## Decision-Making Powers and Institutional Design in Competition Cases: The Brazilian Experience

BY ANA PAULA MARTINEZ & MARIANA TAVARES DE ARAUJO[1]

*This article discusses the experience of Brazil regarding institutional design and decision-making powers and Brazil's efforts to enhance its convergence to international best practices, thereby improving Brazil's competition law enforcement. We describe the history of Brazil's competition law and policy system, and go on to discuss the benefits, as well as the efficiency and productivity costs, that result from the bifurcation of prosecutorial and adjudicative roles within the administrative system; warn that independency for a competition agency can be a two-edged sword; and emphasize the need to consider resources when designing and implementing merger and control systems.*

## I. INTRODUCTION

In the last several years, procedure and process rules that apply to competition law have been at the forefront in the agenda of international fora and of several jurisdictions. The International Competition Network ("ICN") and the Organization for Economic Co-Operation and Development ("OECD")[2] have promoted discussions among its members on procedural fairness and transparency, which can be achieved within different institutional designs. Likewise, many scholars have devoted substantial attention to institutional design and decision-making powers' issues and have assessed the performance of competition agencies around the world based on individual frameworks. [3]

"INDEPENDENCY" GRANTED TO A COMPETITION AGENCY CAN BE A DOUBLE-EDGED SWORD

The present article discusses the experience of Brazil regarding institutional design and decision-making powers and its efforts to enhance convergence to international best practices and, with that, to improve competition law enforcement in the country. While describing Brazil's competition law and policy system since the 30's to today, we plan to demonstrate:

1. The bifurcation of prosecutorial and adjudicative roles within the administrative system, although helpful from a due process and procedural fairness point of view, can come associated with a heavy toll on efficiency and productivity.

2. "Independency" granted to a competition agency can be a double-edged sword: It protects the agency against "regulatory capture" but it can also limit the ability of the agency to foster competition advocacy within the government. Early-stage adopters of a competition framework should be concerned with the "perils of insulation."

3. Merger control systems cannot be designed and implemented without regard for actual resources at the disposal of the antitrust agency. For agencies with scarce resources at hand, an "imperfect" *ex-post* merger system might be more indicated than a pre-merger system. The incremental experience in

Brazil of transitioning to a full-blown *ex-ante* merger control only after the ecosystem was mature and properly resourced probably makes sense for other developing economies.

## II. THE EARLY DAYS: FROM THE '30S TO THE MID-'90S

Brazil's Constitution of 1934 explicitly provided that "crimes against the economy" would be treated as crimes against the Brazilian State, where severe penalties would apply. At that time, Brazil relied on extensive government intervention, with broad-ranging price controls and a great number of state-owned companies operating in different segments of the economy. Law No. 431 of May 18, 1938[4] was passed in this context. It established that it was a crime to attempt to manipulate markets for essential goods for the purpose of maximizing profits or gains (the law referred to artificially increasing or decreasing prices); sanctions included from six months to two years of jail time.

Likewise, Law No. 869 of November 18, 1938,[5] which was inspired by the *U.S. Sherman Act*, was specifically targeted to promote competition—prohibiting practices such as cartels and anticompetitive mergers, predatory pricing, and interlocking directorates involving competitors, among other actions. Such conducts were treated as a crime, punishable with jail sentences from 2-10 years. For other anticompetitive conducts, such as resale price maintenance, the law established less severe sanctions—jail times from six months to two years and the payment of a criminal fine. The law also provided for sanctions against legal entities, to be applied by the Ministry of Justice. The statute had limited application and there is no record of enforcement actions taken based on these laws.

Following the end of the Second World War, Brazil's Congress passed Law No. 7.666, of June 22, 1945,[6] known as the "Malaia Law," which provided that anticompetitive acts against the "national economic interest" were to be considered an administrative infringement, in addition to being a crime. The draft law was submitted by the then Minister of Justice Agamemnon Magalhães. A federal government agency was created to enforce such law, named "Comissão Administrativa de Defesa Econômica—("CADE"). At its early stages, CADE was a branch within Brazil's Presidential Office and presided over by the Minister of Justice himself.

Among the reasons for the adoption of Law No. 7.666/1945, Agamemnon Magalhães listed the need to battle against trusts and other form of economic concentrations that could harm Brazil's working class and its small industries. The wording of the provisions clearly indicates that Congress' least worry was to maximize economic efficiency; conversely, protectionism and the need for greater State-intervention were the main goals of the law. Due to the political context that followed its enactment—Brazil's President Getúlio Vargas left government a few months later in October that same year[7]—the law produced no enforcement record and ended up being revoked in early November 1945.

In 1946, the Brazilian Congress passed a new Constitution that explicitly promoted competition. Its Article 148 provided that any form of abuse of dominance targeted to dominate national markets, eliminate competition, or arbitrarily increase profits would be punishable. It was the first time that legislation made use

of the expression "abuse of economic power" in Brazil—this approach was then followed by the 1967, the 1969, and the 1988 Constitutions as well.

Despite the 1946 constitutional provision, it was only in 1962 that Brazil adopted, after extensive legislative discussions, a competition law that once again set forth an administrative system to enforce competition rules.[8] Law No. 4,137, of September 10, 1962,[9] created the Administrative Council for Economic Defense (Conselho Administrativo de Defesa Econômica (a new "CADE")), empowered to fight against the abuse of economic power. In his introductory statement, Agamemnon Magalhães referred to the abuse of economic power as a "power of economic and political corruption" and to one of the "four powers of the Republic,"[10]which therefore needed to be harshly punished by the State. This legislation reflected Congress' shift from a standpoint where its concern was focused on protecting the working class, included in Law No. 869 of 1938, to another where the main purpose was to protect consumers.

THE 1962 LAW WAS NOT EFFECTIVE PRIMARILY BECAUSE OF PROTECTIONIST MEASURES IN PLACE AGAINST IMPORTS, AND PRICE CONTROLS

Under the 1962 law, CADE was based in Brasília,[11] with jurisdiction to investigate and sanction anticompetitive conduct affecting the Brazilian territory. It was subject to the Council of Ministers, a body under the President of the Republic. CADE was then composed of one chairman and four commissioners, appointed by Brazil's president following a recommendation of the Council of Ministers, for a term of four years,[12] except for the chairman, who could be removed by Brazil's president at any time. Commissioners could be exceptionally removed due to malfeasance as specified by law. Decisions were taken by a majority, formed by at least three commissioners out of four voting members. CADE had limited investigative powers, basically the ability to review financial statements and annual reports of companies and inquiry witnesses on alleged anticompetitive practices.

DESPITE THE 1946 CONSTITUTIONAL PROVISION, IT WAS ONLY IN 1962 THAT BRAZIL ADOPTED, AFTER EXTENSIVE LEGISLATIVE DISCUSSIONS, A COMPETITION LAW THAT ONCE AGAIN SET FORTH AN ADMINISTRATIVE SYSTEM TO ENFORCE COMPETITION RULES

However, regardless of the stated goals to promote competition and preserve markets, the 1962 law was not effective primarily because of protectionist measures in place against imports,[13] and price controls.[14] Moreover, at that time, most of Brazil's largest industrial, transportation, and financial enterprises were State-owned or private monopolies, and the country was from 1964 until 1985 subject to a military regime with direct influence over CADE's nominations and law enforcement. Against this backdrop, the existence of CADE had a marginal impact in promoting competition in the marketplace and/or protecting consumers.

There is limited data on enforcement during that period, but the available record indicates that in 21 years—from 1963 to 1984—CADE reviewed 152 cases and imposed only 16 sanctions against anticompetitive practices in Brazil, most of them reverted by judicial courts. This is substantially less than CADE's performance in just seven months after the regime became market-based; for example, from May to

December 1996 the agency reviewed 162 cases and imposed 20 sanctions for illegal behavior.[15] According to CADE:

> The promotion of competition was not a priority in Brazil under the old framework. During the "CIP era," bodies like CADE existed from a formal perspective but they were not envisioned to work (…). Authorities used and abused their powers to intervene in the economy, while at the same time the bureaucratic system for competition cases turned the competition system ineffective.[16]

The transition into a market-based economy began in 1988, when again a new constitution was passed in Brazil. From that moment on several substantial macro- and micro-economic reforms were implemented. So, differently from what had happened before, the constitutional provision that established that competition was a crucial feature of the "economic order" now carried considerable meaning. This led the way for the country to adopt privatization programs, for the reduction of trade barriers, and for the vast majority of price controls to be eliminated. Moreover, inflation was controlled with the introduction of a new currency (Real ("BRL")) in 1994.

As part of the 1990s reforms, a new competition law was introduced in 1994, jump-starting the modern era of competition law in Brazil, as discussed below. A few years before, Congress had enacted Brazil's Economic Crimes Law (Law No. 8,137/90), which established that some types of anticompetitive conduct may be considered a crime, subject to penalties of 2-5 years of imprisonment or to the payment of a criminal fine. The dual nature (administrative and criminal) of Brazil's competition system was, therefore, preserved in the 1990s reforms. Furthermore, in 1991 Congress passed Law No. 8.158, which created the then "National Secretariat of Economic Law" (Secretaria Nacional de Direito Econômico ("SNDE")), within the Ministry of Justice, which was responsible for reviewing merger cases.

DIFFERENTLY FROM WHAT HAD HAPPENED BEFORE, THE CONSTITUTIONAL PROVISION THAT ESTABLISHED THAT COMPETITION WAS A CRUCIAL FEATURE OF THE "ECONOMIC ORDER" NOW CARRIED CONSIDERABLE MEANING

## III. A LANDMARK: LAW NO. 8,884, OF JUNE 11, 1994

The introductory statement to the 1994[17] law pointed out the reasons that justified the adoption of a new competition law in Brazil: (i) lack of specialized staff, (ii) the need to create a more effective legal services office within CADE, (iii) the need for a more rational merger control system, and (iv) the need for an institutional reform.

The 1994 law introduced relevant institutional changes, reconfiguring CADE as an independent agency[18] responsible for adjudicating all types of competition cases, including merger reviews and prosecution of anticompetitive conducts. The agency was comprised of six commissioners and a chairman, and all of its decisions were subject to judicial review. CADE's commissioners and chairman were appointed by the President of the Republic and confirmed by Congress, for a term of two years, with the possibility of being reappointed for one additional term. Decisions were taken by majority, formed by at least three commissioners

out of five voting members.

In this regard, there were two main changes introduced by the 1994 law when compared to the 1962 law: (i) the Executive Power could no longer appoint members to CADE without getting Congress' confirmation, aligned with the constitutional principle of checks and balances; and (ii) terms were reduced from four years to two years, which later proved to be a wrong decision.[19]

TERMS WERE REDUCED FROM FOUR YEARS TO TWO YEARS, WHICH LATER PROVED TO BE A WRONG DECISION

Two other agencies outside CADE were responsible for investigating anticompetitive practices and issuing non-binding reports in connection with merger reviews, namely the Secretariat of Economic Law of the Ministry of Justice (Secretaria de Direito Econômico ("SDE")) and the Secretariat of Economic Monitoring of the Ministry of Finance (Secretaria de Acompanhamento Econômico ("Seae"))—the agencies were jointly referred as the "Brazilian Competition Policy System" (Sistema Brasileiro de Defesa da Concorrência). The SDE was headed by a secretary of state appointed by the president of the Republic and was divided into two divisions, one with responsibility for enforcing the competition law (Departamento de Proteção e Defesa Econômica ("DPDE")), and the other responsible for the consumer protection law (Departamento de Proteção e Defesa do Consumidor ("DPDC")). The SEAE was also headed by a secretary of state appointed by the president of the Republic and was originally composed of public officials that had previously served in price-controlling commissions. The system was, therefore, based on ensuring full independence to the decision-making agency (CADE) while leaving the agencies with investigative powers under the umbrella of the Federal government.

FROM 1994 TO 2003, THE BRAZILIAN COMPETITION AUTHORITIES FOCUSED PRIMARILY ON MERGER REVIEWS, AND SUBSTANTIAL RESOURCES WERE DEVOTED TO REVIEWING COMPETITIVELY INNOCUOUS MERGERS

To address concerns regarding procedural fairness, two independent legal officers were established within CADE: (i) CADE's attorney general, who represented CADE in court and could render opinions in all cases pending before the agency; and (ii) the federal public prosecutor, who could also render opinions in connection with any case pending before CADE.

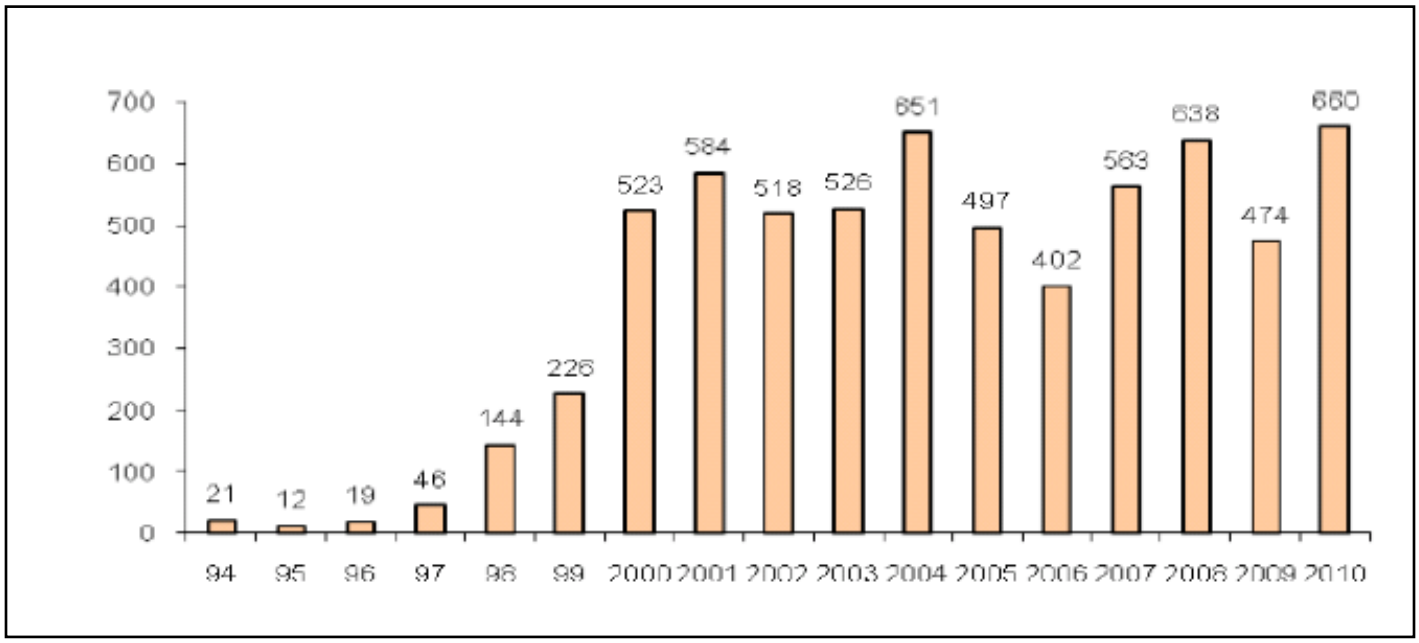
The 1994 Law introduced a more coherent structure to the post-merger control system established in 1991. Article 54 of the law provided that any act that could limit or otherwise restrain competition must be submitted to CADE for review. Under §3 of Article 54, the acts for which this submission was required included transactions aimed at any form of economic concentration which caused any participating company or group of companies to achieve 20 percent of market share of a relevant market, or in which any of the participants has posted annual gross revenues equivalent to at least BRL $400,000,000.00.

The 1994 law was amended three times: in 1999, to create a merger filing fee; in 2000 to empower the SDE with dawn raid powers and the ability to execute leniency agreements with wrongdoers in exchange of

confession and cooperation; and in 2007 to allow settlement of cartel investigations.

From 1994 to 2003, the Brazilian competition authorities focused primarily on merger reviews, and substantial resources were devoted to reviewing competitively innocuous mergers. The post-merger review system proved to be very inefficient: CADE reviewed around 8,000 transactions, and in only a few instances decided to block them—there were a small handful of other cases in which remedies were imposed in order for the transaction to be approved.[20]

**Mergers reviewed by CADE (1994-2010)[21]**



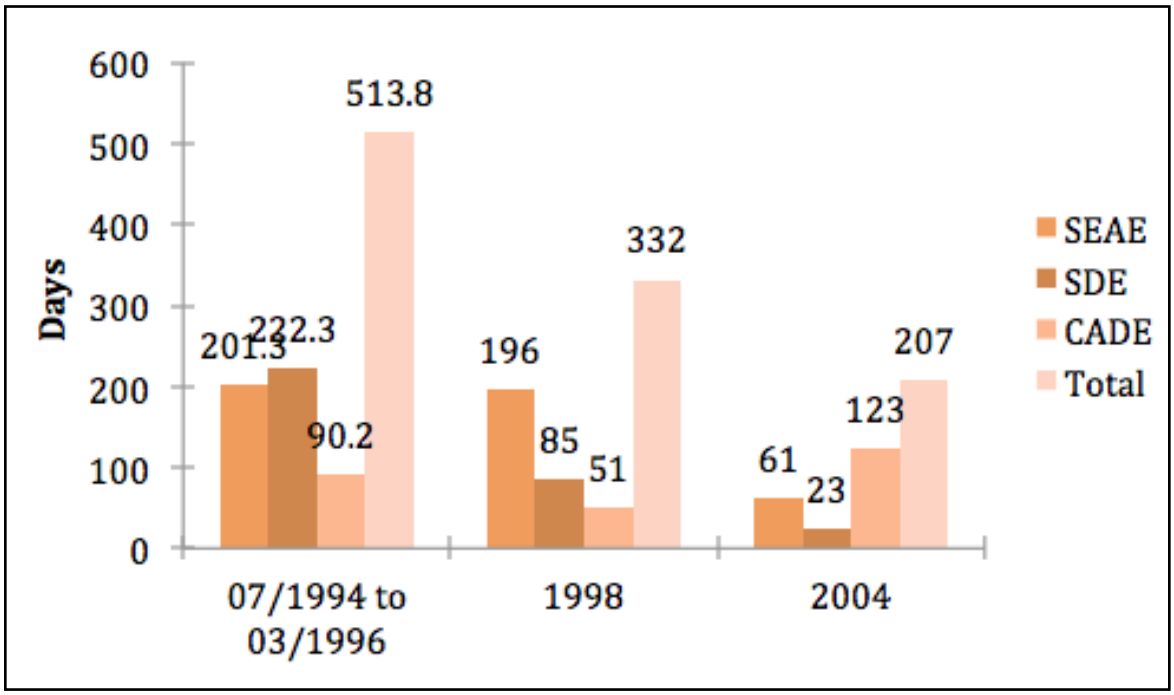

**Remedies and Transactions blocked by CADE (1994-2010)[22]**

| | 94 | 95 | 96 | 97 | 98 | 99 | 00 | 01 | 02 | 03 | 04 | 05 | 06 | 07 | 08 | 09 | 10 |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Remedies | 2 | 4 | 8 | 8 | 4 | 7 | 17 | 12 | 9 | 8 | 43 | 37 | 16 | 37 | 58 | 19 | 27 |
| Transacations blocked | 2 | 0 | 0 | 0 | 0 | 0 | 2 | 0 | 0 | 0 | 1 | 0 | 0 | 0 | 1 | 1 | 1 |

Regarding the timeframe for the review of filed transactions, under Law No. 8,884/94, SEAE had 30 days in which to issue an opinion about the transaction, which was then forwarded to SDE. Upon receipt of SEAE's opinion, SDE also had 30 days to issue its own opinion. Both opinions were then forwarded to CADE, which in turn had to issue its decision in 60 days. The law also required that CADE's attorney general issue an opinion within 20 days, which the reporting commissioner could or could not take into account in preparing his/her own opinion.

Notwithstanding the 120-day review period established by the law, the Brazilian merger review system was, on average, not completed within 120 days.[23] From July 1994 to March 1996, the average review period for a transaction was 514 days. This number was reduced to 332 days in 1998 and to 207 days in 2004 as a consequence of a number of measures adopted by the agencies to deal with the institutional challenges of the system.

**Average period of time for merger reviews (1994 – 2004)**




Source: From July 1994 to March 1996, CADE's 1996 annual report; 1998, CADE's 1998 annual report, and 2004, CADE, SDE, and SEAE's 2004 annual report.

In the absence of a more rational legal framework, merger review had to be improved through infra-legal measures such as the: (i) adoption of a simplified filing form in 1996 and in 1998;[24] (ii) introduction of a "fast track" procedure for simple cases[25] and cooperation agreements among SDE, SEAE, and CADE's legal services, reducing overlapping functions;[26] (iii) provision of consent decrees (Medida Cautelar) or agreements with the parties (Acordo para Presevar a Reversibilidade da Operação or APRO) that prevented complex transactions from being closed prior to CADE adjudicating the case;[27] and (iv) ability of CADE to issue binding interpretations of law with the purpose of ensuring legal certainty regarding the notification thresholds (Súmulas).[28]

Starting from 2003, as a result of reducing overlapping functions between SDE and SEAE, SDE started to dedicate its resources to the fight against cartels and to use the enhanced investigative tools granted by the Brazilian Congress in 2000 (mainly dawn raids and leniency). With direct evidence being available in the cases to be adjudicated, CADE began imposing record fines (up to 25 percent of the company's gross turnover in the year preceding the initiation of the investigation, doubled for recidivism) on companies and executives were found liable for anticompetitive conduct.

Brazil's competition authorities' strategy of focusing available resources on cracking cartels proved successful and there was an increasing number of investigations of anticompetitive practices, as well as dawn raids. There were also a growing number of applicants to the leniency program. More than 30 leniency agreements have been signed since 2003, and more than 300 search-and-seizure warrants have been served since then to obtain evidence of illegal conduct. Well-known international cases, such as air cargo, marine hose, compressors, and CRT, were initiated in Brazil through leniency applications filed before the SDE. As a result of such prioritization, Brazil's anti-cartel program became widely respected both in Brazil and abroad.[29]

Brazil's settlement program, later introduced in 2007, represented a remarkable improvement as early cooperation on the part of the defendants saved public resources, cut down litigation, enabled early payment of a significant sum of money, and provided expedited treatment and more certainty and transparency to the business community. Settling also proved beneficial for the defendant, as it often meant a more efficient use of resources on the part of the company. Over 30 settlements have been executed by CADE since 2007, approximately 15 of which were in connection with cartel investigations.

**Fines imposed by CADE for anticompetitive conduct /Investigations settled with CADE (1994-2011)**

| Case | Initiation of the Investigation –Adjudication | Fines (U.S.$) | % of the Total Turnover |
|---|---|---|---|
| Beer (abuse of power) | 2003-2010 | 170 million | 2% |
| Industrial Gases | 2003-2010 | 1.3 billion | 25% (50%) |
| Steel Bars | 1996-2005 | 210 million | 7% |
| Crushed Rock | 2002-2005 | 45 million | 15-20% |
| Flat Steel | 1996-1999 | 38 million | 1% |
| Security Services | 2003-2007 | 25 million | 15-20% |
| Vitamins | 1999-2007 | 10 million | 20% |
| Sand Extractors | 2006-2008 | 1.35 million | 10-22.5% |

| Case | Initiation of the Investigation –Settlement | Settlement (U.S.$) |
|---|---|---|
| IT Services | 2005-2011 | 20 million |
| Compressors | 2009-2009 | 60 million |
| Plastics Bags | 2006-2008 | 15 million |
| Cement | 2006-2007 | 19 million |
| Compressors | 2009-2009 | 50 million |
| Marine Hose | 2007-2008, 2009 and 2011 | 10 million |

Enforcement records under the 1994 law showed that, as a policy matter, enforcers were determined to impose stiffer sentences against anticompetitive conduct that targeted Brazilian businesses and consumers. Further progress, however, depended on broad legislative reform.

In order to change the institutional framework in a way that was consistent with the ever-increasing challenges in enforcement, antitrust authorities proposed a fairly bold overhaul of the 1994 regime. The reform aimed to increase efficiency and bring greater rationality to competition enforcement in Brazil. In essence, the proposed changes consisted of:

1. restructuring the system by creating a single competition agency to enable the government to eliminate existing overlaps among agencies;

2. adopting a pre-merger review system and incorporating appropriate standards of materiality as to the level of the "local nexus" required for merger filing;

3. introducing sanctions and other specific provisions addressing anticompetitive conduct investigations, including amendments to the leniency program and criminal sanctions; and

4. enhancing human resources for the new agency.

The bill, which was aligned with the recommendations issued by the OECD in its 2005 and 2010 Peer Reviews of Brazil's competition law and policy, went through intense legislative discussions after 2000 and was finally approved by Congress in November 2011.

## IV. THE WAY FORWARD: BRAZIL'S NEW COMPETITION LAW

### *A. Creation of a Single Competition Agency*

The new law, which entered into force in May 2012, consolidated the investigative, prosecutorial, and adjudicative functions of the Brazilian competition authorities into one autonomous agency. CADE was restructured to include: (i) an administrative Tribunal composed of six commissioners and a chairman, responsible for adjudicating merger and antitrust cases; (ii) a Directorate General for Competition ("DG"—*Superintendência-Geral*), responsible for conducting antitrust investigations and reviewing merger cases; and (iii) an Economics Department, responsible for providing economic support both for the Tribunal and the DG. All CADE's decisions are subject to review by non-specialized judicial courts—either *de novo* review or deferential to fact-finding.

BRAZIL'S SETTLEMENT PROGRAM, LATER INTRODUCED IN 2007, REPRESENTED A REMARKABLE IMPROVEMENT AS EARLY COOPERATION ON THE PART OF THE DEFENDANTS SAVED PUBLIC RESOURCES, CUT DOWN LITIGATION, ENABLED EARLY PAYMENT OF A SIGNIFICANT SUM OF MONEY, AND PROVIDED EXPEDITED TREATMENT AND MORE CERTAINTY AND TRANSPARENCY TO THE BUSINESS COMMUNITY

The DG, appointed by the President of the Republic and confirmed by Congress for a two-year term, performs the former functions of SDE's Antitrust Division and SEAE, combining the roles of an investigator and a prosecutor. The main goal creating the bifurcated agency structure was to preserve independence of the decision-making body, although some argue that this did not eliminate a certain "confirmation bias" due to the close relationship existing between the DG and CADE's Tribunal officials.

The bifurcation of prosecutorial and adjudicative roles within the administrative system, although helpful from a due process and procedural fairness point of view, is still associated with a heavy toll on efficiency and productivity, with the average length of antitrust investigations being much more significant when compared to systems like the United States or the European Union.

SEAE continues to exist but deals exclusively with "competition advocacy" before the Brazilian regulatory agencies and other governmental bodies. It is particularly relevant that this function continues to be performed by SEAE, since its position as part of the powerful Ministry of Finance affords it access to many other government bodies. Now divested of its other responsibilities, it may be in a better stance to promote competition standards within government.

THE NEW LAW, WHICH ENTERED INTO FORCE IN MAY 2012, CONSOLIDATED THE INVESTIGATIVE, PROSECUTORIAL, AND ADJUDICATIVE FUNCTIONS OF THE BRAZILIAN COMPETITION AUTHORITIES INTO ONE AUTONOMOUS AGENCY

The fact that the antitrust investigative agencies were within the Ministry of Justice and Finance in the early days of competition enforcement in Brazil played a very important role in disseminating the concept of competition within the government and strengthening the role of CADE, the then competition tribunal. An important lesson can be learned from the Brazilian experience: Policy makers should be careful when creating independent competition agencies at the beginning of establishing a competition regime—if the country has no competition culture, it is likely that the agency will lack power and resources to enforce the competition law and will be left excluded (what we refer to as being the "perils of insulation").

Also, the fact that the primary investigative agency for anticompetitive behavior was within the Ministry of Justice allowed for a more comprehensive platform for cooperation with the criminal authorities, as the Federal Police was also within the structure of the Ministry of Justice. This is not to say that cooperation cannot take place under the new framework, but it certainly requires an added effort on the part of the DG.

As for CADE, under the 1994 law, as previously discussed, its chairman and commissioners were appointed by the President of the Republic and approved by Congress for terms of two years, which could be renewed once. Under the new law, this was changed to a single term of four years, with staggered terms to avoid simultaneous vacancies and the possibility that a quorum could not be convened. The reasoning behind the change was to avoid pressures on commissioners who would still be eligible for reappointment—which could affect their ability to vote on cases—and also to reduce the relatively high turnover rate.

Finally, the use of economic analysis in Brazil has grown dramatically in competition matters over

recent years and is expected to play a major part in every important abuse of dominance and merger case under the new regime. The creation by the 2011 law of an Economics Department within CADE is certainly a watershed event in that respect.

### *B. Merger Control*

After almost 25 years of a post-merger review system being in place in Brazil, the new law introduced a mandatory pre-merger notification system.[31]

The maximum period to conduct the merger review is 330 calendar days from the day of filing or from the date CADE considers the filing to be complete. Simple cases can be cleared solely by the DG without the need for being reviewed by the Tribunal. The few complex cases that require the adoption of remedies to address antitrust concerns, or transactions that have to be blocked, necessarily need to be reviewed by CADE's Tribunal.[32] This rearrangement of roles between the prosecutorial and adjudicative agency has brought more efficiency to Brazil's competition system and freed-up resources of the Tribunal to focus on the review of complex cases.

THIS ARGUES THAT THE BRAZILIAN EXPERIENCE OF TRANSITIONING TO A FULL-BLOWN EX-ANTE MERGER CONTROL ONLY AFTER THE ECOSYSTEM WAS MATURE AND PROPERLY RESOURCED MAY SERVE AS AN INSPIRATION TO OTHER DEVELOPING ECONOMIES

In 2013, the average review period for simple case was 25 calendar days,[33] aligned with international best practices. This argues that the Brazilian experience of transitioning to a full-blown *ex-ante* merger control only after the ecosystem was mature and properly resourced may serve as an inspiration to other developing economies.

Regarding the criteria for the substantive merger review, the new law follows the same lines of Law No. 8.884/94, and the 1994-2012 CADE case law generally governs CADE's decisions under the new system.

### *C. Prosecution of Anticompetitive Behavior*

Article 36 of Brazil's new competition law deals with all types of anticompetitive conduct other than mergers. The statute did not change the definition or the types of anticompetitive conducts that could be prosecuted in Brazil under the previous law. The law prohibits acts "that have as object or effect" to (i) limit, restrain, or in any way cause injury to open competition or free enterprise; (ii) control a relevant market of a certain good or service; (iii) increase profits on a discretionary basis; or (iv) engage in market abuse. Article 36, §30 contains a lengthy but not exclusive list of acts that may be considered antitrust violations provided they have as an object, or produce, the above-mentioned effects. The listed practices

POLICY MAKERS SHOULD BE CAREFUL WHEN CREATING INDEPENDENT COMPETITION AGENCIES AT THE BEGINNING OF ESTABLISHING A COMPETITION REGIME—IF THE COUNTRY HAS NO COMPETITION CULTURE, IT IS LIKELY THAT THE AGENCY WILL LACK POWER AND RESOURCES TO ENFORCE THE COMPETITION LAW AND WILL BE LEFT EXCLUDED

include various types of horizontal and vertical agreements and unilateral abuses of market power.

The table below provides a summary of the main changes introduced by the new competition law regarding sanctions:

**Main changes introduced by the new competition law regarding sanctions**

| Law No. 12,529/11 | Law No. 8,884/94 |
|---|---|
| **Corporate fines** | |
| Fines range between **0.1** and **20 percent** of the **company**'s or **group of companies**' pre-tax **turnover in the sector of activity affected by the conduct** in the year prior to the beginning of the investigation, but should be no less than the amount of the unlawful gain from the conduct. CADE may resort to the total turnover whenever information on revenue derived from the relevant "sector of activity" is unavailable or not reliable. | Fines range between **1** and **30 percent** of the **company**'s pre-tax **total turnover** in the year prior to the beginning of the investigation, but should be no less than the amount of the unlawful gain from the conduct (i.e., the fine is to be calculated as a percentage of the defendant's total revenues, not just those that derives from the affected or relevant market). |
| **Directors and Officers Fines** | |
| Directors and Executives of companies in violation may be fined between **1** and **20 percent** of their company's fine. | Directors and Executives of companies in violation may be fined between **10** and **50 percent** of their company's fine. |
| CADE needs to establish fault or negligence on the part of the directors and executives. | No need to prove fault or negligence. |
| **Other Individuals and Non-profit Entities** | |
| Other individuals; public or private legal entities; as well as any association of persons or *de facto or de jure* legal entities, legally incorporated or not, which do not perform business activities, may be fined between **BRL 50,000.00 (fifty thousand reals) to BRL 2,000,000,000.00 (two billion reals).** | Other individuals; public or private legal entities; as well as any association of persons or *de facto or de jure* legal entities, legally incorporated or not, which do not perform business activities, may be fined between **BRL 6,000.00 (six thousand reals) to BRL 6,000,000.00 (six million reals).** |

| **Other sanctions that may be imposed to Companies (the previous and the current competition laws contain similar provisions)** |
|---|
| Corporate spin-off, transfer of control, sale of assets, or any measure deemed necessary to cease the detrimental effects associated with the wrongful conduct. |
| Publication of the decision in a major newspaper at the wrongdoer's expense. |
| Prohibition of the wrongdoer from participating in public procurement procedures and obtaining funds from public financial institutions for up to five years. |
| Inclusion of the wrongdoer's name in the Brazilian Consumer Protection List. |
| Recommendation to the tax authorities to block the wrongdoer from obtaining tax benefits. |
| Recommendation to IP authorities to grant compulsory licenses of patents held by the wrongdoer. |

The new law also modified Brazil's Leniency Program.[34] The 2000 rule that leniency was not available to a "leader" of the cartel was eliminated. The elimination of the disqualification of the "leader" as an applicant in the law does not necessarily mean that the authority will disregard the role played by a cartel participant in determining whether to grant leniency or not—Article 86 of Law No. 12,529/2011 provides that the authority *may* grant leniency if the program requirements are fulfilled. Therefore, the authority is no longer required to address arguments that a leniency applicant must be disqualified for having been a leader in a conspiracy, but this will most likely not be followed by policy changes resulting in immunity from sanctions independent of the role played by each party. Further, a grant of leniency currently extends to criminal liability under the Federal Economic Crimes Law but not to other possible crimes under other criminal statutes, such as fraud in public procurement. The new law broadens the leniency grant to extend to those crimes as well.

Law No. 12,529/2011 also introduced changes to the criminal sanctions applicable to anticompetitive conduct. The previous provision of the Federal Economic Crimes Law set forth jail terms of 2-5 years *or* the payment of a criminal fine. The new law amended that provision and established that anticompetitive behavior may be punished with a jail term of 2-5 years *plus* the payment of a criminal fine. Criminal prosecution continues to be solely against individuals, and State and Federal-level prosecutors are the ones in charge of prosecuting the conduct.

Finally, as for procedure, both the previous law and the current law grant court-like due process protections. In the balance between agency effectiveness and rights of defense, the law opted for the latter, aligned with provisions of Brazil's constitution.

### *D. Increased Agency Staffing*

An important element in the new law is the provision for 200 permanent positions in CADE. These positions would not require candidates to be specialists in antitrust regulation but, rather, the new staff would be drawn from other specialties in the federal civil service. Until 2012, the most serious problem confronting Brazil's competition authorities has been its lack of resources, compounded by a high rate of employee turnover which adversely affects its institutional memory. The agencies have been chronically understaffed, leading to a large backlog of investigations. To date, CADE has hired around 50 officials out of the 200 that have been provided for under the new law.

## V. CONCLUSION

Although institutional design is more of an art than a science, a healthy predisposal to constantly learn, measure, and evaluate data and outputs is paramount to assure institutional dynamism. "Reforming" needs to be a constant exercise, and, indeed, striving after an effective institutional design has been a constant challenge for Brazil's competition system during the past 25 years.

IN THE BALANCE BETWEEN AGENCY EFFECTIVENESS AND RIGHTS OF DEFENSE, THE LAW OPTED FOR THE LATTER, ALIGNED WITH PROVISIONS OF BRAZIL'S CONSTITUTION

The regime in place today was built upon the experience accumulated during this time, and resulted in the implementation of a bifurcated agency/tribunal model: The DG is appointed for a two-year term, which can be renewed once and, at the tribunal level, commissioners serve a single term of four years, with staggered terms to avoid simultaneous vacancies and the possibility that a quorum can not be convened. This system, although helpful from a due process and procedural fairness point of view, can come associated with a heavy toll on efficiency and productivity. The legislators' decision that an independent agency would be in charge of enforcement, while SEAE's role would be limited to competition advocacy, had, as its purpose, reducing the risk of political intervention.

THE MAIN CHALLENGE NOW IS TO ENSURE THAT THE JUDICIAL REVIEW OF ITS DECISIONS WILL NOT UNDERMINE WAS HAS BEEN ACOMPLISHED AT THE AGENCY LEVEL.

That is not to say that the previous system did not prove to be beneficial to promoting competition enforcement in Brazil. Quite to the contrary—the fact that the antitrust investigative agencies were within the Ministry of Justice and Finance in Brazil's early days of competition enforcement played a very important role in disseminating the concept of competition within the government and strengthening CADE's role.

An important lesson can be learned from the Brazilian experience: Policy makers should be careful when initially creating independent competition agencies—if the country has no competition culture, it is likely that the agency will lack power and resources to enforce the competition law and will be left excluded; what we have referred to throughout the text as being the "perils of insulation." In other words, independency might well be a double-edged sword.

CADE now seems to have all it needs to have an effective competition system: a mature system with broad investigative powers; a sufficient budget; and increased staffing, as provided for under the new law. The main challenge now is to ensure that the judicial review of its decisions will not undermine was has been acomplished at the agency level. ▲

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[1] Ana Paula Martinez is a partner in Levy & Salomão Advogados. She was the Head of the Antitrust Division of the Secretariat of Economic Law from 2007 to 2010, and co-headed the cartel sub-group of the ICN with the U.S. Department of Justice. Before entering the government, Ms. Martinez was an associate with Cleary Gottlieb Steen and Hamilton LLP. She is licensed to practice law in Brazil and New York and served as an antitrust advisor to UNCTAD, the World Bank, and to the Government of Colombia. Ms. Martinez holds a Master of Laws from both the University of São Paulo and Harvard University and is a Ph.D. in Criminal Law. She is also a Law Professor at the Graduate Program of Fundação Getúlio Vargas—RJ. Mariana Tavares de Araujo is a partner with Levy & Salomão Advogados. Prior to joining the firm, Ms. Araujo worked with the Brazilian government for nine years, four of which she served as head of the government agency in charge of antitrust enforcement and consumer protection policy. Before joining government, she was the General Counsel of a biotech firm in Brazil. Besides advising private parties, Ms. Araujo provides counseling in competition-related matters for the World Bank and is currently a non-governmental advisor to the ICN. She is also a Law Professor at the Graduate Program of Fundação Getúlio

[2] *See* OECD, *Procedural Fairness and Transparency* (2012), http://www.oecd.org/document/20/0,3746,en_2649_37463_50235668_1_1_1_37463,00.html, for a summary of OECD's three roundtable discussions on transparency and procedural fairness held during 2010 and 2011. *See* also Christine A. Varney, former Assistant Attorney General, U.S. Dep't of Justice, *Coordinated Remedies: Convergence, Cooperation, and the Role of Transparency* (February 15, 2010), http://www.justice.gov/atr/public/speeches/255189.htm. *See* also Rachel Brandenburger, Special Advisor, International Antitrust Division, US Dep't of Justice, *International Competition Policy and Practice: New Perspectives?*, King's College, London (October 29, 2010), http://www.justice.gov/atr/public/speeches/70980.htm.

[3] *See*, e.g., William E. Kovacic, *Rating the Competition Agencies: What Constitutes Good Performance?*, 16 Geo.Mason L. Rev. 903 (2009); William E. Kovacic, *Getting Started: Creating New Competition Policy Institutions in Transition Economies*, 23 Brook J. Int'l L. 403 (1997). Also *see* Eleanor M. Fox & Michael J. Trebilcock, *The Design of Competition Law Institutions and the Global Convergence of Process Norms: The GAL Competition Project*, New York University Law and Economics Working Papers. Paper 304 (2012), available at http://lsr.nellco.org/nyu_lewp/304.

[4] A copy of the law is *available at* http://www.planalto.gov.br/ccivil_03/decreto-lei/1937-1946/Del0431.htm.

[5] A copy of the law is *available at* http://legislacao.planalto.gov.br/legisla/legislacao.nsf/viwTodos/64751179347B52E3032569FA005E374F?Opendocument.

[6] A copy of the law is *available at* http://www.planalto.gov.br/ccivil_03/decreto-lei/Del7666.htm.

[7] There was also alleged political pressure from the United States to revoke Brazil's Law No. 766/1945, as the law was perceived as being based on nationalism protectionism. *See* Letter No. 26, dated June 27, 1945, from Brazilian Ambassador based in Washington to the Brazilian President. *See* Luiz Carlos Delorme Prado, *Infrações da Ordem Econômica e legislação de defesa da concorrência no Brasil: uma perspectiva histórica*, Farina: Laércio (org.) A nova lei do CADE. Ribeirão Preto: Migalhas 96-122, p. 102 (2012). See also Darcy Ribeiro, Aos Trancos e Barrancos: Como o Brasil deu no que deu, Rio de Janeiro: Guanabara Dois (1986): "Getúlio issued the antitrust law, which prompted a major reaction from the representatives of foreign companies. Otávio Mangabeira has even requested the Army's intervention against the enforcement of the Malaia Law, named after the Minister of Justice Agamenon Magalhães, due to its physical characteristics. The Malaia Law was envisioned to fight the acts against the economic and moral order. The morality aspect has not moved anyone, but the protection of the economy—inspired by the US legislation—has prompted a negative reaction especially on the part of the foreign companies, which were not willing to accept a government control as the one which existed abroad."

Agamenon Magalhães presented draft law No. 122/48 to the House in March 1948 stating that "so that the Brazilian State could be empowered, it has to be above any economic power." Agamenon's son later resubmitted the draft under No.3 in 1955. In 1961, the then President of the Republic, Jânio Quadros, defended the existence of a criminal system, where decision-making powers were restricted to the criminal courts. Under his proposal, individuals were subject to jail time from 1-5 years and convicted foreigners could be expelled from Brazil. Congress rejected President Quadros' proposal and passed the draft law that provided for the existence of an administrative system.

[9] A copy of the law is *available at* http://www.planalto.gov.br/ccivil_03/leis/1950-1969/L4137impressao.htm.

[10] *See* Congress' Official Journal, 2.444 (Abril 16, 1948).

[11] The agency started its activities in Rio de Janeiro as Brasília was still under reforms to become the capital of Brazil.

[12] They could be reappointed for one additional term, under CADE's Internal Rules, issued on March 9, 1964. *See* http://www.planalto.gov.br/ccivil_03/decreto/Antigos/D53670.htm.

[13] Brazil is well-known for having adopted, since the 30's, an import substitution industrialization ("ISI") policy, which is a trade and economic policy that advocates replacing foreign imports with domestic production.

[14] On August 29, 1938, Brazil created the so-called "Comissão Interministerial de Preços" (Interministerial Pricing Commission), a body composed of representatives of different Ministries to regulate prices. Price regulation was abolished in Brazil in the mid-90's.

[15] *See* CADE's 1996 Annual Report. Brasília: Official Press (1997).

[16] *Id.*

[17] A copy of the law is *available at* http://www.planalto.gov.br/ccivil_03/leis/l8884.htm.

[18] The agency was associated with the Ministry of Justice solely for budgetary purposes.

[19] The OECD, in its 2000 review of Brazil's Competition Law and Policy, concluded that the term was too short, resulting in rapid turnover in the agency. *See* OECD, *Competition policy and regulatory reform in Brazil* (2000), Paris: OECD press, *available at* http://www.cade.gov.br/internacional/OECD_2000_Report.pdf.

[20] The blocked transactions were: the proposed joint venture between asbestos producers Brasilit/Eternit (Case No. 06/94, adjudicated in 1996); the proposed joint venture Brasil-Álcool/Bolsa Brasileira do Álcool among alcohol producers with the goal of serving as a joint selling agency for all output of the members (Case No. 08012.002315/99-50, and Case No. 08012.004117/99-67, adjudicated in 2000); and the merger between chocolate makers Nestlé/Garoto (Case No. 08012.001697/2002-89, adjudicated in 2004, in which CADE ruled that the transaction had to be unwound, notwithstanding the fact that the transaction had closed two years earlier. The decision is now being challenged in Brazil's judicial courts). Only in cases involving high concentrations in the Brazilian market and a lack of efficiencies resulting from the transaction has CADE imposed restrictions in order to approve the transaction (e.g., Case No. 12/94, Rhodia/Sinasa; Case No. 27/94, Kolynos/Colgate-Palmolive; Case No. 16/94, Siderúrgica Laisa/Grupo Korf Gmbh, "Gerdau Case"; Case No. 58/95, Brahma/Miller; Case No. 83/96, Antarctica/Anheuser Bush). According to the OECD & Inter-American Development Bank, *Competition Law and Policy in Brazil: A Peer Review*, at 31 (2005), although CADE has imposed conditions on approximately 3.4 percent of transactions for the period 2000/2005, structural requirements directing the sale or utilization of assets were imposed only in four cases.

[21] Table extracted from Ana Paula Martinez, *An Overview of Merger Review in Brazil and Upcoming Challenges*, Temas Atuais de Direito da Concorrência, Singular: São Paulo (2012). 2011 data not available in 2011 CADE's Annual Report.

[22] *Id.*

[23] All deadlines provided for in the Law were interrupted whenever any of the agencies requested additional information, either from the companies involved in the transaction or from third parties.

[24] On August 28, 1996, CADE issued Resolution No. 5, which reduced the number of items on the filing form. Such resolution was primarily responsible for the 66 percent decrease in the time consumed by

merger reviews after the issuance of Resolution No. 5 (the average review period in CADE was reduced from an average of 604 days pre-Resolution No. 5 to 204 days in December 1997 (source: 1998 CADE's annual report). Shortly thereafter, on August 19, 1998, CADE issued Resolution No. 15 (this resolution revoked Resolution No. 5/96 and was then known as "Super 5"), which reduced the number of the items on the filing form from eighty-five to fifty. Although the aim of reducing the merger review process from 7 months to 2.4 months in one year was not achieved, it is undeniable that Resolution No. 15/98 contributed to a decrease in the time consumed by the merger review process.

[25] The first measure was the issuance by CADE of Resolution No. 8 of April 27, 1997, pursuant to which CADE's Commissioners could prepare simplified reports in cases in which the SEAE, SDE, and CADE attorney-general opinions were all favorable, permitting summary judgment of a case. Another important step toward expediting merger reviews in Brazil occurred in February 2002 when the SEAE and SDE issued a joint note, providing that simple cases incapable of causing changes to the existing competition environment could be reviewed by means of a simplified procedure, subject to the sole discretion of the Secretariats. This procedure was memorialized by SEAE and SDE Joint Resolution No. 01/2003, as amended by Joint Resolution No. 8/2004, which reduced to fifteen days the time within which SDE and SEAE had to issue their respective opinions.

[26] The first one was executed in 2006 and a more comprehensive version was later adopted in 2009.

[27] This proved to be insufficient to deal with the scrambled-eggs dilemma of a non-suspensory system. In this regard, CADE's final decision in the Nestlé-Garoto transaction (Merger Case No. 08012.001697/2002-89) in 2004 requires mention. CADE ruled that the transaction had to be unwound within 150 days, notwithstanding the fact that the transaction had closed two years earlier. The decision is now under the analysis of the Judiciary.

[28] The Anglo-American concept of binding judicial precedent (i.e., *stare decisis*) is virtually non-existent in Brazil, which means that CADE's commissioners are under no obligation to follow past decisions in future cases. CADE's internal rules were amended to allow CADE to codify a given statement via the issuance of a binding statement (legal certainty is only achieved if CADE rules in the same way at least 10 times).

[29] According to the OECD 2010 *Competition Law and Policy in Brazil – A Peer Review*, "Brazil's anti-cartel programme is now widely respected in Brazil and abroad" and "[i]n 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." Similarly, the 2008 and 2009 "Rating Enforcement" published by the *Global Competition Review* states, respectively, that "Brazil has the fastest-growing cartel enforcers in the world" and that "*[t]here were some notable achievements in the SDE's cartel busting programme in 2009, in terms of both results and procedure*." Along the same lines, Thomas O. Barnett, while Assistant Attorney General of the U.S. Department of Justice Antitrust Division, acknowledged "the great progress achieved on this front in Brazil." (See Thomas O Barnett, *Perspectives on Cartel Enforcement in the United States and Brazil*, BRASILIA (April 2008)). As a result of such improvements, Brazil has shifted from exclusively being a recipient of technical assistance—and in this respect, it is worth noting the assistance received from the U.S. authorities during the late 1990s and early 2000s—to being a provider of technical assistance to countries interested in improving their anti-cartel programs, such as Chile and Argentina.

[30] One of the defendants had its fine doubled for recidivism.

[31] Law No. 12,529/2011 provides for minimum-size thresholds, expressed in total revenues derived in

Brazil, for two merging parties. The 20 percent market share test in the 1994 law was eliminated in the new law, following international best practices which recommend that notification thresholds should be clear and understandable, based on objectively quantifiable criteria. The law also introduced a claw back provision that allows CADE to review transactions that fall outside the merger thresholds within one year of their closing. Fines for "gun jumping" range from BRL 60,000 to BRL 60 million. Violations can occur even if the parties to the transaction do not compete in the same markets. In cases involving competitors, coordination of competitive activities or detailed information exchanges can also lead to a cartel violation, subjecting the parties to fines from 0.1 percent to 20 percent of a company's (group of companies' or conglomerate's) gross revenues generated in the "sector of activity" affected by the infringement in the year prior to the initiation of the investigation.

[32] For complex cases, the law allows the Reporting Commissioner to authorize the parties to close the transaction before receiving CADE's clearance, subject to conditions such as the limitations on the freedom of the acquirer to liquidate assets, integrate activities, dismiss workers, close stores or plants, terminate brands or product lines, and alter marketing plans.

[33] *See* CADE's website, www.cade.gov.br.

[34] Brazil has a Leniency Program that follows the general lines of the U.S. Program and adopts a winner-takes-all approach. It has the following general features: (i) full or partial immunity from administrative sanctions for the first company and/or individual to apply for a leniency agreement; (ii) immunity from criminal sanctions, provided that the individual(s) sign the agreement along with the company; (iii) full confidentiality of the application; (iv) requirement for immediate cessation of the applicant's involvement in the alleged or investigated violation; and (v) the applicant must effectively and permanently cooperate with the investigation. Full or partial administrative immunity for companies and individuals depends on whether the DG was previously aware of the illegal conduct at issue. If the DG was unaware, the party may be entitled to a waiver from any penalties. If the DG was previously aware, the applicable penalty can be reduced by one- to two-thirds, depending on the effectiveness of the cooperation and the "good faith" of the party in complying with the leniency agreement. In the leniency agreement, the DG states whether it was previously aware of the conduct and makes a recommendation to CADE, which will recognize the benefits while adjudicating the case.