competition law ratified and in 2009 its competition agency began working; Brazil, throughout CT-5, has been giving all assistance concerning guidelines and methodology for analysing mergers and cartels.

139. Since 2005, SEAE also has a role in monitoring technical standards of products issued by Brazilian Association of Technical Standards – ABNT, in order to prevent harm to competition and/or consumers due to introduction of technical barriers or unfair patterns of competition.

#### 4. Resources of competition authorities

##### 4.1 Resources overall

###### 4.1.1 Annual Budget (in Reais and USD)

	<b>Council for Economic Defence CADE</b>	<b>Secretariat for Economic Monitoring - SEAE</b>	<b>Secretariat of Economic Law - SDE</b>
Brazilian Real (BRL)	BRL 15.662.561,00	BRL 4,800,000.00	BRL 1,695,000 <sup>5</sup>
U.S Dollars (USD)	USD 8.798.090,66	USD 2,784,223.00	USD 973,466.57

###### 4.1.2 Number of Employees

	<b>Council for Economic Defence- CADE</b>	<b>Secretariat for Economic Monitoring- SEAE</b>	<b>Secretariat of Economic Law- SDE</b>
Economists	11		05
Lawyers	32	49	21
Other Professionals	09	10	04
Total Technical Staff (working on Competition Enforcement)	52	24	30
Support Staff	132	83	47 <sup>6</sup>
All staff combined	184	74	77
		157	

##### 4.2 Human Resources

	<b>Council for Economic Defence CADE</b>	<b>Secretariat for Economic Monitoring - SEAE</b>	<b>Secretariat of Economic Law SDE</b>
<b>Enforcement against anticompetitive practices</b>	CADE does not assign a separate staff for enforcement activities		23
<b>Merger review and enforcement</b>	CADE does not assign a separate staff for merger analysis and enforcement		04
<b>Advocacy Efforts</b>	CADE does not assign a separate staff for advocacy efforts		03

##### 4.3 Period Covered by the above information

140. January 1<sup>st</sup>, 2009 – December 31<sup>st</sup>, 2009

<sup>5</sup> The SDE's approved budget to 2009 was of R\$ 14.8 million. It should be noted that R\$1.7 million can be used by Competition Division under its own discretion. The remaining R\$13.11 might be allocated to the Competition Division upon request to and authorisation of the head of the Secretariat of Economic Law.

<sup>6</sup> It includes support employees that work in both Competition and Consumer Divisions.

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

### 5.1 *Articles*

#### Brazilian Papers on Competition submitted to the OECD

Title	Year	Committee	Code
Questionnaire on the Challenges Facing Young Competition Authorities	2009	CC	DAF/COMP/GF/WD(2009)51
Competition Policy, Industrial Policy And National Champions - Contribution from Brazil	2009	CC	DAF/COMP/GF/WD(2009)15
V Annual Report on Competition Policy Developments in Brazil	2009	CC	DAF/COMP(2009)14
Competition in Financial Markets- Contribution by Brazil	2009	CC	DAF/COMP/WD(2009)22
Roundtable on Two-Sided Markets – Contribution by Brazil	2009	CC	DAF/COMP/WD(2009)70
Tackling Bid Rigging in Public Procurement – Brazil	2009	CC	DAF/COMP/LACF(2009)10
The Application of Antitrust Law to State-Owned Enterprises (SOES)	2009	CC	DAF/COMP/A(2009)3
Margin Squeeze in Brazil	2009	CC	DAF/COMP/A(2009)3

#### Brazil has contributed to the following documents

Title	Year	Committee	Code
The OECD Project to Reduce Bid Rigging in Latin America	2009	CC	DAF/COMP(2009)10
Future Roundtable Topics	2009	CC	DAF/COMP(2009)84

141. In relation to Seae's participation in the 10<sup>th</sup> Meeting of IGE's UNCTAD in 2008, Seae presented the following written contributions:

MORAES, Ricardo Kalil and MENDONÇA, Elvino de Carvalho. "The relationship between industrial policy and antitrust policy and its impact on economic development: an analysis of the Brazilian case".

MORAES, Ricardo Kalil. "Public monopolies, concessions and antitrust policy and legislation".

142. Annually, all the three BCPS' authorities publish Annual Reports.

### 5.2 *Articles Published by CADE's Commissioners in 2009*

CARVALHO, Vinícius Marques, et al. "Processo decisório do CADE sobre limitações pessoais". Site Consultor Jurídico. Available in <<http://www.conjur.com.br>> . Access in May 06.

CHINAGLIA, Olavo Z. 10º Seminário Internacional sobre Cartéis em Cairo, Egito. Cade Informa, Brasília, Brasil, 01 nov. 2009.

### 5.3 *Published Chapters of Books*

CARVALHO, Vinícius Marques de. "Elementos para a implementação do novo marco regulatório na gestão dos serviços de saneamento básico no Brasil: qual o espaço da iniciativa privada?". In: SCHAPIRO, Mário (org.). *Direito e Economia na Regulação Setorial*. São Paulo: Saraiva, 2009, p. 183- 236.

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