THE EFFECTIVENESS OF BRAZILIAN COMPETITION LAW

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ABSTRACT

Attempts to regulate competition in Brazil have been made since the early 1960s without much success. However, with the adoption of trade liberalisation measures in the early 1990s, competition has gradually been regarded as an essential element of the process of liberalisation of the economy, and thus efforts have been made to develop and enforce competition law and policy. This thesis describes and evaluates competition law in Brazil during this last period. It critically analyses the legislation, the practices of enforcement agencies and the relevant case law. Emphasis is given to the study of cases which involve restrictive business practices as well as mergers, and which have been decided at the administrative level.

This thesis highlights four main points: 1) developing countries should try to develop their own approach to competition law, and avoid adopting models created in other countries that reflect another reality; 2) competition legislation must define the approach to be adopted in the implementation of competition law in order to avoid uncertainty in the market; 3) a well structured institutional framework is necessary for the enforcement of competition law and policy; and 4) competition policy should be part of a coherent set of economic policies adopted by the government.

The conclusion of this thesis is that competition policy in Brazil has not yet produced significant results. Factors that undermine competition policy in Brazil are the system for the enforcement of the law, the lack of coherence in case law, and changes in economic policy. On the other hand, there has been some progress: the legislation covers the main aspects of competition; the performance of enforcement agencies is improving; these agencies are co-ordinating their enforcement practices; and there is growing awareness among economic actors in Brazil that competition is desirable and should be protected.

INTRODUCTION

1. Goal of the thesis

The regulation of competition is not a recent phenomenon in Brazil. As early as the 1930s Brazil had enacted Constitutional provisions and laws that in some way were related to competition;[1] however, these laws were not enforced. This can be explained by several factors. In the first instance, it was only in the 1960s that an institutional framework to implement these laws was first developed. Secondly, there was no political will to enforce competition law. Above all, the economic policies adopted by the various governments did not favour the existence, and also the necessity, of legislation regulating competition, since such policies supported State intervention in the economy which did not encourage a competitive market.

Thus, for almost 60 years since the 1930s competition law in Brazil existed only on paper. Only with the adoption of trade liberalisation measures in the beginning of the 1990s did the importance of competition law gain recognition by the government.[2]

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[1] Decree-law 869/38, Decree-law 7666/45, Law 1521/51, Law 1522/51. See chapter 2, footnote 159.

[2] For the purposes of this study, "liberalisation measures" is understood here in its broad sense, to include every measure adopted by the government with a view to achieving a market economy, thus reducing the direct intervention of the State in the economic activities. These measures would be deregulation, privatisation, liberalisation of imports, suspension of price control, liberalisation of trade, among others.

Due to its only recent enforcement, an assessment of competition law in Brazil based on case analysis has never been attempted. The literature on Brazilian competition law is not extensive, and includes mostly analysis of the laws, without reference to cases.[3] As a matter of fact, in Brazil legal studies rarely take into account case law; on the contrary, importance has been given in the majority of such studies to theoretical aspects of the subject of the study, or to the legislation concerning it. Accordingly, as a civil law country, the decisions of the courts are based mainly on legislation, whereas similar cases are used only as support to the decision, not as a guidance or the grounds of the decision.[4] However, case analysis is essential for a more comprehensive understanding of the subject since it reflects the application of the law in practice. Case analysis thus places the law in the context into which it is applied, making the study of competition law more linked to reality.

This thesis aims to bring the study of competition law in Brazil to its context by investigating and evaluating Brazilian competition law mainly through the analysis of cases concerning competition decided by the competent administrative agency. However, the investigation would be deficient if based only on these cases, since other issues are also relevant. It follows that this investigation will also include the analysis of the legislation, as well as the role played by enforcement agencies.

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[3] See, for instance, Vaz, I., *Direito Econômico da Concorrência*, Forense, Rio de Janeiro, 1993; Shieber, B.M., *Abusos do poder econômico*, Ed. Revista dos Tribunais, São Paulo, 1966; Fonseca, J.B.L. da, *Lei de proteção da concorrência*, Forense, Rio de Janeiro, 1995; Sodré Filho, A.C. de A. and Zaclis, L., *Comentários à legislação antitruste*, Ed. Atlas, São Paulo, 1992; Cretella Jr., J., *Comentários à lei antitruste*, Forense, Rio de Janeiro, 1995.

[4] Similar cases may be the grounds of a decision only when there is no law regulating the issue (article 4 of the Introductory Law of the Civil Code).

2. Brazil as a case study

Brazil is a sui generis country. At the same time that it is an emerging economy, it presents serious developmental problems. While in the South of the country a process of industrialisation has been occurring, resulting in economic growth and wealth in the region, in the North stagnation and poverty have been the main features of the area. It follows that the government has been compelled to deal concomitantly with the problems arising from different economic environments. Moreover, Brazil presents the structural characteristics of the majority of the developing countries,[5] such as highly concentrated market, publicly owned enterprises, high concentration of ownership, unequal distribution of income, unemployment, among others.

The regulation of competition in Brazil has to take into account this inequality of conditions. It is not possible to develop competition law and policy considering only the needs of the more industrialised region, otherwise the law would be ineffective. Competition law in Brazil thus has to reflect the differences between the economic agents, markets and consumers. If this is successfully achieved, than the Brazilian competition law can be a model to be adopted by other countries that are willing to regulate competition.

Moreover, the history of the economic development in Brazil reflects that of many developing countries, especially in Latin America. Another factor of the relevance of Brazil as a case study is that Brazil has been enacting competition laws

since the 1960s, a time where there was little awareness in Latin America about the importance and necessity of regulating competition. Finally, the evolution of the law pertaining to the regulation of competition in Brazil took place against the backdrop of a socio-political and economic environment that was not suitable for proper enforcement of the law.

Through the study of Brazil, it is possible to understand and analyse the factors which require consideration prior to the adoption of a competition law by an emerging economy. It is also possible to assess the regulations in their historical perspective and understand the shortcomings therein and the reasons for the effectiveness or ineffectiveness of certain provisions. And last but not the least it is possible through this study to investigate the different enforcement mechanisms and evaluate their effectiveness. Brazil can thus work as a paradigm for the analysis of competition law.

2.1 Overview of the economic history of Brazil

Up to World War II the Brazilian government had been following the liberal approach of not intervening in the economy nor adopting any "economic development" policy, though sometimes it supported specific sectors of the economy. Until the 1930s, the economy was based mainly on the production and exportation of coffee.[6] At that time, due to a successful scheme of price-support implemented by the coffee-producing states, where they applied directly to international credit sources without the help of the State, the coffee growers achieved strong political power and therefore were able to impose their economic ideas on the government. Coffee export

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[5] Obviously it is not possible to consider identical each developing country, since in the first place there are differences in the level of development. However, developing countries present common features

earnings financed the import of manufactured goods to satisfy consumer needs. At the same time the domestic market was growing and attracted investments for the production of consumer goods, food processing and textiles. However, this production was still in its infancy and did not represent a significant share of the economy.

After the 1929 crisis, a transition to an industrial system began to take place.[7] Due to its high price, coffee was being produced on a large scale. With the world crisis and the consequent price fall, the losses were transferred to the community as a whole, as the economy had developed a series of mechanisms to protect the coffee ruling class. This was achieved by withholding and destroying part of the coffee output, which resulted in the maintenance of the level of employment in the export economy, as minimum buying prices were guaranteed.[8] It was the first time that the federal government directly intervened in a productive sector of the economy.

According to Furtado, this "protection of the coffee sector during the years of the great depression was actually an authentic program of boosting the national income".[9] This program was also responsible for an external disequilibrium, which was corrected by a sharp decline in the external buying power of the currency. This decline was reflected in an increase in prices of imported goods, which reduced the demand for imports. As the internal demand remained steadier than demand abroad,

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that allow a generalisation in specific situations.

[6] Baer, W., *The Brazilian Economy - growth and development,* 3rd ed., Praeger, New York, 1989, p. 32

[7] "...in 1931 industrial production had fully recovered from a decline that started in 1928, and in the following eight years it more than doubled". Baer, supra n. 6, p. 37.

[8] Furtado, C., *The economic growth of Brazil - a survey from colonial to modern times,* University of California Press, Berkeley, 1971.

[9] id.

the sector producing for the domestic market afforded better investment opportunities than the exporting sector, attracting capital generated in that sector.[10]

The government however did not adopt any kind of policy to promote its industrial sector - at that time the liberal idea of no State intervention in the economy was still followed. This inertia of the State led to private enterprises adopting practical methods and developing an import-substitution industry, without plan or help from the State.[11] The Constitution of 1934 determined that the intervention in the economy should only occur in case of public interest,[12] and provided for the nationalisation of banks, insurance companies and mines. In order to become effective, the Constitutional provisions had to be complemented by regulation; as this did not happen, the provisions were ineffective.[13]

The situation remained the same approximately until the end of the 1930s, when in 1937, through a *coup d'etat*, the Brazilian President Getulio Vargas established a dictatorship which was called *Estado Novo* and lasted until 1945. The *Estado Novo* was characterised by having very nationalistic ideals, which were clearly reflected in the attitudes towards not only politics but also the economy. In that way, it was during the *Estado Novo* that State intervention in the economy began to take place.

During that period Instruction 70 was issued, which nationalised exports of agricultural commodities and alienated the agrarian elite; a major government steel

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[10] id.

[11] Jaguaribe, H., *Economical and political development,* Harvard University Press, Cambridge, 1988, chapter 10.

[12] Article 116, Constitution of 1934, which authorised the monopolisation by the State of an economic activity in cases of public interest.

plant was established; major hydroelectric dams were built; a national petroleum monopoly, *Petrobrás*, was established; the *Vale do Rio Doce Company* was created to enlarge mining operations; and the government was working on the creation of a national electric company, *Eletrobrás*. The adoption of these policies resulted in major changes in the national economy, as the share of agriculture in GDP dropped, while the share of industry increased, and the annual growth rate increased after the war.[14]

Moreover, during the war the import of goods became more difficult; while in one hand it caused adverse effects on the industrialisation of the country as supplies of plant and equipment were cut off, on the other it stimulated domestic production in order to meet the need for local sources of manufactured goods.[15] Domestic and export prices increased rapidly during that period, while import prices grew much more slowly, which led to a "subversion of the relative price level which had served as a basis for Brazilian industrial development from the beginning of the thirties".[16]

It was during the war years that planning by economists began in Brazil. Most of them consisted of a systematic analysis and evaluation of the economic structure of the country, in order to influence the direction the development would take.[17] In 1942 a group of engineers and specialists from the USA came to Brazil and produced a plan

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[13] Franceschini, J.I.G., and Franceschini, J.L.V.A. *Poder Econômico: Exercício e Abuso*, Ed. Revista dos Tribunais, São Paulo, 1985, p. 7.
[14] Dalland, R.T., *Brazilian Planning - Development, Politics and Administration*, The University of North Caroline Press, Chapel Hill, 1967.
[15] "Industrial production grew at an annual rate of 5.4 percent in the period 1939-1945. Especially noteworthy are the yearly average growth rates of metal products (9.1 percent), textiles (6.2 percent), shoes (7.8 percent), and beverages and tobacco (7.6 percent), which were all industries whose imports were drastically curtailed." Baer, supra n. 6, p. 39/40.
[16] Furtado, supra n. 8.
[17] Baer, supra n. 6, p. 43.

of investment for a ten-year period.[18] The USA was interested in using Brazil as a pilot area to test new methods of industrial development; however, after the war the project was dropped.

In the meantime a new project was developed, consisting of a list of capital expenditures with a duration of five years and characterised as a supra-agency budget, without any special arrangements for its execution. In 1943 another US mission came to Brazil and worked with a group of Brazilian technicians;[19] they produced a report that did not constitute a plan but was the basis for a planning work developed later by economists. At the end of that year a second five-year plan was developed, consisting again of a public works budget but this time providing the elements of a system of implementation.[20]

After the war, imports were liberated and the external supply became regular.[21] The government returned to the liberal tradition of free trade, resulting in the importation of non-essential goods and thus exhausting the country's reserves. At the same time, though the idea of planning as a regular governmental function had gained much ground, this return to liberalism suspended the planning activity of the State.[22] Besides, there was no political and administrative will to implement the plans,

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[18] This was the *Taub Mission.* See Lopes, C.T.G., *Planejamento, Estado e Crescimento,* Pioneira, São Paulo, 1990, p. 82.

[19] This mission was known as the *Cooke Mission.* See Baer, supra n. 6, p. 44, and Lopes, supra n. 18, p. 82.

[20] *Plano de Obras e Equipamentos - POE.* See Takahashi, C.S., *Direito do Planejamento Econômico e Social,* dissertation submitted for the degree of Master in Law, Universidade de São Paulo, São Paulo, 1991, p. 74/75; and Lopes, supra n. 18, p. 82/83.

[21] Baer, supra n. 6, p. 53.

[22] As pointed out by Lopes, President Dutra (1946-1950) did not show much enthusiasm towards the idea of planning. Lopes, supra n. 18, p. 83.

and the new Constitution of 1946 was written which did not provide for any agency for national planning.[23]

As reserves fell, however, the authorities abandoned the import liberalisation measures adopted after the war and established a series of selective quantitative import controls, maintaining the official rate of exchange of the currency but reducing imports of finished consumption manufactures, to the benefit of capital goods, raw materials, plant and equipment required for home production. This policy had strong protectionist effects, and obviously favoured the industrial sector as competition from abroad was reduced and raw materials and equipment could be acquired at relatively low prices, leading to the intensification in the process of growth.[24]

The period between the end of World War II up to 1954 can be considered the final stage of the "take off" to Brazil's industrial development. At this "take-off" stage, which occurred during the second administration of Getúlio Vargas (1951-1954), central planning gained more support and was relatively successful.[25] The idea of State intervention in the economy and adoption of national development policy was consolidated and since then has been enforced by the different governments that have been in power. Many plans and measures to protect the Brazilian industrial and

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[23] However, agencies for regional planning and development were created to deal with the problems of the two most depressed areas of the country, Amazônia and the Northeast (articles 198 and 199 of the 1946 Constitution). See Takahashi, supra n. 20, p. 50.

[24] In the period 1948-1950, the distribution of imports were as follows: capital goods, 35.2%; raw materials (except fuel), 23.8%; food products, beverages and tobacco, 17.9%; fuels, 12.8%; manufactured consumer goods, 9.7%; other, 0.6%. Baer argues that these data reflect the import substitution measures adapted by the government. See Baer, supra n. 6, p. 48.

[25] In 1951 a Joint Brazil-US Economic Development Commission was formed in order to make technical studies, decide on projects that needed subsidy and prepare projects that met the technical standards required by the financing institutions. Later on, the National Development Bank was created initially in order to carry out the program of the Commission, but later it was transformed into a mechanism for the execution of plans and in a planning agency. See Lopes, supra n. 18, p. 84/85, and Baer, supra n. 6, p. 63 and 243/244.

agricultural sectors have been adopted.[26] The import-substitution policy initially developed by private enterprises was later taken over by the State and strongly enforced during the years. Regulation of the economy by the State has been a common practice, as the country has developed an economic system characterised by an expanded role of the State in the economy.[27]

During the government of Juscelino Kubitschek (1956-1960), the *Plano de Metas* was created with the purpose of supporting the industrialisation of the country through import-substitution policy, especially of durable consumer goods. The plan was based on studies that had demonstrated that there was a demand for such goods; by developing that sector of the economy, other sectors would also be affected and grow.[28] Most of the goals of the plan were achieved, which resulted in rapid economic growth.[29] However, there were negative consequences, such as inflation caused by the issue of money to finance public investments, increase of the external debt, increase of income concentration, and lack of stimulus to agriculture.[30]

It was in the beginning of the 1960s that the first competition law was created in Brazil. The bill of Law 4137/62, which was enacted in 1962, was first submitted to Congress in 1948. In a speech at the Congress, the Congressman who proposed the

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[26] An example is Law 1474, enacted in 1991, which increased income taxes and determined that the resources resulting from such increase would be invested in docks, railways, electricity, industrialisation and agriculture. See Lopes, supra n. 18, p. 85.

[27] According to Baer, "the present dominance of the state over the Brazilian economy has not resulted from a carefully conceived scheme. It is largely the result of a number of circumstances that, in most cases, forced the government increasingly to intervene in the country's economic system. Those circumstances include reaction to the international economic crisis; the desire do control the activities of foreign capital, especially in the public utility sector and in the exploitation of natural resources; and the ambition to rapidly industrialize a backward economy", Baer, supra n. 6, chapter 11, p. 238.

[28] Takahashi, supra n. 20, p. 77.

[29] id. P. 79.

[30] Vasconcellos, M.A.S. de, Gremaud, A.P., and Toneto Jr., R., *Economia Brasileira Contemporânea*, Ed. Atlas, São Paulo, 1996, p. 180/182; and Lopes, supra n. 18, p. 87.

bill explained that it was based on the American laws - both Sherman Act and Clayton Act - which were adapted to the Brazilian reality.[31] However, the bill spent 14 years in Congress, during which time it underwent several modifications and thus lost the approach adopted in the original bill.

At that time Brazil was facing a serious economic crisis which resulted from those negative effects of the process of import substitution. A new economic plan, *PAEG*, was then adopted by the first military government,[32] in order to solve these economic problems. Its goals were to increase economic development, control inflation, diminish the imbalance between sectors and regions, increase investments and increase employment.[33] This should be done through structural reform and combating inflation.[34] These reforms led to a period that was called "the Brazilian economic miracle", where economic growth was high, prices were stable, and inflation was controlled. However, this growth was based on borrowed money from international sources, which resulted in an increase in the external debt of the country. Another characteristic of this period is the expansion of State intervention in the economy through price control, investments and subsidies.[35]

This period of economic growth did not last for long, since it depended on a favourable external situation which did not exist due to the oil crisis of 1973. Thus, inflation started to increase, and there was a deficit in the balance of payments.[36] The

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[31] Shieber, supra n. 3, p. 18

[32] In 1964 the Armed Forces took the power and established a military dictatorship, which lasted until the middle 1980s.

[33] Takahashi, supra n. 20, p. 81/82.

[34] Vasconcellos, supra n. 30, p. 184.

[35] Baer, supra n. 6, p. 86.

[36] Baer argues that, after the 1973 oil crisis, "[i]nstead of engaging in an austerity adjustment program to cope with the dramatic decline in the country's terms of trade, the government opted for a growth policy that resulted in substantial structural changes in the economy, in a resurge of inflation, and in a

government then adopted a new economic plan, the *II PND,* which opted for maintaining the economic growth of 10% per year by supporting the manufacture of capital goods, instead of consumer goods.[37] The government took the plan in its hands, by making the public enterprises implement the policies.[38] To finance the goals of the plan, these public enterprises borrowed money from international sources, while the private enterprises were granted subsidies from the government. Thus, the external debt increased rapidly, and the State lost its capacity of financing the implementation of the policies, since it did not have much money and could not borrow more, otherwise the external debt would increase much more than it was desirable.[39]

At the end of the 1970s there was the second oil crisis, which resulted in the growth of the international interest rates, thus deeply affecting Brazil, due to its increasing external debt and the fact that it was in American Dollars.[40] The flow of money to developing countries was suspended, and the government had to seek balance of payments surplus, by reducing the public deficit, increasing the internal interest rates, reducing credits, decreasing the rate of exchange of the currency, and stimulating competition through suspension of public prices and subsidies. These measures were part of the agreement with the International Monetary Fund to which the government had to turn after 1982 in order to re-negotiate the external debt.[41] The result, on one hand, was recession, inflation and reduction in growth levels; on the

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rapid expansion of the country's international debt". Baer, supra n. 6, p. 96. See also World Bank, *Brazil. Industrial Policies and Manufactured Exports (a World Bank country study),* The World Bank, Washington DC, 1983, p. 45.

[37] Vasconcellos, supra n. 30, p. 200/203.

[38] Takahashi, supra n. 20, p. 92

[39] Vasconcellos, supra n. 30, p. 200/203.

[40] Baer, supra n. 6, p. 107.

[41] id., p. 116/118.

other, there was a change in the balance of payments, moving from deficit to surplus.[42]

After 1985 the government focused its attention on combating inflation. In 1986 a new economic plan was adopted, the *Plano Cruzado,* which created a new currency and froze prices, among other measures.[43] It resulted in a decrease of inflation, an increase of consumption, lack of goods in the market, and negative interest rates, as well as a negative balance of payments. However, after prices were "defrozen", inflation increased rapidly.[44] It was during that time that the government started to use competition law and the competition authorities as one of the tools to control prices.

In the following year another economic plan was adopted, the *Plano Bresser,* with the purpose of combating the increase of inflation and avoiding hyperinflation. It succeeded in recovering the balance of payments, controlling inflation in the first stages of the plan, and decreasing the public deficit. However, in the end it resulted in a decrease in industrial production and increase of inflation.[45] Yet another plan was adopted in 1988, the *Plano Verão,* which intended to restrain the demand through the decrease in public expenditure and increase in interest rates. It also established another price freezing.[46] However, at the end inflation was around 80% per month.

The 1990s has been characterised by a neo-liberal approach to the economy. The governmental policies have been attempting to reduce the State participation in

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[42] Vasconcellos, supra n. 30, p. 207/212.
[43] Takahashi, supra n. 20, p. 98/99.
[44] For a thorough analysis of the *Plano Cruzado,* see Baer, supra n. 6, p. 164/194.
[45] Vasconcellos, supra n. 30, p. 220.

the economic process and let the market work by itself. Due to the long tradition of State intervention in Brazil, this transition has been slow and gradual. Nevertheless, measures towards the liberalisation of the economy has been adopted with some success. They include privatisation of State enterprises, import liberation, and end of price control, among others.

It started with the Collor government in 1990 which adopted a new economic plan that provided for freezing of saving accounts, with the purpose of avoiding pressure from consumption so that the Central Bank could adopt monetary policies.[47] It also provided for fiscal and administrative reforms, alteration in the exchange regime, and liberalisation of trade, through the decrease in import taxes.[48] However, with the impeachment of President Collor in 1992 there was a certain discontinuity in such measures.

It was during the Collor government that it was felt that changes were necessary in order to adapt competition law to the new Constitution[49] and to the neo-liberal approach adopted by the government. Thus, a new competition law was enacted. However, it did not revoke the previous law. Moreover, at the same time that the government was adopting liberalisation measures, it once again used competition law to punish companies that were not complying with the policies on price control.[50] It follows that there was not a coherence in the policies adopted nor in the enforcement of competition law.

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[46] Takahashi, supra n. 20, p. 107.
[47] Vasconcellos, supra n. 30, p. 227.
[48] Takahashi, supra n. 20, p. 108.
[49] A new Constitution was written in 1988. See below, Chapter 2, subsection 2.1.

In 1994 the last economic plan was adopted, the *Plano Real,* against a background of economic liberalisation and a new flow of foreign resources to the country. It established high interest rates, and succeeded in reducing inflation, but also resulted in an increase of demand.[51] The adoption of trade liberalisation measures was resumed, and included the enactment of a new competition law as one of the policies to support the new plan.[52]

According to the World Trade Organisation - WTO, "Brazil has made considerable progress in dealing with some economic constraints it faced in the early 1990s: principally, in restoring growth and confidence in the economy and lowering inflation. Since economic growth resumed in 1993, the economy has proved resilient to external shocks and foreign capital has flowed copiously into the country. Trade liberalisation, privatisation, the gradual opening of key activities to foreign investment, and general deregulation are creating an increasingly competitive economy".[53]

3. Four hypothesis

In order to evaluate Brazilian competition law, I shall work with four hypothesis on the adoption and enforcement of competition law in developing countries. The first hypothesis is that, though developing countries do need a competition law, they cannot adopt wholeheartedly models that already exist in more

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[50] See Chapter 5.
[51] Vasconcellos, supra n. 30, p. 229.
[52] This time the new law revoked the previous two competition laws.

economically developed nations. They may seek inspiration in these models, but they cannot copy them. To have a competition law properly applied it is necessary that it takes into account the specific necessities of the country,[54] as well as the characteristics of its market and industries if the law is to achieve its purposes. Further, the same antitrust provisions do not necessarily cause the same effect in two different countries. Therefore it follows that though the precedent of existing laws, their enforcement and consequent results achieved in a country can be useful as an indicator for the efficacy of the law, it can at best serve as a guide and not more.

The second hypothesis is that competition law cannot be effective if the legislation concerning it does not define with rigour the approach towards competition and the issues inherent to a proper regulation of competition, such as the types of conduct that may be anticompetitive, the concepts involved in such conduct, the acts of economic concentration, and the procedure to be adopted in the process of enforcement of the law. In order to bring certainty to the economic agents and to the market in general, a detailed legislation is necessary for developing countries that do not have a tradition of well-articulated and enforced competition law.

The third hypothesis is that, in order to be implemented, competition policy and law need a well structured and effective institutional framework to enforce them. It is not important whether this system is administrative or judicial, or both, because what is important is that the system works properly and performs well the tasks to which it was created.

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[53] WTO, *Trade Policy Review Body - Brazil,* Report by the Secretariat, Press/TPRB/45, 24.10.96.

Finally, the adoption of competition law and policy not only has to take into consideration the special needs of the country and the characteristics of its economy, but also must be inserted into a coherent economic policy framework. By this I mean that competition law cannot be isolated from the other economic policies adopted by the government. On the contrary, all of them must work together in order to reach a common final objective, that is, to achieve economic development. Thus, if the government wants to regulate competition in order to have a competitive market, it cannot adopt other measures and policies that are against it, such as price controls or an inconsistent privatisation policy.

4. Overview of the thesis

Chapter 1 will provide an overview of the theoretical debate regarding competition in order to decide on an approach that best suits the necessities of the developing countries. It will cover the relation between macroeconomics and competition, the discussion on the necessity of regulating competition as well as on the purpose of competition law and policy, and the attempts to regulate competition both on individual and global basis. Chapter 2 will start the investigation of the Brazilian case by examining the development of the legislation regarding competition in Brazil. Chapter 3 will focus the attention on the institutional framework created for the enforcement of competition. Chapters 4 and 5 will analyse the administrative proceedings decided by CADE regarding restrictive business practices, while Chapters 6 and 7 will be directed to the analysis of the acts of economic

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[54] such as the sectors of the economy that must be enhanced, the level of development of the country,

concentration. In the conclusion I will bring together the main points discussed throughout the thesis in order to develop the assessment of Brazilian competition law.

5. Some methodological remarks

The development of this thesis is based on two main points: the analysis of the legislation that regulates competition enacted since 1962, and the analysis of cases concerning competition decided by the competent administrative agency. One problem faced during this research is the lack of literature regarding competition law in Brazil, especially in relation to case analysis. Studies on the analysis of the legislation can be found,[55] but none of them has made any systematic analysis of the competition cases. Nor any commentaries on these cases could be found. It follows that the analysis carried on in Chapters 4 to 7 could not benefit from the arguments and critique developed by other authors in relation to the competition cases decided in Brazil.

During the analysis of the Brazilian cases reference is made to cases decided in other jurisdictions. This happens because, though the Brazilian competition law differs in several aspects from other legislations, there are situations where the competition authorities seek inspiration and help in the laws of especially the USA and the EEC. It has to be stressed that the Brazilian case law is not based on the American and European decisions; these decisions are used only as reference in the development of a determined argument.

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the needs of the population, among others.

Reference also is made to the model law on competition proposed by the United Nations Conference on Trade and Development - UNCTAD.[56] When pertinent, the provisions of Brazilian competition law will be compared to those of the model law, in order to assess the likelihood the Brazilian law being successfully enforced. Though the first hypothesis proposed in section 3 must be applied also in relation to the model law,[57] one can argue that UNCTAD's model law was created with the view to being applied to developing countries and thus can be used as a starting point for adoption of competition law.

Another methodological issue is related to the compilation of the competition cases decided by the administrative agency, *Conselho Administrativo de Defesa Econômica - CADE* (Administrative Council for Economic Protection). With the exception of some cases decided between 1962 and 1980, which were published in the periodical issued by CADE at the time, *Revista de Direito Econômico,* the remaining cases were not published. Even where cases were published, it was done sporadically, and sometimes took the form of brief synopsises of arguments and decisions. It follows that, in order to collect these cases, fieldwork at CADE was necessary, and this occurred in March and April of 1996.

It has to be stressed that during the period of the fieldwork the work at CADE was suspended, because the term of office of the majority of the Commissioners had expired and the new Commissioners were not yet appointed. At CADE I was given access to the cases started since 1991, because there are no records for the period

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[55] see note 2 supra.
[56] See Chapter 1, section 4.
[57] The first hypothesis is that developing countries should not adopt models of competition law that already exist.

before that. Thus, I examined 62 cases decided between 1991 and March of 1996 (37 were administrative proceedings, while the remaining 25 were acts of economic concentration). Of these, I selected 16 cases, of which seven are administrative proceedings on anticompetitive behaviour and nine are cases of economic concentration, to be analysed in this study. This selection was made based on the issues that were discussed in the case of the administrative proceedings, and on the defences accepted in the case of the acts of economic concentration. These 16 cases are representative of the issues that CADE had to deal with during the period of the research.

CHAPTER 1 - THEORETICAL BACKGROUND

1. Introduction

This chapter discusses the theoretical framework on which competition law is based, in order to identify the main issues involved in the debate on the regulation of competition. We shall analyse the debate on the macroeconomic aspect of competition, in particular how theoretical concepts such as perfect competition, monopoly and workable competition affect the regulation of competition. After this analysis, we will proceed to the debate on the necessity of regulating competition, and thus identify the main arguments of the theories in favour of such regulation and those against it. It will also be necessary to distinguish between the different approaches towards competition, in order to attempt to establish the one that is most suitable for developing countries.

We will then investigate the situation in developing countries in relation to the regulation of competition. We shall identify the arguments in favour and against the regulation of competition in developing countries, the reasons for the lack of regulation in these countries, the development that has been achieved in this area, and the attempts towards the creation of a model law regarding competition.

However, it is not possible to develop this discussion without bearing in mind the hypothesis proposed in the Introduction that developing countries should not apply the competition laws and theories of developed countries without considering their own necessities and the characteristics of their markets. It follows that the issues discussed in this Chapter must be seen only as a guidance to competition laws and policies of developing countries, as aspects of competition that have to be critically assessed and adapted to a particular reality before being embraced.

2. Economics of competition

According to Scherer and Ross, "[i]n modern economic theory, a market is said to be competitive (or more precisely, purely competitive), when the number of firms selling a homogeneous commodity is so large, and each individual firm's share of the market is so small, that no individual firm finds itself able to influence appreciably the commodity's price by varying the quantity of output it sells".[58]

This is the definition of perfect (or pure) competition. It follows that perfect competition involves a great number of producers and consumers, where the former produce identical or homogeneous goods or services for the latter. The fact that a great number of buyers and sellers can be found in the market means that the actions adopted by them will not cause any perceivable effect on price. There are no barriers neither to enter nor to exit the market, which facilitates the emergence of new competitors or the leaving of the market at any time. Moreover, under perfect

competition the market is transparent, in the sense that consumers have perfect information about market conditions. Therefore, buyers and sellers are able to make their own decisions, without consulting or seeking the collaboration of their competitors.[59] Thus, under perfect competition there is no need to collude. It is argued that, if consumers do not have enough information and a producer takes advantage of their ignorance, competition will eliminate this abuse, since other competitors will inform consumers of what is happening.[60] Perfect competition also means that resources can go from one industry to another without obstruction.[61]

One of the effects of perfect competition is allocative efficiency. This means that producers will manufacture only what consumers are willing to buy, and they will increase their production as long as this brings profits, that is, until the moment when the costs of producing the last unity becomes higher than the benefits it brings. Thus, the market will be efficient when the marginal benefits of the last unit produced is the same as the marginal costs.[62] This means that efficiency will occur when the additional benefits of producing the last unit is equivalent to the additional cost of producing this same unit. Scherer and Ross argue that efficiency of resource allocation results from the marginal cost being equal to the price paid by consumers, because this equality "is a necessary condition for profit maximization, given the competitive firm's perception that price is unaffected by its output decisions".[63]

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[58] Scherer, F.M. and Ross, D., *Industrial Market Structure and Economic Performance,* 3rd ed., Houghton Mifflin Co., Boston, 1990, p. 16.
[59] see Areeda, P., *Antitrust Analysis,* Little Brown and Co., Boston, 1967, chapter 1-A.
[60] McKenzie, R. B. and Tullock, G., *Modern Political Economy: an Introduction to Economics,* McGraw-Hill, New York, 1978, p. 131.
[61] Whish, R., *Competition Law,* 3rd edition, Butterworths, London, 1989, chapter 1, p. 2.
[62] McKenzie, supra n. 60, p. 124.
[63] Scherer, supra n. 58, p. 20.

Perfect competition, however, is a theoretical model that does not exist in practice. It is an ideal situation that cannot be found in the marketplace. Armentano points out that, according to this theory, competition is impaired when we move away from perfect competition, as there is an economic waste in doing so. On the other hand, competition is improved if we move towards perfect competition, because then markets become more efficient. Thus, this "neoclassical analysis appears able to demonstrate scientifically what has always been assumed concerning monopoly, namely, that the prices tend to be higher, the outputs less, and the equilibrium costs greater than under comparably competitive conditions".[64]

Frazer, in its turn, argues that "the notion of 'perfect competition' has no real use in practical antitrust policy",[65] because it is not related to the imperfections that can be found in real markets. Moreover, he understands that the expression "perfect competition" is equivocal, since "productive rivalry" between firms is not to be found in perfect competition, which is essential to the purposes of antitrust policy, as this rivalry should result in price reductions and product development. Since the market does include imperfections, he argues that "the theory of second best suggests that the public interest will be best served by permitting other imperfections to exist as a counterweight, rather than to remove".[66]

The opposite situation to perfect competition is monopoly, where only one producer supplies the goods or services to the consumers. The most important

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[64] Armentano, D., *Antitrust and Monopoly - Anatomy of a Policy Failure,* Holmes and Meier, New York, 1990, chapter 2, p. 20.
[65] Frazer, T., *Monopoly, Competition and the Law,* 2nd edition, Harvester Wheatsheaf, New York, 1992, p. 5.
[66] id., p. 5.

requirement for the survival of monopolies is the existence of barriers to entry.[67] They include the sole ownership of a strategic resource by the monopolist as well as the possession of a patent or copyright; the granting of an exclusive government franchise to sell a product in a defined geographical area; the existence of a well-known brand name among customers; a production conducted on a very large scale; the need for very large financial resources.[68]

The costs to enter the market are so high that it prevents the emergence of new competitors. Therefore, the monopolist is able to affect the price of the goods or services he/she produces, as there is no one else in the market who can supply these products with a lower price. Moreover, the economic resources are not allocated in an efficient way. As the monopolist is not confronted by other competitors, he/she does not have to attract more consumers, and therefore he/she does not have a stimulus to innovate nor to develop new products.

The goal of the monopolist is to maximise his/her profits, what can be achieved by not producing as much as he/she could. He/she will produce until the marginal cost of his/her production is the same of the marginal revenue. The amount of output he/she will sell in the market will be smaller and the prices charged will be higher. Since the consumers do not have the option to change to another similar good, as there is no substitute in the market, they will have to pay more than they are prepared to at normal conditions.

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[67] McKenzie, supra n. 60, p. 166.
[68] id., p. 167.

Posner explains that "a monopolist will always charge a price higher than the competitive price if demand at the competitive price is inelastic, that is, if the proportional reduction in the quantity demanded as a result of the higher prices is less than the proportional increase in price".[69] Consequently, the monopolist will rise the price until it leads to a proportionally larger reduction in the quantity demanded, as the increasing of the price raises total revenue at the same time that reduces total cost. According to Posner, the monopolist will raise his/her price until the point at which his/her profits are maximised, which is "the point where any further increase would reduce total revenues by more than the reduction in total cost resulting from the smaller quantity produced".[70]

The existence of monopoly causes several negative effects in the society. In order to acquire monopoly power, a firm may spend money to erect barriers to entry into its market, money which could have been allocated in the production of goods that would increase consumers' welfare. Another aspect is that the governmental agencies will spend time, money and efforts to prevent the acquisition of monopoly power by a firm and to fight against those who have already acquired this power.

Moreover, wealth will be transferred from the consumers to the producer, as the latter, through his/her monopoly power, will raise the price of his/her goods and consequently have his/her profits increased. Another negative effect is that, in order to gain more advantages, a monopolistic firm may influence the level and the distribution of governmental expenditure through political campaign contributions, paid lobbyists, and bribes.

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[69] Posner, R.A., *Antitrust Law - an Economic Perspective,* The University of Chicago Press, Chicago,

The problem with the theory of perfect competition and monopoly is that it is a theoretical model and does not reflect the imperfections that exist in the real market, where intermediate situations between the two extremes can be found. For instance, there are markets that present a situation of monopolistic competition, where, though a producer has some power derived from his/her product being differentiated from others, the consumers' loyalty to his/her product is not necessarily unconditional, as they may change to the brand of a competitor if the prices rise too much. Monopolistic competition is characterised by a market where a number of competitors sell "a similar but differentiated product",[71] and entry is not free but relatively easy. Under monopolistic competition, a producer does not have monopoly power over a product but over a relevant product market, which shall include all substitutes to that good.[72]

Another example of these intermediate situations is the oligopolistic market, where "there are few major competitors, generally no more than six and certainly no more than a dozen, who sell similar or differentiated products".[73] As the market is in the hands of just a few producers, any action from any of them can significantly affect the market position of the other producers. Moreover, it is usually difficult to enter an oligopolistic market, due to high costs and the consumers' attachment to the brand names of the producers.

Thus, economists have been trying to find a model that reflects the imperfections of the market, and they have developed the theory of workable

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1976, chapter 2, p. 9/10.
[70] id., p. 10.
[71] McKenzie, supra n. 60, p. 168.
[72] Whish, supra n. 61, p. 5.

competition. According to Frazer, workable competition is a "compromise which takes account of irremovable imperfections, the nature of the market, and that degree of attainable competition which will satisfy public policy".[74] It follows that, under workable competition, firms will have more control over price, because product differentiation, imperfect knowledge and collusion can be found in the market. As Armentano explains, "if products are differentiated, individual sellers discover that the demand curve for their own product is downward sloping and not horizontal, and that they will not loose all of their customers with a price slightly higher than a competitor's".[75] These aspects - price control and product differentiation - are the characteristics of an imperfect market, and thus of workable competition.

The importance of these economic theories is that, notwithstanding the fact that they are only economic models, they provide the elements to justify the adoption of any policy regarding the regulation of competition, by highlighting the advantages and disadvantages of competition and monopoly. By taking these elements into account, as well as the characteristics of the market and the economy of the country, the policy maker has the necessary tools to opt for the regulation - or not - of competition, and, in the case of a positive decision, to put more weight on those aspects that are more important for the necessities of the country.

The knowledge of such models is thus fundamental for the understanding of the organisation of the markets. Consequently, it can be applied to the different contexts of developed and developing countries, because the understanding of the

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[73] McKenzie, supra n. 60, p. 168.
[74] Frazer, supra n. 65, p.06.
[75] Armentano, supra n. 64, p.19.

structures of the market allows a clearer comprehension of the operation of any kind of market.[76]

3. Regulation of competition - relevance and approaches

3.1 Is it necessary to regulate competition?

The above discussion on the economics of competition leads to two questions that are intertwined: is it necessary to regulate competition, or is it enough to let the market settle by itself the problems that may arise from the struggle between competitors? It would not be incorrect to give an affirmative answer to both questions. Competition does not necessarily have to be regulated. A State may adopt a competition law in order to avoid abuse of economic power or may adopt no law at all and leave the market to supervise monopoly power.

Against the regulation of competition there is what has been called the "laissez-faire approach to market power".[77] According to this approach, the problem of market power does not exist, or, if it exists, it cannot be corrected by public policy. This is based on the assumption that market forces are per se adequate to maximise social welfare, without the help of external intervention. Moreover, the fact that the market is extremely competitive would allow new firms to enter that market, or existing competitors to increase their production, so that they would be able to take advantage of monopoly profits, provided that there are no great economies of scale.

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[76] Gremaud, P.G. and others, *Manual de Economia*, 3rd ed., Saraiva, São Paulo, 1998, Chapter 7, p. 182.

The high profits deriving from monopoly power would be the means and inducement to innovative activities; other firms would be attracted by the high profits, would copy the innovation and drive down prices and profits to the benefits of the consumer.[78] Also, entry barriers are not likely to harm competition in the long run. Another argument is that "[e]ven market power based upon scale economies is susceptible to technical progress and, in the last event, market power grounded upon such economies would be endorsed even by a fully-fledged cost-benefit analysis".[79]

The laissez-faire approach also maintains that the State is not so "charitable" as it is represented in the economic theory of public policy, nor is an impartial and omniscient servant of the public good, because State intervention can be considered more like compromise solutions that do not promote social welfare, and thus cannot be relied upon. Consequently, it is held that it is better "an imperfect market solution than an emasculated antitrust alternative", because, by not being impartial, regulation involves a commitment by the policy makers to the interests of the government, which in its turn is subject to political pressure. Moreover, it is argued that in the end the policy makers will not be able to maintain their independence from those that are subjected to the regulation.[80]

It has been claimed that it is not possible to create a logical antitrust system if based on abstract rules that define "desirable" and "undesirable" economic structures.[81] Therefore, it would be preferable to reject the prohibition principle and

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[77] Rowley, C.K., *Antitrust and Economic Efficiency,* Macmillan, London, 1973, p. 72.
[78] id., p. 85.
[79] id., p. 73.
[80] id., p. 74/75.
[81] As argued by Professors Vito, Marchal, Wessels and Woitrin. In McLahlan, D. L. and D. Swann, *Competition Policy in the European Community,* Oxford University Press, London, 1967, chapter 5.

adopt a policy of preventing firms from following harmful policies, which would include the threat of nationalisation.[82]

In favour of the regulation of competition, it is said that the market alone is not able to supervise monopoly power, and that only the law can protect the competitive process. "In almost any markets left without government intervention or regulation", Goyder points out, "it is likely that the competitive process itself will ensure that sooner or later participants in them will gain a degree of market power". He adds that "[i]t is the function of competition policy to seek to prevent the unfair acquisition of market power by individual undertakings, without at the same time becoming too overprotective of rivals".[83]

Another argument favouring the regulation of competition is that competition policy in general has a dynamic character, which means that it can be adaptable to the different economic and political tendencies of the policy makers.[84] It follows that the standard embraced at the time of the adoption of an antitrust policy does not necessarily have to be definitive - the purpose of the policy, as well as its enforcement, can be changed. An example of this assertion can be found in the antitrust laws of the USA, which have been changing over the years, according to the approach of those who are in power towards the problem.

The idea of letting the market itself regulate competition has not prevailed. However, the degree to which competition laws and policies should intervene in the

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[82] id., p. 86.
[83] Goyder, D.G., *EC Competition Law*, 2nd edition, Clarendon Press, Oxford, 1993, chapter 2, p. 12/13.
[84] Green, N., Hartley. T.C., and Usher, J.A., *The Legal Foundations of the Single European Market*, Oxford University Press, Oxford, 1992, chapter 14, p. 198

competition process, as well as the manner this regulation should be done, depends on the approach adopted towards competition. Before discussing this issue. it is necessary first to examine the role played by law in the regulation of economic policy.

3.2 Law and the regulation of economic policies

The most appropriate instrument the State can use to implement economic policy is the law. However, this has not always been the case, and even today there is not a consensus regarding this issue. The liberal tradition of separating the State from the economy viewed the law in two distinct areas: the public law, which would organise and structure the State, and the private law, which would co-ordinate the market exchange as well as the private rights and duties derived from it. The State would be connected to the protection of these rights only through the enforcement machinery. The use of the law by the State to implement its economic policies would lead only to negative results. The laissez-faire position is one extreme of this understanding - according to it, State interference in the economy would lead to misallocation of resources, economic inefficiency and a net wealth loss.[85]

The Chicago school inclines towards laissez-faire, as it proposes that any law which is the vehicle of State interference must be bad.[86] Also rejecting law as an instrument of economic policy is Hayek, who defends the idea that "the dynamics of the market are too complex and variable to be grasped by the policy-maker who, continually erring in his appreciation of market malfunctions, enacts 'corrective'

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[85] Daintith, T., "Law as policy instrument: comparative perspective", in Daintith, T. (ed.), *Law as an instrument of economic policy: comparative and critical approaches*, Walter de Gruyter, Berlin, 1988, p. 9.

[86] for an overview of the arguments of the Chicago School in relation to antitrust, see below, subsection 3.3.

legislation which leads sooner or later to visibly inefficient results and calls for further correction".[87]

As a result, the only way to have an economy that works properly would be "by avoiding this kind of intervention and relying on the free play of competition guaranteed by appropriate permanent legal rules".[88] Therefore, the only acceptable rules of law would be those that are general and abstract, which is not the case of interventionist laws such as the laws for regulation of prices.

On the other hand, one can argue that this view is quite drastic and cannot be applied to all economic systems due to their different aspects and characteristics. Therefore, the law is the most suitable instrument of economic policy. It is the means of reaching certain political, social and economic ends, as well as of promoting and implementing the various kinds of public policies. As Daintith points out, the necessity of the law as an instrument of economic policy is explained by the assumption that economic life is arranged by private law, and the State is linked to it through its courts.[89]

Economic policy is bound to impose unilateral alterations to private law rights, therefore these alterations must be made through the law. Moreover, he argues that this law should "assume a similar shape to the law (...) which maintains those rights".[90] It should then be general in coverage, precise in form, abstract in expression, individual in focus and long-standing in duration. There are certain types

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[87] Daintith, supra n. 85, p. 10.
[88] id., p. 10.
[89] id., p. 13.
[90] id., p. 13.

of law that do not alter private rights but nonetheless can be used as an instrument of policy as they derive from the need to provide "formal recognition and protection for collective interests".

These laws are related to the management of State funds and property as well as to areas where private rights cannot or do not exist, such as national defence. Their mandatory effects are indirect or confined to organs within the State apparatus, therefore these laws may have considerably different forms from those that deal with the maintenance or alteration of private rights. An example is the annual budget laws that, even though have almost nothing in common with private legal rights, have considerable effect on the economy and therefore can be used as an instrument of economic policy. In that way, these laws use the private relations of the economy without unilaterally altering them.[91]

3.3 Debate on the approaches towards competition

The debate on the approaches towards competition has been developed in the USA, based on the intent of the American Congress when enacting the antitrust statutes, and seeking to explain how the regulation of competition may result in consumer welfare. The approach towards competition has been changing over the years, and they are represented by different schools of thought.

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[91] id., p. 14.

On one hand, there is the "old Chicago" school,[92] which, by giving more attention to the historical and social aspects of antitrust, considered monopoly. both private and public, a serious problem in real markets.[93] Therefore, the old Chicago school defended a strict antitrust policy in order to dissolve concentrations of economic power, as they could result in the exploitation of the community. the disruption of the flow of social income and the sabotage of the whole system. Moreover, the old Chicago held that "concentrated markets and corporate giantism were the artificial results of corporate mergers and acquisitions, rather than the fruits of superior economic performance in any meaningful sense".[94]

This approach, which has been called also the populist approach,[95] is based on the assumption that the American Congress, when enacting antitrust laws, intended to promote competition through the protection of small businesses. It has been argued that the Sherman Act, when approved in the Congress, was not the result of "a consensus among economists as to its utility in enhancing economic efficiency, but a rough consensus in society at large as to its value in curbing the dangers of excessive market power... [I]t is based on a political and moral judgment rather than economic measurement or even distinctively economic criteria".[96]

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[92] Shepherd agues that a sign of the difference between the "old Chicago" and the Chicago schools is "the total amnesia about the old Chicagoans which the new Chicagoans display". See Shepherd, W.G., "Three 'efficiency school' hypotheses about market power", *The Antitrust Bulletin*, vol. 33, Summer 1988, p. 397, footnote 3.

[93] id., p. 396/397, footnote 3.

[94] Adams, W., Brock, J.W., and Obst, N.P., "Pareto optimality and antitrust policy: the old Chicago and the New Learning", *Southern Economic Journal*, vol. 58, July 1991, p. 3.

[95] Baker, D. and Blumenthal, W. "Ideological cycles and unstable antitrust rules", *The Antitrust Bulletin*, vol. 31, Summer 1986, p. 324

[96] Hofstadter, R., "What happened to the antitrust movement?", in *The Paranoid Style in American Politics and other Essays*, 1965, p. 232, cited in Ponsoldt, J.F., "The unreasonableness of coerced cooperation: a comment upon NCAA decision's rejection of the Chicago school", *The Antitrust Bulletin*, vol. 31, Winter 1986, p. 1010/1011.

Thus, the purpose of antitrust laws would be to protect the competitive market system "by guaranteeing free and easy market entry, by stimulating potential rivalry, and by dispersing market power".[97] Rivalry would then be an encouragement to greater efforts by the producers, therefore a market of small economic units and decentralised power would be necessary - the larger the number of competitors, the more competitive the market is, and consequently the more the consumers can obtain.

The populist enforcement policy is supported by traditional economics, which hold that concentration gives rise to market power and excess profits, this situation being sustained by market imperfections such as barriers to entry.

Opposed to the old Chicago, the "new" Chicago school of antitrust analysis developed another approach to competition, based on efficiency. This school started with the ideas developed by Aaron Director in the 1950s, who sought in basic economic theory explanations for business behaviour. He gave special attention to the question of a firm achieving and maintaining monopoly power by itself. Roughly putting it, he argued that tie-in sale, resale price maintenance and selling below cost are not rational methods of obtaining monopoly. Therefore, firms are not able to achieve monopoly power by unilateral action. It follows that antitrust should focus only on cartels and horizontal mergers that could directly result in monopoly or facilitate cartelization.[98]

These ideas were the basis of the Chicago school, which evolved to propose efficiency as the ultimate goal of antitrust. Efficiency, as defined and measured in

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[97] Ponsoldt, supra n. 96, p. 1007.

terms of consumer welfare, "consists in offering anything, whether products or services, that consumers are willing to pay for".[99] Efficiency is the maximisation of consumer welfare, therefore the school puts more emphasis on market performance, concluding that inefficient firms will not stay in the market, as they will not be able to compete with the efficient firms.

Thus, the Chicago school understands that monopoly should not be per se condemned, because it may be the result of efficiency.[100] The argument is that a firm will achieve higher profit rates or will create natural monopoly if it has superior management and its technology leads to large economies of scale. After obtaining dominance of the market, the firm will only be able to maintain it if it continues with its superior performance. Therefore, its profit will not be due to monopoly, but instead they will reflect its cost superiority.

It follows that monopoly power can only occur through collusion among rival firms; since this monopoly power does not derive from efficiency or economy of scale, it should be condemned. However, the Chicago school argues that the profits made by firms with monopoly power are dissipated in advance, during the process of acquiring this monopoly power. This happens because, while struggling to achieve this position, the firms spend a large amount of money, which will be "up to the amount of the prospective supra-normal profits that they hope to gain".[101] As a consequence, the profits made as a monopolist will be only "a competitive rate of

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[98] Posner, R., "The Chicago School of Antitrust Analysis", *University of Pennsylvania Law Review*, vol. 127, 1979, p. 925/928.
[99] Bork, R.H., *The Antitrust Paradox*, Basic Books, New York, 1978, p. 105.
[100] Shepherd, supra n. 92, p. 397.
[101] id., p. 401.

return (its profits, as a percentage of its real investment plus the sum of its dominance-gaining expenditures)".[102]

The school argues that the monopoly power will not last for a long time, as the existence of higher prices will attract other producers to the market. As entry into a market takes some time, the monopolist will enjoy his/her power for a while, but in the long run substitutes to his/her products will be available and competition will be restored.[103] On the other hand, the monopolist knows that a more efficient producer may enter the market, therefore he/she will have a stimulus to minimise its costs, otherwise he/she will lose his/her place to the new entrants.[104] The same happens in relation to cartels, as new competitors may break them down. If the members of the cartel do not have their costs minimised, they will not be able to compete with the other firms of the market.

Moreover, members of a cartel have an additional incentive to minimise costs because, as Posner points out, those in the cartel that have "the lowest costs will press for a reduction in the cartel price, since the lower a firm's marginal costs, other things being equal, the lower the price that will maximise its profits".[105]

Apart from the danger of new entrants, the members of a cartel are threatened by the possibility of "cheating" by the other members. There is a situation of competition between the members of the cartel, which means that there is an incentive for them to break the agreement and reduce their price in order to obtain a larger share

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[102] id., p. 401.
[103] Posner, supra n. 69, p. 9.
[104] id., p. 17.
[105] id., p. 17.

of the market.[106] Finally, it is argued that cartel or monopoly should not be per se condemned as there is no theoretical or empirical proof that it leads to lack of innovation or slackness about costs.[107]

The Chicago school does not believe that social goals should be taken into consideration in the regulation of competition. Elzinga argues that socio-political goals are "indirectly and costlessly promoted by a direct attack on inefficient, anti-competitive market structures and practices".[108] He defines these socio-political goals as equity objectives, which include redistribution of income, promotion of small business enterprise, promotion of the liberty of the entrepreneur and neutral treatment of minorities. This opposition of values - efficiency and equity - should not be supported, he argues, as these non-efficiency goals are not outside the scope of economic studies.

By attempting to prove that these equities goals can be achieved through the efficiency approach to competition, Elzinga seeks to answer the criticism that the theoretical presuppositions of economic theory do not correspond to the real world. Although conceding that this may be true, he argues that the usefulness of the paradigm is not vitiated, as "science continuously postulates impossibilities in order to understand existing situations".[109]

The Harvard school has also developed an approach to antitrust, which is based on the maintenance of competition in the market. The Harvard school

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[106] McKenzie, supra n. 60, p. 178.
[107] Posner, supra n. 69, p. 17.
[108] Elzinga, K.G., "The goals of antitrust: other than competition and efficiency, what else counts?", *University of Pennsylvania Law Review*, vol. 125, 1977, p. 1202.

understands that there are other elements other than efficiency to be taken into account in antitrust analysis. According to Sullivan, there are assumptions of the Harvard school that are in opposition with the Chicago school. In the first place, the Harvard school is "skeptical of the reassurance that neoclassicists provided about the industrial status quo", and thus they do not believe that a rigid group of presuppositions is able to explain a particular market. This means that they assume that changes can occur in the markets from time to time. Moreover, the Harvard school believes that concentration can bring problems to competition.[110]

Another characteristic of the Harvard school is that it does not necessarily view monopoly as a result of efficiency. Also, it has a more unrestricted understanding of barriers to entry, among which it includes control of scarce resources, high capital requirements, product differentiation and also vertical relationships. Moreover, the school regards "certain characteristic aspects of competitive style, such as high advertising expenditures, as capable of dampening competition either by increasing capital requirements for entry, or by increasing product differentiation and, thereby, tending to disaggregate markets".[111]

Other scholars have also contributed to the debate. Fox, for instance, understands that antitrust should include both efficiency and non-economic goals.[112] She argues that it is not possible to narrow the goal of antitrust to efficiency only, as this would go against the language of the statutes, the history of these statutes and the

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[109] id, p. 1212.
[110] Sullivan, L.A., "Antitrust, microeconomics, and politics: reflections on some recent relationships", *California Law Review,* vol. 68, n. 1, January 1980, p. 8.
[111] Sullivan, L.A., "Economics and more humanistic disciplines: what are the sources of wisdom for antitrust?", *University of Pennsylvania Law Review,* vol. 125, 1977, p. 1217.

case law related to competition. Moreover, she holds that, although scholars and jurists agree that competition law "should tend to increase the responsiveness of producers to consumers' wants", they are not in accordance regarding how this end should be achieved. She argues that, whatever the approach adopted, it means that the same questions will have to be confronted. Therefore, the assumption that efficiency is the only "clear and certain path" to antitrust, as it eliminates difficult choices, is false.

She does not discard efficiency as one of the goals of antitrust. On the contrary, she argues that "efficiency defined in terms of serving consumers' long run interests and implemented by protecting the competition process is and should continue to be a major goal of antitrust". However, as she sees competition as a process that is concerned with power, consumers and opportunity for entrepreneurs, she understands that socio-political values, which do not include the protection of small business for its own sake, do not conflict with the efficiency goal. Moreover, after 100 years these socio-political values are already embodied in competition law, which means that it would be destructive to try to take them out.

Another example is what Ellig called "the market rivalry school", which views competition as a rivalry process. He argues that, as the economic agents do not possess information, or rather, as they possess imperfect information about the real world or other agents' intentions, they have to bear costs related to this lack of information. These costs are called transaction costs and they include discovering prices and consumer preferences; disseminating knowledge about products;

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[112] Fox, E., "The modernization of antitrust: a new equilibrium", *Cornell Law Review*, vol. 66, 1981, p.

measuring and securing agreement on characteristics of products and inputs; among other difficulties.[113] The market rivalry school takes these difficulties as the central economic problems to be analysed, while market institutions and structure are considered a result of the efforts made by the economic agents to gather and interpret information.

This overview of the debate allows us to conclude that there are three main approaches to competition: the efficiency approach, the social approach, and the competitive approach. They have been developing throughout the years, but at specific times one of them has been predominant. For instance, the approach adopted by the Chicago school has exerted great influence over antitrust analysis in the USA during the 1980s, where it reached its peak.[114]

The theoretical debate on the approaches to competition is extremely helpful to identify the main paths that are open for competition law to follow. However, when investigating the competition laws of developing countries, one has to bear in mind that the debate is to be considered only as a guidance, as options that exist for the enforcement of competition law. It is not possible to apply the arguments of the different schools of thought directly to the developing countries, due to the lack of similarities between the USA and these countries.

In the first place, there is an enormous difference in relation to the market itself. In the USA, and in developed countries in general, a market economy has been

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[113] Ellig, J., "Untwisting the strands of Chicago antitrust", *The Antitrust Bulletin*, vol. 37, Winter 1992, p. 866.

[114] Amato, G., *Antitrust and the Bounds of Power*, Hart Publishing, Oxford, 1997, p. 24.

developed for a longer time, which means that the markets are usually competitive, the intervention of the State in the economy is not extensive, the economic agents have more freedom to act. As it will be seen in the next section, this is not always the case in developing countries, which are now starting to adopt trade liberalisation measures and decreasing the role of the State in the economy.

There are also political differences that stress the non viability of the application of the arguments to developing countries, such as instability in the government, lack of coherence in the adoption of economic policies due to these constant changes, lack of political will to implement policies, and so on. The political and economic models of developing and developed countries are different, which means that the arguments of any of the school of thoughts cannot be embraced completely; it is necessary to see the discussion only as an indication of what are the approaches to, and effects of, competition law.

Having in mind the hypothesis proposed in the Introduction that the competition models existing in more economically developed nations cannot be wholeheartedly adopted by those countries that are commencing to regulate competition,[115] one can argue that emerging economies must critically assess the issues considered in the theory of competition if their competition laws and policies are to be effective. It must be taken into account the effect of State monopolies in the market, the appropriateness of privatisation of such monopolies, the existence of highly concentrated markets, the needs of the economy, as well as other relevant characteristics of a particular economy. These issues, along with the goals that are to

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[115] Introduction, section 3.

be achieved by the regulation of competition, must guide the development of competition laws and policies in any country.

4. Regulation of competition and developing countries

Until the beginning of the 1980s competition had seldom been subjected to regulation in developing countries. When this occurred, however, the law was not enforced. One of the motives behind it is that these countries supported price control policies, State monopolies dominated the economy and competition was weak due to a lack of independent companies in the market.[116] Gray and Davis give complementary reasons for this lack of adoption or enforcement of competition laws. In the first place, many industries have been started by State enterprises or by enterprises supported by the government; consequently, the government was not interested in seeing these enterprises compelled to face competition.

Another reason is that governments have believed that their markets would only allow one or a small number of enterprises producing at economic scale in a given industry, therefore monopoly or a monopolistic market was necessary. Also, these governments have seen competition that leads to excess capacity and exit of less competitive companies not only as a waste of capital but also as socially and politically costly, as it would result in unemployment. Moreover, they have believed that their bureaucracies would have the necessary knowledge to establish the desirable price ceilings, so it would not be considered indispensable to supervise price fixing.

Also, those countries that supported exports believed that only concentrated industries with market power would be able to compete in the international market with the enterprises of the developed countries. Finally, consumer protection organisations were not very common in developing countries, which means that enterprises would have more freedom to act.[117]

Regarding the relevance of the control of anticompetitive practices, Gray and Davis ask whether it is efficient to adopt restrictive business practices control or whether it is better to give the enterprises complete freedom of action. According to them, trade liberalisation by itself is not a guarantee that competition will be restored. They base this argument on the fact that, notwithstanding the open economy and the high level of industrialisation in the developed countries, it has been necessary to be attentive to the conduct adopted by the firms of the market, because these firms continue to engage in restrictive business practices. Thus the significance of restrictive business practices control.[118]

It follows that there are several reasons for developing countries to adopt legislation regulating competition. Davidow points out some of them. Initially, he argues that a law against cartels would protect the State from "bid rigging or other cartel conduct directed toward it". This would emphasise the necessity of respecting the competition principle. Moreover, the existence of a law against the abuse of dominant position may improve the performance of State enterprises and monopolies, as well as "speed economic development in traditional societies". Finally, he argues

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[116] Davidow, J., "The relevance of antimonopoly policy for developing countries", *The Antitrust Bulletin*, Spring 1992, p. 278.
[117] Gray, C.S. and Davis A.A., "Competition policy in developing countries pursuing structural adjustment", *The Antitrust Bulletin*, vol. 38, Summer 1993, p. 429.

that the creation of a competition commission would result in a centre of expertise of antitrust policy, which would help also in the processes of privatisation, deregulation, restructuring, and, ultimately, in achieving market economy.[119]

However, Davidow warns that developing countries should develop their own legislation concerning the regulation of competition, instead of copying those already in practice in developing countries, as a complement to trade liberalisation measures, such as privatisation, restructuring and deregulation.[120] This argument supports the first hypothesis presented in the Introduction, that is, that developing countries should not adopt models that already exist in other countries, without first taking into account their own necessities.

The adoption of competition law and policy in developing countries is a necessary step to secure the existence of a competitive market by checking the behaviour of the economic agents, in order to avoid the adoption of practices that may result in damage to the market. This is particularly true if we take into consideration the transition to a market-oriented economy that has been taking place in developing countries. The existence of highly concentrated markets in these countries is by itself a threat to the market, due to the potentially negative effects that may arise from market power. It is not possible to carry out this transition without a market that works properly. The adoption of legislation regulating competition would help this transition.

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[118] Id., p. 448/449.
[119] Davidow, supra n.116, p. 279.
[120] Id., p. 278/279.

A report of the World Bank on competition in Argentina supports the argument that regulation of competition can be necessary in order to secure the implementation of trade liberalisation measures. This report affirmed that, "in order to ensure that the full benefits of the privatisation and deregulation program are realised, and in order to protect against future recidivism, it is necessary to have a program under which the government continues to protect consumers from the threat of cartelization and monopoly, whether these tendencies arise solely in the private sector or as a result of government responses to private economic interests".[121]

The report claims that in Argentina barriers to international trade have been reduced and practically all quantitative restrictions on foreign trade have also been removed, which should help to increase competition in the economy. Moreover, the macroeconomic situation is being stabilised, price control have been eliminated, a deregulation effort is under way and the taxation system has been made more efficient. According to the report, "as these policy reforms take effect, and competitive pressures are restored to the Argentine economy, there will be increasing efforts by firms to avoid competition. It is therefore important to complement the other economic reforms with an intensified effort to promote competition policy".[122]

Accordingly, competition law can be adopted as an alternative to State intervention in the economy. An OECD paper holds that

> "[c]ompetition policy is based on the belief that competitive markets are more likely than detailed government intervention to place decision-makers

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[121] Economists Incorporated, *Report of the Advisory Team on Competition Policy and Consumer Protection in Argentina*, Economists Incorporated, Washington, 1992, p. 2.
[122] id., p. 10.

close to information on costs, supply and demand and technology that are essential to efficient decision-making by economic agents. Reliance on market signals ensures that correct decisions are rewarded and encouraged and that incorrect decisions are discouraged or rectified quickly. Thus, barring market failures or significant externalities, competition is a superior alternative to government management of the economy".[123]

The approach towards competition adopted by developing countries has been changing in the last decade. Developing countries have been abandoning their strategies of intervention in the economy and thus adopting trade liberalisation policies. Gray and Davis argue that one of the reasons for this change of approach is that the State enterprises were not performing well and therefore retarding economic growth. Also, the governments are now seeing import competition as a positive aspect, that leads to lower consumer prices and lower customer industries' production costs.

Another reason is that they are starting to regard excess capacity as a factor for inducing competition between producers. Accordingly, easy of entry and exit has now been considered a positive aspect. Moreover, the experience of the developing countries with price control has shown that it "discourages investments, decapitalizes enterprises and wastes valuable management time". One more reason is that, though the concentration of certain markets has been important to create enterprises able to compete in the international market, in some cases this is not happening any more and therefore the development of certain sectors has been impaired. Finally, consumer

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[123] OECD, *Competition and Economic Development,* OECD, Paris, 1991, p. 7.

associations have been created in developing countries, and they have been performing their role in the fight against anticompetitive conduct adopted by producers.

It follows that now there is not only more space but also more government will for the adoption and enforcement of competition law, which has been done gradually. For instance, in 1989 Kenya transformed its price control office into a monopolies and prices department of the Ministry of Finance. Morocco has started the process of regulating competition in 1985. Sri Lanka, in its turn, created a Fair Trading Commission in 1987 in order to supervise anticompetitive conduct and administer price control. Moreover, price control in Sri Lanka has been decreasing. In 1980 Korea enacted a Fair Trade Law to fight the effects of a interventionist policy that had been adopted by the government.[124]

Developing countries can make use of the work developed by the United Nations Conference on Trade and Development – UNCTAD regarding competition law and policy. In 1980 the United Nations General Assembly's Resolution n. 35/63 approved the "Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices",[125] which gave UNCTAD the mandate of promoting competition law and policy. Since then UNCTAD has been playing an active role in that area, be it by giving technical assistance, organising seminars and training authorities, preparing reports on the effects of market concentration on

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[124] see Gray, supra n. 117, p. 457/465.
[125] 35th session of the United Nations General Assembly, 05.12.1980.

international markets,[126] producing study on the relation between competition policy and economic reforms,[127] or by developing a model law on competition,[128] among other activities.

When enacting a competition law, developing countries can take into consideration the general principles that UNCTAD has developed specially for this purpose. According to these principles, the law must be clear and simple, and define its goal as the enhancement and protection of competition. Also, the law has to develop a system of enforcement that is fast and effective. Another principle is that it must be created an institutional framework that is adequate for the enforcement of the law. In this case, UNCTAD suggests the use of independent competition authorities. Finally, competition law must be in accordance and work together with other governmental policies and authorities.[129] It follows that these principles proposed by UNCTAD conform to the hypothesis on the adoption and enforcement of competition law on which this thesis is based.[130]

Another source of help in the creation of a competition law is the model law developed by UNCTAD, which includes elements that should be taken into account in the legislation as well as references to comparative law.[131] The model law defines the purpose of the law as the control and elimination of restrictive practices and abuse of

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[126] UNCTAD, *Concentration of Market Power through Mergers, Take-overs, Joint Ventures and Other Acquisitions of Control and its Effects on International Markets (in Particular the Markets of Developing Countries)*, TD/B/RPB/80/Rev. 2 (1993).
[127] UNCTAD, *The Role of Competition Policy in Economic Reforms in Developing and Other Countries*, TD/B/RPB/96/Rev. 1 (1994).
[128] see Nunez, Luis Jose Diez-Canseco, "Comment", in Faundez, Julio (ed.), *Good Government and Law*, Macmillan, Basingstoke, 1997, p. 189.
[129] UNCTAD, *Activities relating to Specific Provisions of the Set of Principles and Rules*, TD/B/RBP/90 (1992).
[130] See Introduction, section 3.
[131] UNCTAD TD/B/RBP/81/Rev.3 (2 August 1994).

market power that adversely affect competition and domestic and/or international trade, as well as economic development. It also provides definitions of "enterprises",[132] "dominant position of market power"[133] and "relevant market", [134] which are essential in the analysis of antitrust cases to be carried out by any competition authority. Moreover, it supplies the criteria that can be used to define dominant position in the relevant market. It also defines practices that are to be considered per se illegal, due to their highly anticompetitive effect. In relation to mergers, the model law establishes a test to be applied in order to asses the potential danger of the merger.[135] Another important issue is that the model law delimits the power to be given to the competition authority.

However, it has been argued that the model law is just a guidance and therefore it is not possible to adopt it without taking into account the legal tradition of the country in question.[136] Accordingly, it cannot be ignored the specific necessities and characteristics of the country.

UNCTAD has been developing its work of supporting the adoption of competition law also through the compilation of the competition legislation adopted world-wide, as required in The Set of Multilaterally Agreed Equitable Principles and

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[132] "'Enterprises' means firms, partnerships, corporations, companies, associations and other juridical persons, irrespective of whether created or controlled by private persons or by the state, which engage in commercial activities and includes their branches, subsidiaries, affiliates or other entities directly or indirectly controlled by them."

[133] "'Dominant position of market power' refers to a situation where an enterprise, either by itself or acting together with a few other enterprises, is in a position to control the relevant market for a particular good or service or group of goods or services.

[134] "'Relevant Market' refers to the line of commerce in which competition has been reasonably restrained and to the geographic area involved, defined to include all reasonably substitutable products and services, and all nearby competitors, to which consumers could turn in the near term if the restraint or abuse raised prices by a not insignificant amount."

[135] A merger will be prohibited when the market share resulting from it "will result in a dominant firm or in a significant reduction of competition in a market dominated by very few firms".

Rules for the Control of Restrictive Business Practices.[137] This has taken the form of a Handbook on Restrictive Business Practices Legislation, comprising not only the legislation adopted but also commentaries on such laws.[138] Also, UNCTAD has requested States and regional groups to inform about the measures taken regarding the Set of Principles and Rules. Such measures have been gathered and published by UNCTAD.[139]

The World Trade Organisation (WTO), in its turn, has created a working group on competition policy,[140] which is discussing WTO's jurisdiction to adopt competition rules. However, there is controversy over this issue. The working group was the result of a blueprint proposed to the Council of Ministers by Sir Leon Brittan, the European Trade Commissioner, and Mr. Karel Van Miert, the Competition Commissioner. According to Sir Leon, it is necessary to have "an international agreement on competition rules and smoother co-operation between national competition jurisdictions" in order to avoid conflict between competition authorities.[141]

On the other hand, the United States are not very sympathetic to the idea. President Clinton's assistant to international trade argued that, though convergence of competition rules should be sought, this should not be done through legally binding international rules, because they would reinforce differences, and not eliminate them.

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[136] Nunez, supra n. 128, p. 194.
[137] supra n. 125, section F.6 (c).
[138] see for instance TD/B/RBP/94 (1993), with the laws adopted in Italy, Jamaica and Venezuela. This Handbook has been issued periodically, as legislation is sent to UNCTAD by States.
[139] see for instance UNCTAD, *Replies by States and Regional Groupings on Steps taken to Meet their Commitment to the Set of Principles and Rules,* TD/B/RBP/100/Add. 1 (1994), which includes the replies from Australia, Cyprus, Japan, Luxembourg, Netherlands, Niger, Peru, Republic of Korea, Thailand, as well as from OECD.
[140] in *Financial Times,* "World Trade: WTO urged to act on competition rules", 25.07.97.

According to him, efforts should be made to have competition authorities working together and collaborating with each other. Thus, WTO's working group on competition should identify the business practices that are anticompetitive and prevent access to national markets by foreign companies, and then figure out solutions to be adopted by competition authorities.[142] These arguments were reinforced by the assistant attorney general for the Antitrust Division of the US Department of Justice, according to whom the United States supported the creation of WTO's working group on competition so that a "competition culture" could be developed.[143]

5. Conclusion

The discussion developed in this chapter allows us to establish some points in relation to the regulation of competition. In the first place, the economic models demonstrate that there are arguments in favour and against the protection of competition. Perfect competition does not exist in the real market, and monopoly may not be desirable but at the same time may not be harmful. However, there is an intermediate situation between these two extremes, which may be worth maintaining, as they reflect the imperfection of the market and thus are more feasible to be achieved. The importance of these models for developing countries is that they provide a better understanding of the structure of the market, and thus allow to draw solutions for the problems presented.

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[141] id.

[142] Tarullo, D., "A world competition court would reinforce differences, not remove them", in *Financial Times*, Comment & Analysis: Wrong lesson from Boeing: Personal View, 13.08.97.

Another point is that the "laissez-faire" approach to market regulation cannot be applied to the markets of developing countries, if a competitive market is to be achieved, because the main characteristics of such markets have been highly concentrated industries and strong intervention in the economy, which is contrary to competition. Without careful regulation of the market, it is not possible to achieve competition in a market with such features. Moreover, by letting the market solve its problems by itself, competition may be restored, but the costs may be high, be it in a developing or developed country, since consumers, competitors and the market in general may be affected in a harmful manner during the time needed for this self adjustment.

Taking this conclusion into account, we can argue that the approach adopted towards competition cannot be too flexible, otherwise there will be more risks in the process of maximising consumer welfare, which is the main goal of competition. The analysis of the theoretical debate carried on subsection 3.3 demonstrated that there are basically three approaches to competition: the efficiency, the social and the competitive approaches.

The efficiency approach does not conform to the argument that competition law must avoid much flexibility, since it defends a less interventionist approach to competition, supporting a minimum regulation of restrictive business practices, and efficiency as the only way to reach consumer welfare. The social approach, in its turn, shows a well intentioned concern with social issues, but these issues not only can be

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[143] in *Financial Times*, "No monopoly on antitrust", 13.02.98, p. 20.

regulated through other and more adequate means, but also will not necessarily result in consumer welfare.

On the other hand, the competition approach describes a model that seems to be more in accordance with the necessities of developing countries, by not focusing exclusively on efficiency, giving relative importance to socio-political values, and by supporting the maintenance of a competitive market as the most adequate way of maximising consumer welfare. By taking into account these issues, this approach demonstrates that it is more capable to deal with the characteristics of the markets of developing countries, such as highly concentrated markets, State intervention in the economy and price control, among others.

The work that has been developed at UNCTAD regarding competition provides the necessary elements that should be taken into account by the States when adopting competition laws. Moreover, UNCTAD has been keen to assist States in this process of regulating competition. Thus, developing countries should take advantage not only of the model law but also of the assistance provided. However, this should be done bearing in mind that each country has its own needs and thus cannot adopt any pre-existing model of competition law but develop its own legislation.

CHAPTER 2 - LEGAL BACKGROUND

1. Introduction

This chapter will investigate the development of the legislation regarding competition in the country. This investigation will work as a background to the more detailed analysis of competition law that will be carried out in the following chapters.

The basis of competition law in Brazil is in the Constitution. Thus, we will start the chapter with an investigation of the development of provisions related to the regulation of competition that have been inserted in the different Constitutions enacted this century, putting though more emphasis on the present Constitution. An overview of the former competition laws enacted in Brazil will follow, so that we will be able to understand how the law evolved. We will then analyse Law 8884/94, the present competition law. This analysis will be initiated with the legislative history of the law, followed by an overview of its main characteristics, which will include its aims, the institutional framework created for its enforcement, the substantives issues regulated by the law, the method adopted for the control of economic concentration, the procedure established for enforcement, and the penalties provided for in the law.

We will then conclude with an assessment of the law taking into account the hypothesis proposed in the Introduction.[144]

2. Regulation of competition

2.1 The constitutional origins of competition law

The Brazilian competition law finds its roots in the Constitutions that have been written this century. It started with the 1934 Constitution, which adopted an approach of defence of "popular economy".[145] According to article 115 of the 1934 Constitution, the "economic freedom" should be ensured taking into account the principle of justice and the national needs, and should result in a reasonable quality of life to the population. At the same time that provided for economic freedom, the Constitution stated that the statutory law should develop the popular economy by nationalising all the foreign companies working in Brazil.[146] Accordingly, it determined that the intervention on the economy should only occur in case of public interest.[147] In order to become effective, the constitutional provisions should be submitted to regulation; as this did not happen, the provisions were ineffectual.[148]

The defence of the popular economy was provided for in the 1937 Constitution as well. However, it approached the subject in a more severe way, as it provided for

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[144] See Introduction, section 3.
[145] The concept of "popular economy" is characteristic of State intervention in the market, through the control of prices.
[146] Article 117, Constitution of 1934.
[147] Article 116, Constitution of 1934, which authorised the monopolisation by the State of an economic activity in cases of public interest.
[148] Franceschini, José Inacio Gonzaga and José Luiz Vicente de Azevedo Franceschini, *Poder Econômico: Exercício e Abuso,* Ed. Revista dos Tribunais, São Paulo, 1985, p. 7.

strict penalties to be applied to the crimes against the popular economy. Moreover, these crimes were then equivalent to the crimes against the State.[149] Article 141 stated that one of the objectives of the Constitution was "to prevent the obstruction of competition by means of concerted practices, combines and organisations that would result in monopoly power in certain areas of the economy or in the restriction of free competition, which is essential to the development of industries and trade". State intervention in the economy, in its turn, should occur only if necessary to co-ordinate the production factors and to cure deficiencies that impaired the development of the system of free enterprise.[150]

In contrast with the previous constitutions, which dealt only with the promotion and protection of the popular economy, the Constitution of 1946 had ample purposes and introduced the idea of control of abuse of economic power through article 148. It established that the statutory law would prohibit any kind of abuse of economic power, whichever its nature might be but including the concentration of companies that intended to dominate the market, eliminate competition and arbitrarily increase profits.

The first part of article 148 was generic, providing for the repression of <u>any</u> kind of act that would lead to restriction of competition, even if this result was not desired by the economic agent. At the same time, the second part of this provision, which dealt with the concentration of companies, was more specific in the sense that it required the intention to dominate the market, eliminate competition and arbitrarily increase profits.

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[149] Article 141, Constitution of 1937.

In 1967 a new Constitution was written and the control of abuse of economic power was inserted among the principles of the economic and social order. Article 157, VI stated that the purpose of the economic and social order was to achieve social justice based on determined principles. One of these principles was the control of abuse of market power, characterised by market domination, elimination of competition and arbitrary increase of profits. This Constitution abandoned the expression "any kind of abuse of economic power" adopted in the previous one, thus losing the generalisation character of the provision.

In relation to the intervention in the economy, article 157, paragraph 8, reflected the ideology of the time, sustained by the military regime, and permitted intervention both in the economy and in the monopoly of an industry or activity, "when essential for reasons of national security, or in order to organise a sector that cannot be developed efficiently under the system of competition and free enterprise".

The latest Constitution was written in 1988 and introduced important modifications that affected the regulation of competition. Initially, article 1 establishes the fundamental principles of the Republic, among which the principle of free enterprise is included.[151] Another innovation is that the social and economic order are not under the same "title" anymore.[152] The new Constitution separates them and bases the economic order on the respect for human labour and the promotion of free enterprise. Based on the social justice, its purpose is to seek a dignified existence to

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[150] Article 135, Constitution of 1937.
[151] Article 1, IV, Constitution of 1988.
[152] These titles are: fundamental principles, fundamental rights, organisation of the State, protection of the State and democratic institutions, taxation and budget, economic and financial order, and social order.

all.[153] Moreover, article 170, sole paragraph, establishes that everyone has the right to engage freely in any economic activity.[154]

One of the principles adopted to pursue the economic order is the principle of free competition.[155] Other principles of the economic order include private property, social function of property and defence of consumer, among others.[156] It is interesting to note that it is also a principle of the economic order the "favourable treatment for the national small-sized companies",[157] what may be in opposition to the principle of free competition. However, although a principle of the economic order, free competition is subordinate to the fundamental principles of the Republic that are listed in article 1 of the Constitution, as they are hierarchically more important. As mentioned above, among these fundamental principles free enterprise is included. This means that free competition is an instrument to achieve that principle.

Free enterprise is then guaranteed by article 173, paragraph 4, which states that the law shall control the abuse of economic power that intends to dominate the market, eliminate competition and arbitrarily increase profits. The abuse of economic power is then a reason for the indirect intervention of the State in the economy; however, this intervention will be in favour of free competition, not market dominance. In relation to the direct exploration of an economic activity by the State,

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[153] Article 170, Constitution of 1988.
[154] This right is also provided for in article 5, XIII, which is included in the title "Fundamental Rights and Guarantees".
[155] Article 170, IV, Constitution of 1988.
[156] The principles of the economic order are: national sovereignty; private property; social role of property; free competition; consumer protection; environment protection; reduction in social and regional inequality; employment; and favoured treatment for Brazilian owned small enterprises.
[157] Article 170, IX, Constitution of 1988.

article 173 determines that this will only be possible when it is necessary to the national security or relevant to the collective interest, and shall be defined by the law.

Article 177 defines the activities that constitute a State monopoly.[158] Accordingly, article 21, XI, XII and XXIII, lists the activities that shall be explored by the State, which include postal services, telecommunication, electric energy services, navigation, aviation, railway services and nuclear energy. The State may explore these activities directly or through authorisation, concession or permission given to private parties. It follows that, at the same time that the Constitution defends free competition, it also maintains some State monopolies.

2.2 The former system of competition law

Brazil has been enacting laws that in some way are related to competition since 1938,[159] due to the constitutional provisions discussed in the previous subsection. These laws, however, adopted a more punitive approach, and dealt more with the concept of "popular economy" than with competition. It was only in 1962 that an exclusive and specific law governing and regulating competition was enacted. The bill of this law had been in Congress since 1948, and it underwent several amendments until it was approved in 1962.

Basically, Law 4137/62 sought to protect and increase competition and dealt with the abuse of economic power. Article 2 of the law established and enumerated

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[158] They are the exploration, refinement, import, export and transport of oil and other minerals.

[159] These laws are: Decree-law 869, enacted in 1938 with the purpose of protecting competition and the "popular economy" against economic countries; Decree 7666, enacted in 1945 and concerned less with each competitor and more with the rights of the population as a whole, preventing its exploitation

the forms of abuse which were as follows: market dominance and elimination of competition achieved through agreement between companies, acquisition of shares, mergers, suspension of activities or creation of difficulties for the performance of other companies; unreasonable increase of prices that led to an arbitrary increase of profits; conduct leading to monopolistic conditions and abusive speculation of prices, such as destruction of capital or consumer goods and forestalling of goods or raw material; organisation of an economic group through price discrimination and tie-in sales; and unfair competition through exclusivity in publicity or previous arrangement in public biddings.

The law thus did not establish specific types of conduct that were considered abuse of economic power, but it drew up the situations where it may occur or the consequences arising from it. As it will be seen in Chapter 4, the law did not specifically prohibit the imposition of exclusivity agreements, for instance, but it did prohibit agreements between companies that led to market dominance, where exclusivity agreements may be included.[160]

In order to investigate and control the abuses of economic power, the law created a special body with power to deal with competition matters, which was called *Conselho Administrativo de Defesa Econômica* - CADE (Administrative Council for Economic Protection).[161] According to the law, CADE had jurisdiction to investigate types of conduct that were allegedly a violation of the economic power, commence administrative proceedings, pass judgments in relation to these proceedings, apply

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by companies with market dominance; and Law 1521/51, establishing the crimes against the economic order.

[160] see below, chapter, 4, subsection 2.1.

[161] Article 8, Law 4137/62.

penalties, ask the Judiciary to determine the intervention in companies, as well as instruct the population about the various forms of abuse of economic power.[162] The law did not provide for any kind of appeal against CADE's decisions; however, this would not prevent judicial revision because, being also an administrative act, the decision is subject to judicial review.[163]

An act that resulted in economic concentration could be considered legal if it complied with the requirements established in the law. Article 74 determined that any act or agreement between companies that resulted in the balance between production and consumption, the regulation of the market, the standardisation of production, the stability of prices, the specialisation of production or distribution, or the establishment of restrictions in the distribution of goods should be submitted to CADE in order to be approved. If CADE did not reach a decision in 60 days, the act or conduct would automatically be considered valid.[164]

Law 4137/62, however, did not produce the intended effects. For instance, from 1963 to 1990, CADE dealt with 117 administrative proceedings, of which in only 16 a fine was applied.[165] This may be the result of an exceedingly rigorous control of the economy as well as a lack of confidence by the population, which reflected the government's absence of support.[166] It has also been argued that this lack of enforcement is the natural consequence of a series of factors, such as the lack of a

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[162] Article 17, Law 4137/62. See below, chapter 3.
[163] Meirelles, H.L., *Direito Administrativo Brasileiro,* 22nd edition, Malheiros Editores, São Paulo, 1990, p. 610.
[164] Article 74, paragraph 3, Law 4137/62.
[165] in DNPDE - Departamento Nacional de Proteção e Defesa Econômica, *Aplicação da Lei de Defesa da Concorrência - Relatório de Atividades,* 1991, p. 13.
[166] interview with Paulo Germano Magalhães, in *Direito Econômico - Revista do CADE,* nova fase, n. 1, Jan/Mar 1986, p. 14

competition policy consistent with economic policy; the adoption of procedure rules that did not provide for the rapidity required in these cases; the inadequate structure of CADE; the lack of training of the members of CADE; and the anachronistic concept of abuse of economic power adopted by Law 4137/62, which gave too much emphasis to the protection of competition as an end in itself. Moreover, this concept of abuse of economic power was considered very broad, detailed and analytical, and it conflicted with the jurisdiction of other governmental bodies.[167]

After the enactment of the Constitution of 1988, some changes were necessary to adapt the economic laws to the new Constitution, since competition was then explicitly provided for. In 1990, two laws were enacted; Law 8002/90 dealt with the prevention of offences against the consumers' right, and Law 8137/90 defined the crimes against the economic and fiscal order. This law adopted a punitive approach to the matter, defining the crime and determining the penalty to be imposed, which could be imprisonment or fine. The crimes defined by this law were subject to criminal proceedings.[168]

Meanwhile, Decree 99244 defined the new functions of the governmental agencies. It decreased CADE's jurisdiction and created the *Secretaria Nacional de Direito Econômico* - SNDE (Economic Law National Office),[169] which assumed some of CADE's duties.[170] Therefore, CADE was supposed only to control the abuse of

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[167] Carneiro, J.G.P., "Sugestões para a nova lei de abuso econômico", *Direito Econômico - Revista do CADE*, nova fase, n. 1, Jan/Mar 1986, p. 17.

[168] Articles 15 and 16, Law 8137/90.

[169] Four years later SNDE's name changed to SDE - Secretaria de Direito Econômico (Economic Law Office). In order to avoid misunderstanding, from now on we will refer to it as SDE

[170] see below, chapter 3.

economic power,[171] while SDE's jurisdiction included the protection of the consumer as well as the investigation, control and suppression of the abuse of economic power through CADE,[172] and the promotion, co-ordination and supervision of the economic protection.[173]

Law 8158 was enacted in 1991 in order to alter Law 4137/62 and set the rules for the protection of competition. SDE would investigate the distortions of behaviour in the economic sectors that could affect prices, free competition, free enterprise or the constitutional principles of the economic order, and then propose measures to correct them.[174] Moreover, SDE should prevent some distortions: dumping; closure of the market for actual or potential competitors; and market division, among others.[175]

Unlike Law 4137/62, Law 8158/91, in its article 3 defined the offences against the economic order. It listed 18 types of conduct that were to be considered a violation of the economic order when they resulted in market domination, elimination of competition or arbitrary increase of profits. These included price fixing, preventing the access of companies to the market, market division, refusal to sell, tie-in sales, sale of goods without profits.[176]

Law 8158/91 innovated in the sense that it created new proceedings to deal with the abuse of economic power. The investigation should be made by SDE, which

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[171] Administrative Rule n. 105 of 1992.
[172] Article 102, III, Decree 99244/90.
[173] Article 102, I, Decree 99244/90.
[174] Article 1, Law 8158/91.
[175] Article 2, Law 8158/91.
[176] The types of conduct adopted by the law were not exhaustive. Therefore, any other conduct that might result in the effects established in the law were considered violation of the economic order.

was given the power to start it by its own initiative.[177] However, the investigation could be initiated also by request of any interested part in the matter or by any agency or body of the public administration. If the investigation demonstrated the possible existence of an offence, the case would be submitted to judgment by CADE, which could not determine the production of new evidence nor allow the development of new arguments by the parties.[178]

An important aspect of Law 8158/91 was that it provided for alterations to article 74 of Law 4137/62. As mentioned above, article 74 dealt with acts that resulted in economic concentration, which were allowed if they met the requirements established by the law. SDE was competent to examine and allow any kind of agreement that might impair the competition between companies, and should take into account the requirements provided in the article. It included the acts that, through mergers, incorporation of companies or any kind of organisation, resulted in any form of economic concentration and in a participation of the company in at least 20% of the relevant market.[179] It was the first time that the Brazilian law referred to the "relevant market"; however, it did not define it.

Finally, Law 8158/91 gave SDE the power to order the discontinuity of the practice that resulted in economic concentration.[180] This power was not given to CADE by Law 4137/62.

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[177] Article 4, Law 8158/91.
[178] Article 8, Law 8158/91.
[179] Article 74, paragraph 2, Law 4137/62 with the alterations of Law 8158/91.
[180] Article 74, paragraph 4, Law 4137/62, with the alterations of Law 8158/91.

As mentioned above, Law 8158/91 did not expressly annul the previous laws concerning competition. Therefore, the existence at the same time of Laws 4137/62 and 8158/91 created a situation of lack of definition and uncertainty. The new powers given to CADE and SDE were undermined by the fact that Law 4137/62, which created CADE, was still in force, and this resulted in a difficulty in defining the functions of each body. Thus, there were two competition authorities whose powers intertwined, which made difficult a clear identification of the jurisdiction of each of them. Consequently, the enforcement of competition law was deeply impaired.

2.3 Present system

2.3.1 Legislative history of Law 8884/94

The existence of contradictions between the two laws that formed the framework of the Brazilian competition system did not allow for appropriate enforcement of the law. On the other hand, competition law was finally understood as one of the instruments available to the government for achieving economic growth. It follows that, for the other economic measures to achieve positive results,[181] the government required and needed a strong framework for competition law, which was not the case of the competition law in force at that time. Therefore, in April of 1993 the Minister of Justice sent to the National Congress a bill on the "control of the abuse of economic power".

According to the explanatory note annexed to the bill, this bill was based on the presumption that the law that protects competition is not in itself a fundamental

[181] these were economic liberalisation measures - see Introduction, subsection 2.1.

instrument for the efficient performance of the market economy, especially in developing countries.[182] The main purpose of the bill was to improve the existing laws on competition and abuse of economic power, by creating a new procedure as well as a new institutional model for the enforcement of the law.

The explanatory note pointed out the crucial problems that the new law on competition would have to solve. One of them was the lack of personnel with expertise in this issue, because it considered essential to have technical knowledge and professional experience in order to detect illicit conduct in that area. Another problem was the tradition in Brazil of challenging in the courts every attempt of the administration to control economic power; in order to solve it, it was necessary to create an adequate administrative procedure. Other issues to be solved included the lack of means to alert the economic agents to their abusive conduct; the fact that some kinds of abusive conduct, such as arbitrary increase of prices, were not well characterised by the laws in force; and the lack of a clear division of jurisdiction between CADE and SDE.

This bill presented by the Minister of Justice would transform CADE into an *autarquia*,[183] which would give it more freedom of action, as well as an infrastructure that would allow CADE to go to the courts by itself and not represented by the Federal Government. Another improvement was that the jurisdiction of CADE and SDE was clearly defined. SDE would have the power to monitor concentrated markets as well as to examine acts of economic concentration, though the final approval would be given by CADE. This agency would act as an administrative

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[182] see Diario do Congresso Nacional (Seção I), 13.05.93, p. 9628/9629.

tribunal, and its four commissioners and the president would be appointed by the Minister of Justice, examined by the Senate and nominated by the President of the Republic.

The bill maintained the provisions of Laws 4137/62 and 8158/91 on the types of conduct that are considered abuse of economic power, only including the abusive increase of price as one of them. The deadlines on the procedure were shortened, so that the proceedings would not take long to be decided. CADE's decisions were not subject to review by the Executive, which also would help for the rapidity of the proceeding. The bill introduced the "cease and desist commitment", which would allow the economic agent to abandon the illicit conduct without incurring the penalties stipulated by the law.[184]

These were the major modifications proposed by the bill. The House of Representatives, however, presented several amendments to the bill. Some of them were quite simple, adding criteria that should be taken into account when deciding about the fine, or changing the formation of CADE, or suggesting a new division of jurisdiction between CADE and SDE.

On the other hand, three representatives proposed new laws to replace the bill. One of them would extinguish SDE and concentrate the jurisdiction to deal with competition matters in the hands of CADE. The other amendment was very detailed, defining enterprise, violation and dominant position. It revoked Laws 4137/62 and 8158/91, and established 19 types of conduct that would be considered illegal. It

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[183] for the concept of autarquia, see below, Chapter 3, subsection 3.2.2.

increased the value of the fines and created other penalties, providing detailed criteria for the application of penalties. It also extinguished SDE and transferred its power to CADE. CADE would comprise a president and six commissioners, who would be representatives of associations of consumer protection, the Bar Association and the Federal Council of Economics.

The substitute bill provided for the control of acts of economic concentration, which would be carried out by CADE. It also established that the bodies of the public administration should inform CADE about the adoption of measures that could restrict competition, thus allowing for concurrence of policies in relation to competition. The substitute bill established a new procedure, which would bring more rapidity to the proceeding. The explanatory note of this substitute bill argued that the increase in CADE's power was necessary in order to transform it into a specialised body for dealing with competition, since the Judiciary does not have the jurisdiction to control economic concentration, nor has the capacity to investigate the abuse of economic power.

The third substitute bill also transferred all of SDE's power to CADE. And SDE was transformed into an independent Consumer Office, without any connection with CADE. It created a new office subordinated to CADE, which would do the preliminary investigations and answer the consultations about acts of economic concentration. The bill did not revoke the other competition laws.

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[184] see below, subsection 2.3.6, for the treatment given by the law to cease and desist commitments.

The bill of the Minister of Justice, together with the amendments presented by the representatives, and after the opinions of the commissions of the House of Representatives, was submitted to two representatives, who wrote a final bill taking into consideration the original bill and the amendments. The bill was voted in the House of Representatives and approved, then sent to the Senate, where it was also approved. However, this approval was achieved due to an agreement made by the leaders of the parties. The bill had been in the National Congress for more than one year, and the government wanted it approved before the measures of the new economic plan, the *Plano Real*, were adopted.[185] It follows that the representatives and senators agreed not to present amendments for this last version of the bill and approve it as it was.

2.3.2 Aims of the law

The debates in the House of Representatives on competition law provide an interesting insight on the perception the representatives have in relation to what competition law is trying to achieve. Most of the time this perception does not coincide with the purpose established in the law. One party saw the bill as a way to protect the domestic industry against the foreign enterprises that were to enter the country after trade liberalisation, as well as a way to monitor the price of products.[186] The representative of another party considered competition law as an instrument for the combat against the abusive increase of price and the exploitation of small business and consumers.[187]

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[185] see supra, Introduction, subsection 2.1.
[186] speech of Mr. Nelson Marquezelli, of the Brazilian Labour Party - PTB, in Diário do Congresso Nacional (Seção I), 08.06.94, p. 9006.
[187] speech of Mr. Luiz Salomão, of the Labour Democratic Party - PDT, in Diário do Congresso Nacional (Seção I), 08.06.94, p. 8993.

It has also been argued by yet another representative that the law was an instrument not only to establish the State as the mediator in economic relations, but also to fix the limits to the performance of the market, which should be done because the market cannot be allowed to guide society and, though it is a fundamental part of the economy, the market is not the final judge of the public actions.[188] The only party that was against the approval of the bill understood that this law gave the government powers that belong exclusively to the Judiciary, as well as that the purpose of the law was to prevent the abusive increase of prices, which could be done through other instruments not being competition law.[189]

If we look at the law itself we will see that the representatives do not have a clear notion of competition law. Article 1 establishes that the purpose of the law is to prevent and control "the violations against the economic order, guided by the constitutional principles of free enterprise, free competition, the social role of property, consumer protection and restraint of abuse of economic power". In the first place, it is necessary to define "violations against the economic order", which is done in article 20 of the law. An act is considered a violation against the economic order if the purpose or effect of the act are the following:

a) to limit, restrain or in any way injure free competition or free enterprise;

b) to supervise a relevant market for a product or service;

c) to increase profits on a discretionary basis; and

d) to abuse one's dominant position.

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[188] speech of Mr. Artur da Tavola, of the Brazilian Social Democratic Party - PSDB, in Diario do Congresso Nacional (Seção I), 08.06.94, p. 8990.
[189] speech of Mr. Marcelino Romano Machado, of the Renewal Progressive Party - PPR, in Diario do Congresso Nacional (Seção I), 08.06.94, p. 8990/8991.

It follows that the law is concerned with the maintenance of competition in the market, giving particular attention to the behaviour of those who have a dominant position in the market. In this way, the conduct adopted by the economic agents that may affect competition is to be prevented.

If compared to UNCTAD's model law,[190] the aims of the present Brazilian competition law are not so ample. The model law aims to control restrictive business practices and economic concentration that adversely affect not only competition but also the domestic and international trade as well as economic development. By linking the regulation of competition to trade and development, the enforcement of the law has to take into consideration other governmental policies in order to achieve its goals. This would allow the existence of a bunch of economic policies that are co-ordinated among themselves, and thus facilitate the achievement of their common objective, that is, economic development.

This is not the case of Law 8884/94. However, as indicated in article 1, the prevention and control of violations of the economic order have to be in accordance with the principles of free enterprise, free competition, the social role of property, consumer protection and restraint of abuse of economic power, which are established in the Constitution. As discussed above,[191] the economic order is based on the respect for human labour and the promotion of free enterprise. The pursuit of the economic order has to observe a series of principles, including the principle of free competition. The Constitution thus sees the maintenance of competition as one of the conditions necessary to support the economic order. Thus, by construing the constitutional

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[190] UNCTAD TD/RBP/81/Rev.3 (2 August 1994). See supra, Chapter 1, section 4.

provisions, it is possible to argue that, as a principle of the economic order, the maintenance of free competition through Law 8884/94 has as its goal the achievement of economic development and thus should be in accordance with other constitutional principles in order to achieve that goal.

2.3.3 Institutional framework

The previous competition laws had already created an institutional framework for the implementation of the law. As seen above, there was a clash of jurisdiction between these bodies, brought by the concurrent existence of two laws and one decree determining their functions.[192] Law 8884/94 solved this problem by revoking the previous laws and clearly defining the jurisdiction of the bodies that formed the framework for implementation of competition law.

There are two administrative bodies that are responsible for the enforcement of competition law, *Secretaria de Direito Econômico* - SDE (Economic Law Office) and *Conselho Administrativo de Defesa Econômica* - CADE (Administrative Council for Economic Protection). A detailed analysis of these two administrative bodies will be carried out in chapter 3. For the purposes of this chapter it is enough only to outline their structure and jurisdiction.

SDE is part of the structure of the Ministry of Justice, and therefore subordinated to it. It is directed by one person, the Secretary of SDE, who is appointed by the Minister of Justice and can be dismissed at any time. SDE is formed

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[191] See subsection 2.1.
[192] Law 4137/62, Law 8158/91 and Decree 99244.

by three departments, the Department of Consumer Protection and Defence, the Department of Trade Register, and the Department of Economic Protection and Defence. It is this last department, DPDE, that is responsible for enforcement of competition law.

According to Law 8884/94, SDE's main duty is to start and conduct investigations in order to determine the existence of anticompetitive practices, and then refer them to CADE for the final decision on the legality of the practice.[193] In order to do so, SDE is able to request information from the parties involved or from anyone that may bring relevant elements to the investigation. SDE's duties also include the monitoring of the market's activities; the adoption of "cease and desist commitments",[194] which have to be approved by CADE; the supervision of the compliance with these commitments; the adoption of preventive measures that result in the cessation of an anticompetitive conduct; the supervision of the compliance with CADE's decisions.[195]

CADE, in its turn, is linked to the Ministry of Justice but is not subordinated to it. CADE is an autonomous entity, and the role of the Ministry of Justice is just to make sure that CADE complies with the duties it was given by the law. CADE is formed by a president and six commissioners. They are appointed by the President of the Republic and have to be approved by the Senate,[196] after an oral examination. It is

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[193] It has been argued that "in many respects, the SDE has a role similar to the United Kingdom's Director General of Fair Trading/Office of Fair Trading (DGFT/OFT): it acts as investigator and adviser". See Stevens, D., "Framing competition law in an emerging economy: the case of Brazil", *The Antitrust Bulletin*, vol. 40, p. 929.971.

[194] For a discussion on "cease and desist commitments", see below, subsection 2.3.6.

[195] Article 14, Law 8884/94.

[196] Article 4.

then that they are officially nominated by the President of the Republic. Their term of office is two years, and may be renewed for a further term of two years.[197]

CADE's president and commissioners can only be removed from office by the Senate or after being condemned at the criminal courts for any kind of crime established in the Penal Code. They can also loose their office if they are submitted to disciplinary hearings at the administration level, related to illicit enrichment while in office,[198] or if they accept any kind of fee, take part in the management of companies, work as consultants to companies, among other practices.[199]

Law 8884/94 gives CADE the power to decide the cases investigated by SDE, applying fines and determining the cessation of the conduct. CADE also has jurisdiction to decide on the legality of acts of economic concentration that may impair competition, as well as to review the decisions reached by SDE and decide appeals against SDE's decisions.[200] In order to comply with these duties, CADE is allowed to require information from the parties involved, whenever it considers necessary.[201]

It follows that CADE and SDE have the power to enforce competition law. However, Law 8884/94 makes reference to another governmental body, *Secretaria de Acompanhamento Econômico* - SEAE (Economic Monitoring Office). SEAE is part of the structure of the Ministry of Finance and therefore subordinated to it. It was

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[197] Article 4, paragraph 1.
[198] as established by Laws 8112/90 and 8429/92.
[199] Article 6, Law 8884/94.
[200] If SDE has a role similar to that of the DGFT, CADE's function is equivalent to that of the United Kingdom's Monopolies and Mergers' Commission. Stevens, supra n. 193.
[201] Article 7, IX. This article comprises a list of 22 items that constitute CADE's duties.

created in order to monitor the economic situation of the country, especially in relation to prices, giving more attention to the sectors with higher economic concentration. The head of SEAE is appointed by the Minister of Finance and can be dismissed at any time. Law 8884/94 establishes that SEAE must be informed of the administrative proceeding commenced at SDE in order to present an opinion in relation to matters of its expertise.[202] This is also applied to acts of economic concentration. A copy of the acts that are submitted to examination must be sent to SEAE, which has 30 days to give its opinion.[203]

The law then has created an institutional framework to enforce competition law where each body has its function clearly defined. Whether this system is performing satisfactorily will be discussed in Chapter 3.

2.3.4 Substantive issues

As seen above,[204] Law 8884/94 considers a violation of the economic order every act that causes or has the intention to cause the following effects: a) to limit, restrain or in any way injure free competition or free enterprise; b) to supervise a relevant market for a product or service; c) to increase profits in a discretionary basis; and d) to abuse one's dominant position.[205]

The law does not establish whether these effects have to be concurrent or whether the existence of only one of them is enough to characterise the violation. This

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202 Article 28.
203 Article 54, paragraphs 4 and 6.
204 subsection 2.2.2
205 Article 20, Law 8884/94.

has been left for CADE to determine, but until March of 1996[206] CADE had not decided any administrative proceeding based on Law 8884/94. However, it does seem that each of the effects is part of or complement each other. For instance, an act that is an abuse of a dominant position is very likely to restrain competition. Moreover, to supervise a relevant market for a product or service is not in itself a violation of the economic order, as paragraph 1 of this same article admits the existence of market domination when it is the result of the efficiency of the economic agent. Based on this, it can be concluded that it is necessary the occurrence of all the effects established by the law for an act to be considered a violation of the economic order.

One positive aspect of the law is that it defines dominant position and establishes when it occurs. There is dominant position when a company or a group of companies controls a substantial part of the relevant market, which is defined as 20% of the relevant market.[207] By establishing the percentage of the relevant market, the law is clearly defining when the dominant position occurs, which is not the case of UNCTAD's model law's definition of dominant position.[208]

The Brazilian law however does not state what is the relevant market, while the model law does.[209] Once again it has been left for CADE to deal with this lack of definition. As it will be seen in the analysis of the cases submitted to CADE,[210] CADE acknowledges the importance of the relevant market, always establishing what

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[206] As explained in the Introduction, section 5, this research covers the period between 1991 and March of 1996.
[207] Article 20, paragraphs 2 and 3.
[208] See Chapter 1, section 4, n. 133
[209] Id., n. 134.
[210] See Chapters 4 to 7.

constitutes the market in each case, but it rarely explains how this conclusion is reached or what factors are to be taken into account.

There is one exception, though. In the *Belgo Mineira* case,[211] CADE ruled that, in order to define what constitutes the market in question, it is necessary to take into account both the demand for the product and the supply, because then companies that do not manufacture the product but may do so if the market becomes attractive will be included. This case, however, deals with an act of economic concentration, and not with instances of anticompetitive behaviour.

The law also did not define the expression "to increase profits in a discretionary basis", which is one of the effects necessary for the characterisation of a violation of the economic order. This issue was discussed in the House of Representatives, when one of the representatives argued that it is not possible to increase profits in a discretionary basis, but to increase prices. Therefore, he understood that there should have been two effects: to increase prices in a discretionary basis, and to obtain profits above the reasonable.

One of the representatives responsible for the final version of the bill answered that they had excluded that expression from the bill because they understood it not to be a conduct easily characterised. However, at the meeting of the leaders of the parties held to discuss that bill, it was agreed that the expression should be included in the law, because the law had to observe the Constitution, which determines in its article 173, paragraph 4, that "the law shall prevent the abuse of economic power that aims at

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[211] AC 14/94, required by Cia. Siderúrgica Belgo Mineira and Dedini S.A. Siderúrgica.

market domination, elimination of competition and increase of profits in a discretionary basis".[212] So the expression was retained, but the legislators themselves were not certain about the validity of its inclusion in the law. It may be argued then that CADE, when analysing cases of violation of the economic order, will not be very strict in the application of this expression, as the spirit of the law does not allow it to be otherwise.

After establishing in article 20 that a violation of the economic order occurs when a conduct results in impairment of competition, control of the relevant market, increase of profits in a discretionary basis, and abuse of dominant position, the law proceeds to exemplify in article 21 the types of conduct that may be considered a violation. It follows that a violation is characterised only when there is an infringement of both articles 20 and 21.

UNCTAD's model law, in its turn, opted for determining that certain types of practices are per se illegal, that is, they are automatically prohibited. These practices include price-fixing agreements, refusal do sell, bid-rigging and market division.[213] One may argue that UNCTAD's approach is more reasonable, since it would bring more certainty to the economic agents in relation to what is prohibited. Moreover, a per se approach to certain practices may be more cost-effective and less time-consuming.

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[212] see the speeches of Mr. Vivaldo Barbosa and Mr. Fabio Feldman, in Diário do Congresso Nacional (Seção I), 08.06.94, p. 8996.

[213] UNCTAD TD/B/RBP/81/Rev.3, p. 21.

Article 21 presents a list of 24 anticompetitive acts.[214] This list is not exhaustive, and it includes conduct found in most of the competition laws enacted in other countries, as well as the types of conduct that are not related to competition law. One example of the latter is "to abandon or cause abandonment or destruction of crops or harvest, without good cause".[215] This conduct was included in Law 8158/91, though it linked the conduct to the intent of harming competition or obtaining profits in a discretionary basis.[216] The inclusion in the law of these types of conduct that are not related to competition may be explained by the fact that they are seen as unfair conduct that in some way affect the population. The case of destruction of crops and

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[214] The types of conduct of article 21 are: i) to set or offer in any way - in collusion with competitors - prices and conditions for the sale of a certain product of service; ii) to obtain or otherwise procure the adoption of uniform or concerted business practices among competitors; iii) to apportion markets for finished or semi-finished products or services, or for supply sources of raw materials or intermediary products; iv) to limit or restrain market access by new companies; v) to pose difficulties for the establishment, operation or development of a competitor company or supplier, purchaser or financier of a certain product or service; vi) to bar access of competitors to input, raw material, equipment or technology sources, as well as to their distribution channels; vii) to require or grant exclusivity in mass media advertisements; viii) to agree in advance on prices or advantages in public or administrative biddings; ix) to affect third-party prices by deceitful means; x) to regulate markets of a certain product or service by way of agreements devised to limit or control technological research and development, the production of products or services, or to dampen investments for the production of products and services or distribution thereof; xi) to impose on distributors, retailers and representatives of a certain product or service retail process, discounts, payment conditions, minimum or maximum volumes, profit margins, or any other marketing conditions related to their business with third parties; xii) to discriminate against purchasers or suppliers of a certain product or service by establishing price differentials or discriminatory operating conditions for the sale or performance of services; xii) to deny the sale of a certain product or service within the payment conditions usually applying to regular business practices and policies; xiv) to hamper the development of or terminate business relations for an indeterminate period, in view of the terminated party's refusal to comply with unreasonable or non competitive clauses or business conditions; xv) to destroy, render unfit for use or take possession of raw materials, intermediary or finished products, as well as destroy, render unfit for use or constrain the operation of any equipment intended to manufacture, distribute or transport them; xvi) to take possession of or to bar the use of industrial or intellectual property rights or technology; xvii) to abandon or cause abandonment or destruction of crops or harvests, without good cause; xviii) to unreasonable sell products below cost; xix) to import any assets below cost from an exporting country other than those signatories of the GATT Antidumping and Subsidies Codes; xx) to discontinue or greatly reduce production, without good cause; xxi) to partially or fully discontinue the company's activities, without good cause; xxii) to retain production or consumer goods, except for ensuring recovery of production costs; xxiii) to condition the sale of a product to acquisition of another or contracting of a service, or to condition performance of a service to contracting of another or purchase of a product; and xxiv) to impose abusive prices, or unreasonably increase the price of a product or service.

[215] Article 21, XVII.

[216] Article 3, XI, Law 8158/91.

harvest, for instance, is a reflection of the strategy adopted by farmers to have the price of their products increased.

Another conduct that is not to be found in competition laws but that has been included in the Brazilian law is "to impose excessive prices or increase prices without good cause".[217] Obviously this is a disguised way to provide for price control, which has been abandoned by the policies adopted by the government. This conduct was not included in the original bill, which maintained the types of conduct of Law 8158/91. It was probably the result of the negotiations with the leaders of the parties to have the bill approved.

The law, however, provides for the criteria that shall be taken into account when establishing the occurrence of imposition of excessive price or the unjustifiable increase of prices. These criteria include the relation between price and costs of the product or service; the price of the original product, when it is a case of substitution of products; the price of similar products or services in other markets; and the existence of any kind of arrangement or agreement that results in an increase of price or cost. Notwithstanding the inclusion of these criteria, it is not easy to determine when an increase of price is excessive or not. Moreover, this is an issue that should be left for the Economic Monitoring Office - SEAE, of the Ministry of Finance, to deal with.

2.3.5 Control of economic concentration

Law 8884/94 gave CADE the power to examine and approve or disapprove any merger between companies that may result in economic concentration. Article 54

establishes that the acts that may restrict or harm free competition, or result in the dominance of the relevant market, must be submitted to CADE for approval.[218] These acts include mergers with or into other companies, organisation of companies to control third companies or any other form of corporate grouping that result in a participation of 20% of the relevant market, or where any of the participants in the merger had an annual gross revenue of approximately US$ 400 million in the previous financial year.[219] The merger proposal has to be submitted in advance, or within 15 days of its implementation, otherwise the companies involved will be subject to fines that may vary from US$ 30,000 to US$ 3 million.[220] After receiving the opinions of SEAE and SDE, CADE has 60 days to decide. If it fails to reach a decision in that time, the merger will be automatically approved.[221]

The law establishes conditions for the approval of mergers that result in economic concentration. This means that it will be approved mergers that, though controlling more than 20% of the market, bring efficiencies with them. On this rationale mergers will be approved which:

a) aim to increase productivity, improve quality or increase efficiency as well as economic or technological development;

b) result in benefits that are shared between consumers and the parties to the merger;

c) do not result in elimination of competition in a substantial part of the relevant market; and

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[217] Article 21, XXIV, Law 8884/94.
[218] See Chapter 6, note 373, for the quotation of article 54.
[219] Article 54, paragraph 3.
[220] Article 54, paragraphs 4 and 5.
[221] Article 54, paragraphs 6 and 7.

d) use only the means necessary to achieve its objectives[222]

The occurrence of the four conditions is a prerequisite to have the merger approved. However, in the instance of the merger being in the public interest or necessary for the Brazilian economy, the existence of only three of these conditions will be enough.[223]

These provisions constitute the framework for the control of economic concentration. They are much more precise than those of UNCTAD's model law, which establishes only that a merger will be prohibited when the market share resulting from it "will result in a dominant firm or in a significant reduction of competition in a market dominated by very few firms.[224] A more detailed analysis, which will include the acts actually examined by CADE, will be made in chapters 6 and 7.

2.3.6 Procedure adopted in the law

One of the positive aspects of Law 8884/94 is that it brought more rapidity to the proceedings, by clearly establishing the procedure to be followed and setting time limits. A critical discussion of the issue, however, will be carried out below, in chapter 3. The purpose of this section is only to present an overview of the procedure adopted in Law 8884/94 in relation to administrative proceedings discussing restrictive business practices and the analysis of acts of economic concentration.

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[222] Article 54, paragraph 1.
[223] Article 54, paragraph 2.

SDE may start a preliminary investigation on its own initiative or by request from anyone interested in the case.[225] After this investigation, where the party accused of the practice will be requested to furnish information, SDE may either dismiss the case, if it understands that there is no violation of the economic order, or commence the administrative proceedings.[226] During this phase, the company will be given a fair hearing and allowed to defend itself from the accusation. SDE will then decide whether the proceedings are to be dismissed, in case it concludes for the non existence of the violation, or sent to CADE for decision.[227] When dismissing the case, both in the preliminary investigation and the administrative proceeding, SDE will send the case to CADE for review.[228] The decisions of SDE are not subject to appeal to its hierarchical superior, the Minister of Justice, because it is already subject to review by CADE.[229]

After receiving the administrative proceedings, CADE may require further action and evidence if it thinks necessary.[230] It is only after all the evidence has been gathered that the case will be submitted to judgment. CADE's decisions are also not subject to appeal, and they shall be carried out immediately after the judgment by the commissioners.[231] Compliance with the decision must be supervised by SDE.

A preventive measure may be adopted by SDE or CADE at any phase of the proceedings, whenever there are signs or a well-grounded suspicion that the practice

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[224] Supra n. 213, p. 9.
[225] Article 30.
[226] Article 31.
[227] Article 39.
[228] Articles 31 and 39.
[229] Article 41.
[230] Article 43.
[231] Article 50.

may cause or is directly or indirectly causing damages to the market.[232] The preventive measure, which is an administrative act, will order the cessation of the practice and, when possible, reversion to the previous situation, imposing a daily fine in case of non compliance.[233]It is essential that the damages to the market are unrecoverable or difficult to remedy, or may vitiate the final result of the administrative proceeding.

CADE or SDE may allow, at any phase of the administrative proceedings, a "cease and desist commitment", which will establish the terms for the discontinuity of the conduct.[234] The cease and desist commitment is not deemed a confession nor an acknowledgement of an illicit conduct, and it suspends the proceedings, which will be shelved after the party has complied with terms of the commitment.[235]

CADE's decisions may be executed at the federal courts in the event of non-compliance,[236] where the intervention in the company may be determined, in order to ensure the compliance with the decision.[237]

Apart from the administrative proceedings, anyone who feels injured by an act or conduct that may be a violation against the economic order can go to the judiciary to request the discontinuity of the act or conduct, or to ask for compensation,[238]

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[232] Article 52.
[233] Article 52, par. 1.
[234] Article 53.
[235] Article 53, par. 2.
[236] Article 64.
[237] Article 69.
[238] Article 29.

In relation to the acts of economic concentration, the procedure is quite simple. The documents related to these acts have to be sent to SDE in advance or within 15 days of its implementation. A copy of the documents will be sent to SEAE, which has 30 days to write its opinion. After receiving SEAE's opinion, SDE will write its own opinion in 30 days, and then send the case to CADE, which has 60 days to decide. If CADE does not reach a decision during that period, the merger will be automatically approved. CADE, SDE and SEAE may require the parties involved in the merger to present more information and documents, which will then suspend the deadlines established in the law.

2.3.7 Penalties

Law 8884/94 provides for substantial penalties in cases of offence. Companies may be fined from one to thirty percent of the gross pre-tax revenue of the latest financial year, while managers that are directly or indirectly linked to the anticompetitive practice may pay a fine from tem to fifty percent of the fine imposed on the company.[239] The incidence of penalties on managers is a novelty of Law 8884/94, since the previous laws provided only for penalties on the companies.[240]

Non pecuniary penalties may also be applied together with the fines. It includes publication of the sentence in newspapers, ineligibility for official financing, granting of compulsory licences in the case of patent holders, the company's spin-off, among other penalties.[241]

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[239] Article 23, I and II.

The law also establishes that the application of penalties shall take into account the severity of the violation, the violator's good faith, the advantages obtained or envisaged by the violator, actual or threatened occurrence of violation, the extent of damages to competition, the Brazilian economy, consumers or third parties, the adverse effects on the market, the violator's economic status, and recurrences.[242]

Notwithstanding these already heavy penalties, Law 8884/94 has also amended the Code of Criminal Procedure in order to provide for imprisonment when necessary to safeguard public or economic order.[243] CADE, however, has never requested any criminal court to order the arrest of violators. The only time that this provision was invoked was just after the enactment of the law, when a consumer protection council asked a criminal court to order the imprisonment of the president, a manager and two shareholders of a supermarket chain because the increase of price of certain prices was allegedly abusive. The arrest orders were given, but later they were suspended by a federal judge.[244]

3. Conclusion

This chapter has examined the legislation regarding competition. It has been established that the enactment of a new competition law in Brazil - Law 8884/94 - reflected a concern in the government in relation to competition, which was in a state

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[240] As it will see below, Chapters 4 and 5, CADE has been applying heavy fines on companies when the practice adopted is considered a violation of the economic order.
[241] Article 24.
[242] Article 27.

of almost anarchy, due to the existence of various laws regulating the matter. On the other hand, the legislative debate demonstrates that there was no proper agreement among the legislators in relation to the goals of competition law. This is an issue that may hinder the enforcement of the law, as it does not give CADE a clear path to follow. Another drawback of the law is the insertion of practices that are not directly related to competition, which may only result in CADE wasting time in cases that do not pose any danger to competition. As proposed in one of the hypothesis in the Introduction, the legislation on competition has to clearly define the approach towards competition as well as the issues inherent to the regulation of competition.[245]

Notwithstanding these critiques, it can be argued that Law 8884/94 presents a series of positive aspects such as acceptable procedure rules as well as a coherent institutional framework. It is incontestable that the new law improved the situation of competition in the country; yet, its proper application is on the hands of the enforcement agencies.

Another characteristic of Law 8884/94 that must be taken into account is that it was enacted as part of the *Plano Real*, an economic plan adopted by the government to combat inflation and resume economic growth. Competition law was thus seen as one of the instruments to make the market work properly. This assumption is correct and confirms the hypothesis that competition law and policy must be inserted into a coherent economic policy framework.[246] It follows that it is not right to assume that the existence of competition law will automatically solve all the problems. The

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[243] Article 86.
[244] Stevens, supra n. 193.
[245] see Introduction, section 3.
[246] Id.

existence of an infrastructure to enforce the law is necessary. In a way, this infrastructure was created with SDE and CADE, but the issue should not be narrowed to this aspect alone. This infrastructure should include a close integration with the other bodies of the administration that are in some way linked to competition law.

Thus, in order to be properly enforced, as well as to bring more certainty to the economic agents, the legislation regulating competition has to clearly state its goals, the types of conduct that are to be considered an offence, the approach towards competition, the role of the enforcement agencies, the treatment to control of economic concentration, the procedure to be followed and the penalties to be applied. It is only when the legislation defines with rigour these issues that the law will be effective. Law 8884/94 already demonstrates an improvement from the previous laws, but nevertheless does not develop completely these issues that are necessary for its enforcement.

As shown by the comparison with UNCTAD's model law, Law 8884/94 has developed more detailed provisions in relation to mergers and dominant position. However, the Brazilian law could have been more specific regarding the aims of the law, the definition of the relevant market, as well as the per se/rule of reason approach to the substantive issues.

CHAPTER 3 - IMPLEMENTATION OF THE LAW

1. Introduction

A system for the implementation of competition law in Brazil existed since the 1960s, but it has seldom been used. With the necessity of competition law being recognised over the years, the government has been introducing modifications and amendments to the existing system.

The purpose of this chapter is to assess the effectiveness of competition law in relation to its implementation, and to find out the possible reasons for the lack of a complete commitment to this implementation. It follows that we will have to investigate the motives behind the frequent changing in the system and how this has been affecting competition, as well as the drawbacks that can be found in all the aspects related to the implementation.

As the system adopted for the protection of competition is the administrative system, we will have to analyse it in the context of the public administration as a whole. This context also includes the judicial system, since every administrative act is subject to judicial review and control. Accordingly, the administrative system is not complete if taken apart from the procedural rules that it has to comply with in order to

have the law enforced. It follows that, in order to assess the effectiveness of the competition law, it is necessary to examine the public administration and the judiciary on one hand, and the institutional framework and procedure on the other.

2. Institutions for the enforcement of laws in Brazil

2.1 Judiciary in Brazil

The Brazilian judiciary is structured on various different levels. Brazil is a federation of 26 states, and each state has its own courts of Justice, the state courts, as well as a federal court. The jurisdiction of the state court is territorial, that is, cases occurring within the borders of each state, as well as in other states but where the residence of the defendant is in that state, may be submitted to a state court. Appeals against decisions of the state courts are addressed to the state courts of appeal which exist in each state.

The federal courts, on the other hand, deal only with cases where the federal government, its agencies and the public enterprises are parties to the dispute. The state courts have the jurisdiction to decide on all other cases which do not involve the government, its agencies and the public enterprises as one of the parties. The jurisdiction of the federal courts supplants the territorial jurisdiction of the state courts when the government, its agencies and the public enterprises are a party in the case. The federal court of each state will decide the government-related cases of that

state.[247] The decisions of the federal courts can be appealed against at the federal courts of appeals. There are five federal courts of appeals in the country, and each of them is responsible for the appeals of defined federal courts. For instance, the 5th Federal Court of Appeal (Tribunal Regional Federal da 5a. Região) has jurisdiction over the federal courts of the states of Sergipe, Alagoas, Pernambuco, Paraíba, Rio Grande do Norte and Ceará.

The decisions of both the state and the federal courts of appeal are subject to appeal to the Superior Court of Justice. The Supreme Court, in its turn, is able to, among other issues, review decisions that go against the Constitution or that establish the unconstitutionality of a treaty or a federal law.

This is the basic structure of the judiciary. However, other courts were created in order to deal with specific matters. Hence there are the courts that decide exclusively cases on labour (Labour Courts, Labour Court of Appeals and Superior Labour Court), elections (Electoral Courts and Electoral Court of Appeals) and armed forces (Superior Military Court).

The structure of the judiciary in Brazil is not simple and at first may give the impression of a chaotic system where conflict of jurisdiction between the various courts occurs frequently. However, this is not the case. The jurisdiction of the courts is well defined by the Constitution,[248] and when a case of conflict does happen, it is

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[247] For example, if the Union contracts with a building company to build the headquarters of the federal police somewhere in the state of São Paulo, and does not pay the company as established in the contract, the company will then seek redress at the federal court located at the state of São Paulo.
[248] Federal Constitution, articles 101 to 126.

settled by a superior court, which decides which court has jurisdiction over that matter. Thus, conflict of jurisdiction does not pose a problem.

However, negative aspects can be found in the Brazilian judiciary, such as lack of personnel, great amount of cases and lengthy processes, and they are obviously inter-related. The judiciary does not have enough personnel, be it judges, clerks or administrative support. In addition to it there is a great number of cases that are submitted to the courts, especially those challenging the economic measures adopted by the government.[249] To make things worse, the procedural rules to be applied to the cases are extremely time-consuming. Putting all these three factors together we will find a judiciary that is not efficient, where a suit - and it does not matter how simple it is - will inevitably take a long time to be concluded.

2.2 Public administration in Brazil

The administrative system is complex in any country, and Brazil is not an exception, with its complicated structure of bodies, linked among themselves or independent from each other, and placed in different levels of hierarchy. Basically, there are two kinds of administration: the direct administration and the indirect administration. The former includes the bodies integrated in the structure of the Presidency of the Republic and the Ministries, while the latter is constituted by other legal entities that are not the federal government, like *autarquias,* public enterprises and private and public joint stock companies, linked to a Ministry but administratively

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[249] For instance, after being elected, Collor de Mello determined that withdrawal above a certain value could not be made from saving accounts. The majority of the population with saving accounts went to the federal courts to have the right to dispose of their money recognised. It resulted in a remarkable number of cases to be decided by the federal courts. Though in a lesser degree, the a similar situation occurred in relation to compulsory taxes on gas and travels to foreign countries.

and financially autonomous.[250] In this way, the direct public administration is performed by the government, through its own bodies, and the indirect administration is performed by entities linked to the government.

Summarising, the Presidency of the Republic and the 20 Ministries with their bodies are the direct administration. These bodies constitute the structure of each Ministry,[251] are subordinated to it and therefore are not autonomous. They are responsible for the functioning of the Ministry, as well as for the performance of its duties.

The entities that constitute the indirect administration are autonomous, which means that they have freedom of action to accomplish their aims. They are linked to a Ministry, but this connection has only a supervision aspect, as opposed to subordination, in the sense that the Ministry has the power to check on the results obtained by the entity, the harmonisation of its activities with the government's policies, the efficiency of the entity as well as its administrative, operational and financial autonomy, but not the power to determine what the entity should do. Examples of indirect administration are the Brazilian Central Bank, the National Fund for Development, and the National Bank of Social and Economic Development, all linked to the Ministry of Finance; the Brazilian Company of Transport Planning,

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[250] Meirelles, H.L., *Direito Administrativo Brasileiro,* 22nd edition, Malheiros Editores, São Paulo, 1990, p. 637/638. For a discussion on *autarquias,* see below, subsection 3.2.2.

[251] For instance, the Ministry of Justice is composed by the following bodies: Council for the Protection of Human Rights, National Council of Prison and Criminal Policy, National Council of Traffic, Federal Council of Drugs, Superior Council for Protection of Freedom of Creation, National Council of Women Rights, National Council of Public Security, Legislative Studies Office, Civil Rights Office, National Council of Children Rights, Economic Law Office, Federal Police Office, Traffic Office, National Archives, and National Press.

linked to the Ministry of Transport; the Administrative Council for Economic Protection, linked to the Ministry of Justice, among others.

The Brazilian system of public administration is based on the American system, and adopts the rule of judicial control, which means that the administration is supervised by the judiciary. The administration has the power to decide its own matters, but these decisions are always subject to judicial review. This is the way found to avoid the abuse of power by the administration.

It has to be stressed that the role of the public administration increases in the same proportion as the role of the State. The more the State intervenes in the economic process, the more the public administration has to deal with. It has been argued that in developing countries the State has been present in all areas, expanding its functions, increasing regulations and therefore augmenting the bureaucratic apparatus.[252] Brazil is not an exception. The State has been acting in various sectors of the economy, enacting regulations in relation to a great number of issues, supervising the behaviour of the economic agents, adopting policies, investing and so forth. The obvious consequence of this heavy presence of the State is an overwhelming expansion of bureaucracy.

The Weberian concept of bureaucracy as an efficient system of organisation of the modern society, through the "exercise of control on the basis of knowledge", has been loosing ground to a more popular and practical notion, which associates bureaucracy with an incompetent and inefficient public administration that does not

perform well. This present meaning given to bureaucracy only reflects the reality, where the almost omnipresence of the State has transformed the public administration into an enormous organisation that is out of control.

Bureaucracy then is one of the problems found in the public administration that contributes to hampering the adequate performance of the administrative bodies. There are too many of these administrative bodies, and the processes they have to follow are complicated. Moreover, their personnel usually does not have autonomy to take decisions, which means that the power is in the hands of few people. Accordingly, they usually do not have expertise to deal with the specific issues of each administrative body. These factors are just a few of those that make the bureaucratic apparatus slow and inefficient.

From this discussion we can conclude that, as the administrative system in Brazil is complex and slow, and presents problems such as an inefficient bureaucracy, the implementation of the governmental policies is impaired. It is only where there is political will that the policy is more adequately implemented, because the government exert pressure on the administrative bodies. It follows that the administrative system in Brazil does not achieve its goal of acting in the public interest, and therefore cannot be considered a reliable institution.

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[252] Gould, D.J. and Amaro-Reyes, J.A., *The Effects of Corruption on Administration Performance - Illustrations from Developing Countries*, World Bank Staff Working Papers, n. 580, Management and development subseries, n. 7, 1983, p. 16.

3. Administrative system created for the implementation of competition law and policy

3.1 Reasons for the adoption of an administrative system

Since the creation of the first competition law in 1962, we have been witnessing an attempt from the government to find out the most adequate framework to deal with competition matters. During more than 30 years changes have constantly been made in the system originally adopted. However, one aspect of this system has never changed: competition issues have always been left in the hands of the administration rather than the judiciary.

There are several reasons for this, the most obvious one would be that an administrative body with expertise in this subject would be more capable of efficiently dealing with the problems arisen from competition than the courts. Judges, with a general knowledge of the law, do not have the necessary experience or expertise in competition matters. The administration, in its turn, is able to employ experts in the subject, which facilitates the enforcement of the law and make it fairer and quicker.

Though this reason is the most logical one, there are other factors that explain the adoption of an administrative enforcement. One of them is that competition law, as a governmental policy, is characterised by being of public interest, which means that it should be better enforced by the executive than the judiciary, because since the implementation of policies is one of the functions of the executive, it should be more prepared to it. Moreover, as one of its policies, the government would be interested to follow its development closely. It is obvious that, once the policy is transformed into a

law, the government cannot directly influence its enforcement. However, by maintaining it on the executive level, it can at least exert some pressure on relation to the interpretation of the law by the administrative agency responsible for the enforcement of the law. However, if the enforcement was under the preview of the judiciary, the government could not have exerted any influence on the same.

A way to balance expertise and safety is by dividing the implementation of competition law between both the administration and the judiciary. This mixed system is adopted in the USA, where the enforcement of competition law is in the hands of the Federal Trade Commission and the Department of Justice. The latter is responsible for the criminal offences and proceedings in equity to prevent and restrain violations of the Sherman Act, as well as for filing civil proceedings under the Clayton Act. The Federal Trade Commission, in its turn, has also jurisdiction to institute the civil proceedings under the Clayton Act and to prevent the occurrence of unfair methods of competition under section 5 of the Federal Trade Commission Act.

However, one has to bear in mind that this kind of division of jurisdiction between the administration and the judiciary may work well in the US, where competition has been regulated for more than 100 years, time enough to develop the system. In countries like Brazil, where regulation of competition is quite a recent phenomenon and where market economy is starting to develop, it may be safer to stick to either the administrative or the judicial enforcement, and then develop it to perform efficiently.

To illustrate this point, we can refer to the systems adopted by Latin American countries, which will reveal that not one of them adopts a judicial system. The following table helps to understand the enforcement systems of these countries: [253]

Table 1 - ENFORCEMENT SYSTEMS IN LATIN AMERICA

COUNTRY	ENFORCEMENT SYSTEM	COUNTRY	ENFORCEMENT SYSTEM
Argentina	**EJ, C, Cr**	**Guatemala**	**A, C, Cr**
Bolivia	**A, E, Cr, Le**	**Haiti**	**Le**
Brazil	**AJ, E, C, Cr**	**Honduras**	**F**
Chile	**AJ, E, Cr**	**Mexico**	**E, A, Cr**
Colombia	**A**	**Nicaragua**	**A**
Costa Rica	**A, C, Le**	**Panama**	**A, C**
Cuba	**F**	**Paraguay**	**F**
Dominican Republic	**F, Cr**	**Peru**	**A, Cr**
Ecuador	**A, C**	**Uruguay**	**Le**
El Salvador	**F**	**Venezuela**	**AJ, C**

A = administrative enforcement; AJ = administrative with judicial review; J = judicial enforcement; C = civil suits; Cr = criminal liability; Le = legislative; E = executive; EJ = executive with judicial review; F = federal action

Summing up, in Brazil the system adopted for the enforcement of competition law is the administrative system; however, the acts and decisions of the administrative bodies are subject to judicial review. In certain instances private parties injured or harmed by anticompetitive acts of companies are allowed to file civil suits in the

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[253] in Coate, M.B., Bustamante, R. and Rodriguez, A.E., "Antitrust in Latin America: regulating

courts, which may award them compensations. The filing of the suit however does not affect the administrative enforcement. There is also a possibility of criminal sanctions, as Law 8884/94 modified a provision in the Code of Criminal Procedure in order to include imprisonment to safeguard public or economic order.[254]

3.2 Administrative framework

Having established that competition is implemented in Brazil by the administrative bodies, we will proceed to examine the processes involved in the implementation. Basically, the jurisdiction on competition matters is divided between two administrative bodies, CADE and SDE. SDE is an investigative agency, while CADE is a dispute settlement body. There is also the *Secretaria de Acompanhamento Econômico - SEAE* (Economic Monitoring Office), which is responsible for providing technical opinion in the competition cases.

3.2.1 SDE

Law 8884/94 gives SDE the jurisdiction to commence and conduct investigations in relation to practices that may be anticompetitive, as well as to monitor the market's activities, adopt "cease and desist commitments", supervise the compliance with these commitments, adopt preventive measures that result in the cessation of an anticompetitive conduct, and supervise the compliance with CADE's decisions. SDE is formed by three departments, the Department of Consumer Protection and Defence, the Department of Trade Register, and the Department of

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government and business", *Inter-American Law Review,* vol. 24, 1992, p. 50.
[254] Article 86, Law 8884/94.

Economic Protection and Defence. It is this last department, DPDE, that is responsible for the enforcement of competition law.

SDE forms part of the structure of the Ministry of Justice, that is to say that SDE is a body of the direct administration, subordinated to that Ministry. SDE is directed by one person only, who is appointed by the Minister of Justice for an undefined period, and can be dismissed at any time by the Minister. It should be important that this person has at least a basic knowledge of the issues related to competition.

However, the former head of SDE, Mr. Aurélio Wander Bastos, was a lawyer with no previous experience in competition law. Mr. Bastos had had an eclectic career, which involved working in various bodies of the public administration, such as the National Institute of Intellectual Property and the Ministry of Communication. His time at SDE was characterised by a close contact with the media, in order to publicise the work carried out at SDE, as well as by a power struggle with CADE. He was very keen to investigate allegedly anticompetitive practices that had an immediate effect on the population, such as increases in the price of petrol after its liberalisation,[255] and abusive increase of prices in health insurance.[256]

He had been in office for almost three years when his "political godfather", the Minister of Justice, lost his post in the government. Soon afterwards, in June of 1997, Mr. Bastos was asked to leave the direction of SDE. His removal from office had obviously a political character, but this was not the only reason. The relationship

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[255] "Governo quer 'tabelar' margem de posto", *Folha de São Paulo,* 13.04.1996, p. 2-3

between CADE and SDE, while Mr. Bastos had been in office, was not an easy one. Besides, it has been argued that his ideas were not in conformity with the economic team of the Ministry of Finance.[257]

Mr. Ruy Coutinho, a former president of CADE (1992-1996), was then appointed as the new head of SDE. For the government, the appointment of Mr. Coutinho was very convenient. His previous experience at CADE not only gave him the necessary qualification to direct SDE but also shall facilitate the relationship between CADE and SDE, especially if we take into consideration that he was recommended for the post by the present CADE's president, Dr. Gesner de Oliveira.[258] Moreover, the appointment of Mr. Coutinho was approved by the team of the Ministry of Finance, whose economic policies he is in accordance with.[259]

One consequence of this change in the direction of SDE is that the approach towards the role of SDE in the competition framework will not be the same. During the time that SDE was under the direction of Mr. Bastos and its predecessors, it acted as a kind of police of the market directed to the control of prices. According to the new head of SDE, this administrative body will concentrate its power in the protection of competition, by stimulating the mechanisms of consumer protection and punishing companies that act in an abusive manner, especially in relation to the quality of products and the harm they may cause to smaller companies.[260] This is not the only consequence worth mentioning. Above all, this change results in a harmonisation of

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256 "SDE quer explicação dos planos de saúde", *Folha de São Paulo*, 09.05.1996, p. 2-7.
257 "Fim da Sunab deflagra disputa no governo", *Folha de São Paulo,* 10.06.1997.
258 "Novo titular da SDE vai avaliar risco da nova Vale virar truste", *Folha de São Paulo,* 11.06.1997.
259 "Coutinho quer fundir orgãos de defesa econômica", *O Estado de São Paulo,* 22.06.97, p. B3
260 supra n. 255, and "Rui Coutinho: acabou a fase policialesca para evitar abuso de preços", *Correio Braziliense*, 11.06.97.

ideas between CADE, SDE and the Ministry of Finance, making possible a more coherent enforcement of the economic policies of the government.

3.2.2 CADE

SDE is responsible for monitoring the performance of the economic agents in the market, as well as for conducting investigations of allegedly anticompetitive practices. Once these investigations are completed, the case is sent to CADE for a final decision. CADE is an *autarquia,* that is, a legal entity of the public law, created by a specific law (Law 8884/94) in order to perform a specific activity (control the abuse of economic power). *Autarquias* are an option the government has to decentralise the public service, which makes them part of the indirect administration. It follows that they are autonomous, have their own budget and administer themselves according to the law that created them. They are not hierarchically subordinated to their "mother entity", but they are under their control. This control is directed only towards the purpose of the *autarquia*, to ensure that it complies with the duties established by the law.

As it was seen in Chapter 2, CADE is formed by one president and six commissioners, who constitute its board. According to Law 8884/94, members of CADE have to be appointed by the President of the Republic, approved by the Senate after an examination, and then officially nominated by the President of the Republic for their posts. The law establishes that they have to be "reputed for their legal or economic knowledge and unblemished reputation".[261]

It would naturally be expected that the persons appointed to be commissioners at CADE should be the experts of competition law in the country. However, this is not always the case. In part, this is because there are not many persons with such expertise in Brazil. Moreover, those who have the necessary qualification for the post are already employed in the private sector, and the salary paid to a commissioner is not that attractive to make desirable a change in someone's career.[262] Besides, the post is temporary and lasts at most four years. Another negative aspect is a geographical one: CADE is situated in Brasilia, the capital of the country, a city that is isolated from the rest of the country.

On the other hand, to be a commissioner at CADE means to have a certain power over the development of the enterprises in Brazil. Obviously this is not an absolute power, as competition law is just one of the economic regulations that affect these economic agents. Nevertheless, CADE's commissioners have in their hands the future of managerial policies adopted by these enterprises, which puts them in close contact with the most powerful businessmen in the country. Besides, in this relationship the commissioners are in a position of superiority in relation to the businessmen, because the latter have to convince the former of the competitiveness of their conduct. This power may be considered an attractive feature of the post.

The present composition of CADE includes 5 economists (4 commissioners and the president) and 2 lawyers. The commissioners in general have a good curriculum, but are not necessarily experts in competition. Only one of them has had previous experience in the area. However, as already pointed out, this was to be

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[261] Article 4, Law 8884/94.

expected, since competition law is an issue relatively new in Brazil and the number of persons who has worked in this field is small. It is noteworthy that there has been a tendency to look for scholars to fill the post at CADE, since the majority of its members are either lecturers at universities and/or have post-graduate degrees. This positive aspect may counterbalance the fact that some of CADE's members have a career that does not fulfil the basic requirements expected for this kind of post.

The term of office of the commissioners and the president of CADE is two years, which may be renewed for further two years.[263] It may be argued that four years is not enough for the commissioners to develop their knowledge in this field, especially if we take into consideration that the majority of the commissioners do not have previous experience in competition when they assume their post. It would then take some time for the commissioners not only to be familiarised with the subject but also, and more important, to acquire the necessary knowledge required for a good performance at that post. By the time they would reach their peak, their term in office would be ending.

Looking at the experience of other countries, we will find that in Mexico, for instance, the members of the Federal Competition Commission are appointed for a term of 10 years, which may be renewed. Argentina, on the contrary, follows the example of Brazil, and the president and the members of the National Commission in Defence of Competition can stay in office for four years at most. The American system, in its turn, presents a very interesting option, providing the Federal Trade Commission with "administrative law judges", who are judges that act in those

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[262] A commissioner earns about US$ 5 thousand per month, while the salary of a partner in a law firm

complaints made by the Bureau of Competition.[264] It could be suggested that an adaptation of this system would be a reasonable alternative for the implementation of the Brazilian competition law, as the existence of specialised judges, not subject to a fixed term in office but nevertheless subject to dismissal at any time, would possibly solve the problems of lack of expertise and reduced term of office.

CADE's president and commissioners can only be removed from office by the Senate or after being condemned at the criminal courts for any kind of crime established in the Criminal Code. The conviction has to be final, that is, not subject to appeal. The proceedings are not different from those adopted in all crimes. Any person can request a criminal investigation, by submitting an accusation to the authority with jurisdiction in that matter. After the investigation is concluded, the Department of Justice sends the information to the criminal courts, where the criminal case commences. The commissioners can also lose their position if they are submitted to disciplinary hearings at the administration level, related to illicit enrichment while in office,[265] or if they accept any kind of fee, take part in the management of companies, work as consultant to companies, among other acts.[266]

3.2.3 SEAE

Apart from CADE and SDE, there is another body of the public administration that is also involved with competition matters. It is the *Secretaria de Acompanhamento Econômico - SEAE* (Economic Monitoring Office), which is part of

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goes from US$ 10 to 12 thousand per month.

[263] Article 4, paragraph 1

[264] Neale, A.D., *The Antitrust Laws of the USA*, 3rd ed., Cambridge University Press, Cambridge, 1980, p. 383

[265] Laws 8112/90 and 8429/92

the structure of the Ministry of Finance. SEAE is responsible for monitoring the economic situation of the country, especially in relation to prices and in sectors with higher economic concentration. In this way, SEAE's role is to investigate disproportionate increase of prices, referring the case to SDE when it considers to be a situation of abuse of economic power.[267]

The head of SEAE is appointed by the Minister of Finance and can be dismissed at any time. SEAE is composed by five departments, which deal with the following issues: a) agricultural products; b) tariffs, public prices and services; c) industrial products; d) market monitoring; e) protection of the economic order.

The importance of SEAE regarding competition law lies in the fact that Law 8884/94 gives this governmental body the power to present its opinion in cases involving competition. This shall be done while the investigation is being conducted. Article 38 establishes that SEAE must be informed of the administrative proceeding in order to present an opinion in relation to matters of its expertise. The same occurs in relation to acts of economic concentration. A copy of the mergers that are submitted to examination must be sent to SEAE, which has 30 days to give its opinion.[268] SEAE's opinion will include the definition of the relevant market and all the information available about it, such as the level of concentration, the enterprises acting in this market and their performance, the prices of the products of the market, and so forth. SEAE's opinion is then the economic basis for the decision to be adopted by CADE.

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[266] Article 6, Law 8884/94.

[267] This, however, is not an exclusive privilege given to SEAE, as any person can refer to SDE a case of abuse of economic power, as we shall see below, section 4. However, it does show that a framework for the analysis of competition issues is being created.

3.3 Evolution of the administrative system for protection of competition

This system of protecting competition through CADE, SDE and SEAE was created with the enactment of Law 8884/94. Before that, other institutional frameworks had been adopted. When it was created, in 1962, CADE was not an autonomous body. It was first subordinated to the Presidency of the Council of Ministers,[269] then to the Presidency of the Republic,[270] and finally it was transferred to the Ministry of Justice.[271]

CADE remained as a body of the direct administration for 32 years. However, during this period CADE suffered several changes, most of them related to its jurisdiction and composition. For instance, during the time that Law 4137/62 was in force, CADE was composed of a president and four commissioners, all of them appointed by the President of the Republic,[272] for a period of four years, renewable for other four years, the exception being the post of president, whose term of office was not defined. CADE's jurisdiction included the investigation of types of conduct that were allegedly a violation of the economic power, commencement of administrative proceedings, judgment of these proceedings, application of penalties, request to the judiciary for determining the intervention in companies, as well as the instruction of the population about the various forms of abuse of economic power.[273]

In 1984 CADE's composition was modified by the first time. Decree 20283/84 determined that CADE should be composed of two representatives of the Ministry of

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[268] Article 54, paragraph 4 and 6.
[269] At that time, Brazil was under the parliamentary system, which was short-lived.
[270] Decree 52025/63, article 12.
[271] Decree 60901/67, article 1, II
[272] Article 9, Law 4137/62.
[273] Article 17.

Justice - one of them would be CADE's president -, one representative of the Presidency of Republic's Planning Office, and one representative of each of the following Ministries: Agriculture, Finance, Industry and Commerce, and Health. Then in 1986 a new decree changed again CADE's composition, making it return to its original form.

However, it was in 1990 that radical changes were adopted, this time in relation to CADE's jurisdiction, not its composition. Decree 99244/90, which provided for the reorganisation of governmental bodies and agencies, created SDE and transferred to it most of CADE's duties. A year later a new competition law was enacted, without revoking Law 4137/62, which made the enforcement of competition law more confusing than it used to be, as there were two laws and one decree regulating the same issue. What was worse, the provisions of this legislation are at cross points and in several instances contradictory and do not conform. It follows that it was not certain whether CADE or SDE had jurisdiction to investigate cases of abuse of economic power.[274]

An analysis of the cases decided in that period shows that, in practice, SDE was responsible for the investigation of cases, gathering all the information and starting an administrative proceeding, if there were enough elements to prove the illegality of the conduct. CADE's duty was only to decide the administrative proceeding, based on the information provided by SDE, without requiring more investigation nor asking the parties for more information. Moreover, SDE was also

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[274] On one hand, Law 4137/62 gave this power to CADE (article 8); on the other, Law 8158/91 determined that SDE was to investigate abuses of economic power (article 1). At the same time, the law maintained CADE's jurisdiction established by Law 4137/62 (article 14, Law 8158/91). Moreover,

able to examine and authorise any kind of agreement that might limit or diminish competition between companies, and this included the acts that, through mergers, incorporation or any kind of organisation of companies, resulted in any form of economic concentration.[275] In this case, SDE had the power to order the suspension of the practice if there was evidence that it resulted in economic concentration.

As seen above, Law 8884/94 introduced a new institutional framework, where CADE is an autonomous agency with jurisdiction to decide cases of anticompetitive practices and economic concentration, SDE has power to conduct investigation in relation to these cases, and SEAE presents opinions in relation to the economic features of the market involved.

This continuous modification in the administrative framework shows that the regulations pertaining to competition in Brazil are still in a state of flux.[276] As it has been argued before, during the first 25 years competition was not considered an important issue in the country, especially because there was not a complete market economy in Brazil and the State intervention in the economy was a common feature at that time. As there was not much work to do, CADE did not have to exercise much of the powers vested in it by the law. The lack of work and CADE not actively participating in the economic regulations reduced its role in the administration. Thus, the agency did not have power enough to make it object of struggle within the government. It was only in the second half of the 1980s that CADE became more

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Law 8158/91 subordinated CADE to SDE, and transferred to SDE all the offices that constituted CADE's structure.

[275] Article 13, Law 8158/91.

[276] Other reasons for this state of flux of the legislation include lack of political will to enforce it, lack of a market environment for the proper application of the law, complex procedure, State intervention in the economy, lack of knowledge regarding competition, among others.

important, though not exactly for the right reasons: CADE was seen as an administrative body that could be used to control prices, and not as an enforcer of competition law.[277]

Competition law had its relevance recognised only in the beginning of the 1990s, which was when CADE was able to start to develop a steadier and more coherent work, especially because State intervention in the economy began to lessen. This allowed CADE to act as it was supposed to, showing then the extension of power brought with the regulation of competition.

What followed was a struggle for CADE's power, in one side, and the necessity to improve the existing system of enforcement, on the other. The result was Law 8884/94. This does not mean, however, that the best system has been found, or that the one adopted now is final. Competition law in Brazil is in its infancy, and will probably take some time until this system is firmed. For instance, not even three years after the adoption of this system, there was a movement in the Ministry of Justice to change it, where SDE, instead of CADE, would be responsible for the control of acts of economic concentration.[278]

More recently, discussions have been taking place between CADE's president and the heads of SDE and SEAE, in order to study the possibility of transforming the three bodies in one autonomous agency responsible for all stages in the enforcement of competition law, where its members would have longer term in office and its

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[277] see Chapter 5 for the analysis of the cases submitted to CADE involving control of prices.
[278] "FHC quer superpoder com lei antitruste", *Folha de São Paulo,* 05.03.1996, p. 2-8

budget would allow the payment of personnel with expertise in the area.[279] This discussion, however, has not produced any practical result so far. It is interesting to note that the same discussion has been taking place in the United Kingdom, where a former Director General of Fair Trade argued that it would be more efficient to have one single authority to deal with competition issues.[280]

4. Attempts to facilitate the enforcement of the law - changes in the procedure

The main feature of the procedures adopted by the Brazilian competition law is that they are usually complex. The degree of this complexity, however, varies from law to law. Law 8158/91 stipulates and provides for a highly complex structure, while Law 8884/94 is more straightforward. One of the reasons for the enactment of Law 8884/94 was to make the whole process of enforcement of the law easier and simpler. As we shall see below, this was achieved in part. Brazilian law in general has the tradition of regulating all issues in their minimal details, including detailed aspects of procedure.[281] If the enforcer of the law does not comply with one of the procedural rules, the whole process may be annulled. It follows that the procedure in any law will never be simple, and competition law is not an exception. We will examine here how this complexity was dealt with by Law 8884/94, as opposed to Law 8158/91 (see figures n. 1 and 2).

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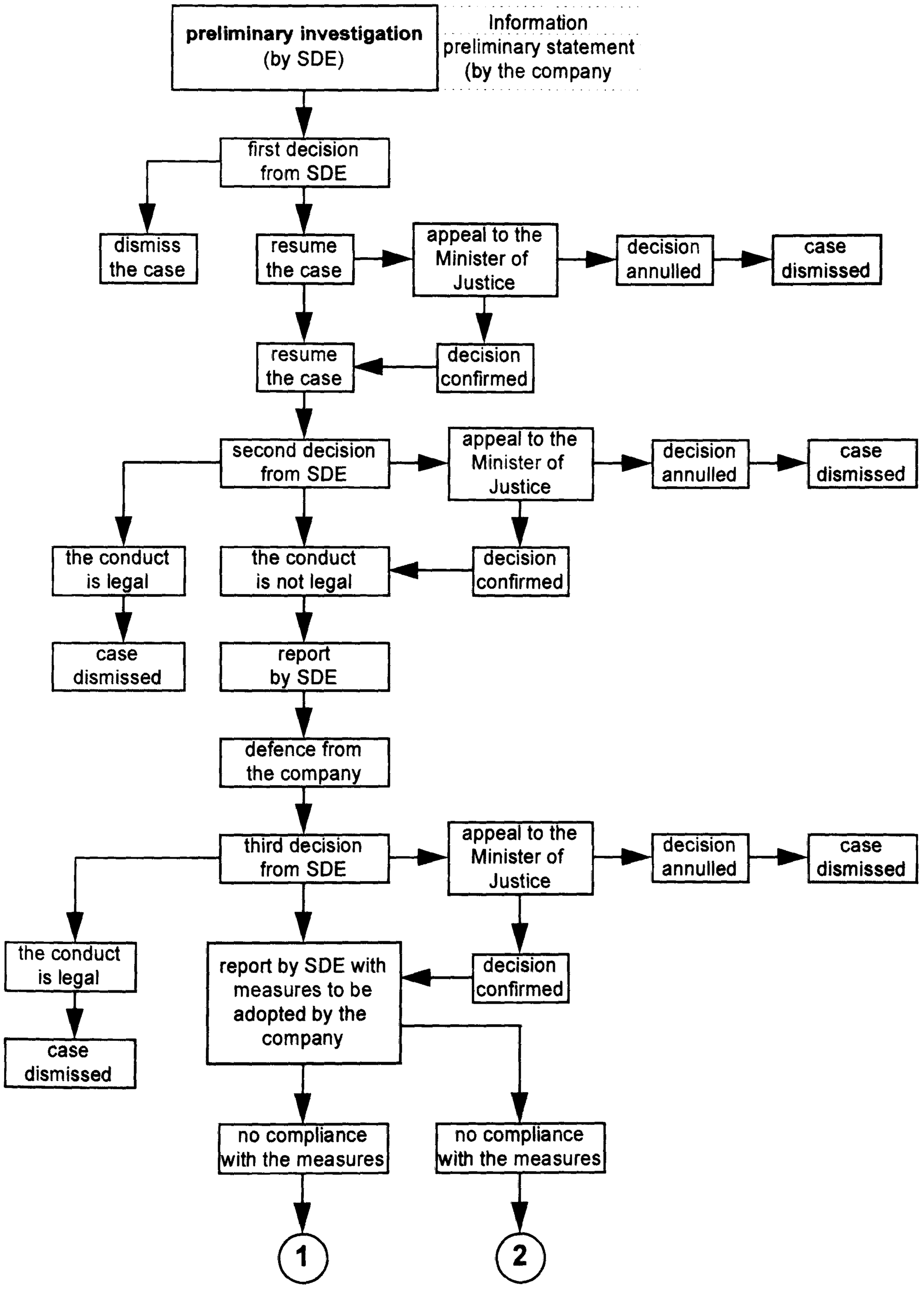
[279] "Coutinho quer fundir orgãos de defesa econômica", *O Estado de São Paulo,* 22.06.97, p. B3.

[280] Stevens, D., "Framing Competition Law in an Emerging Economy: the Case of Brazil", *The Antitrust Bulletin,* vol. 40, p. 929/971.

Figure 1 - PROCEDURE IN ADMINISTRATIVE PROCEEDINGS - LAW 8158/91



[281] This is due to the civil law system, where the courts are not supposed to make law but to apply the statutory laws enacted by the legislative.

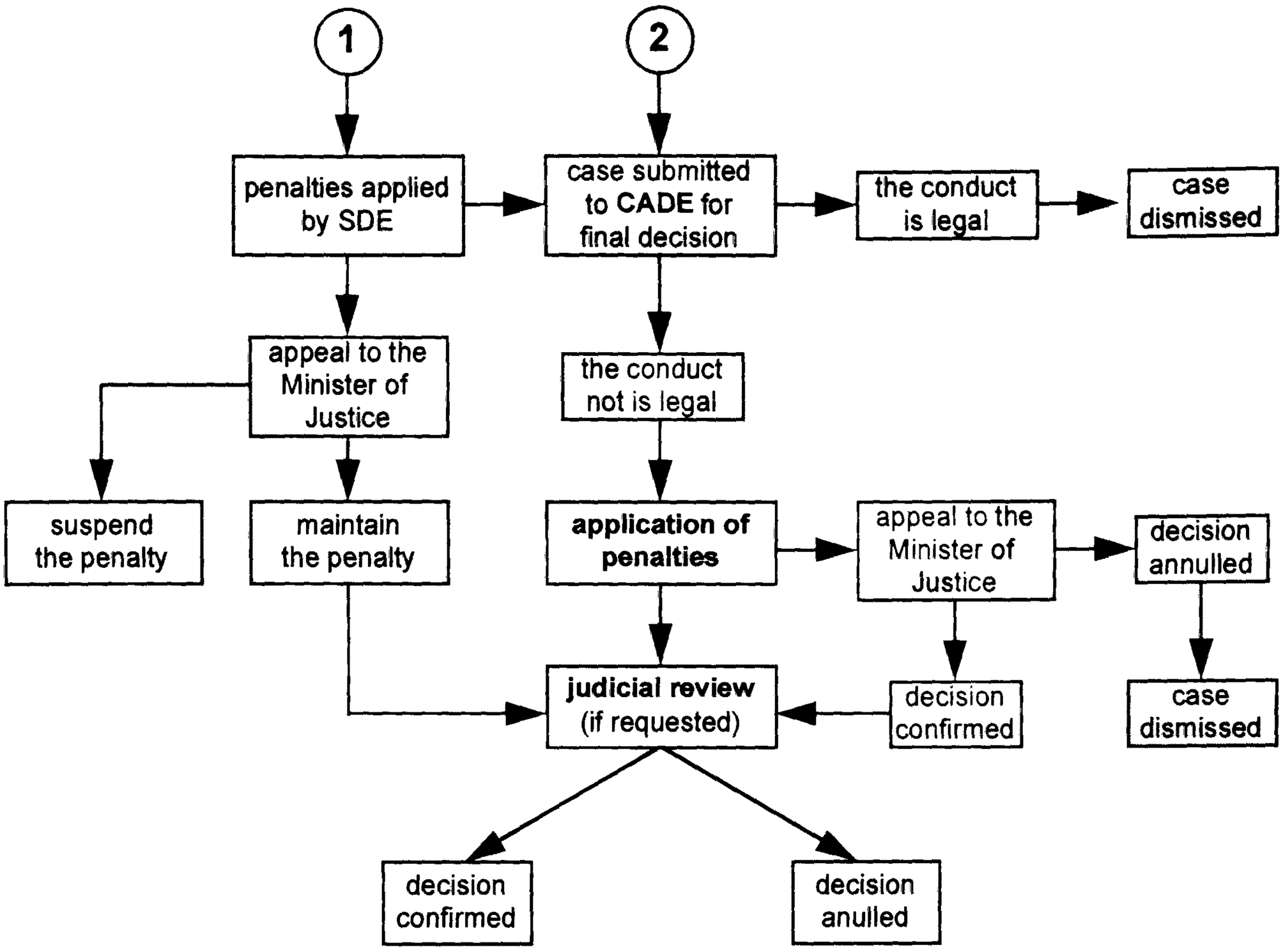
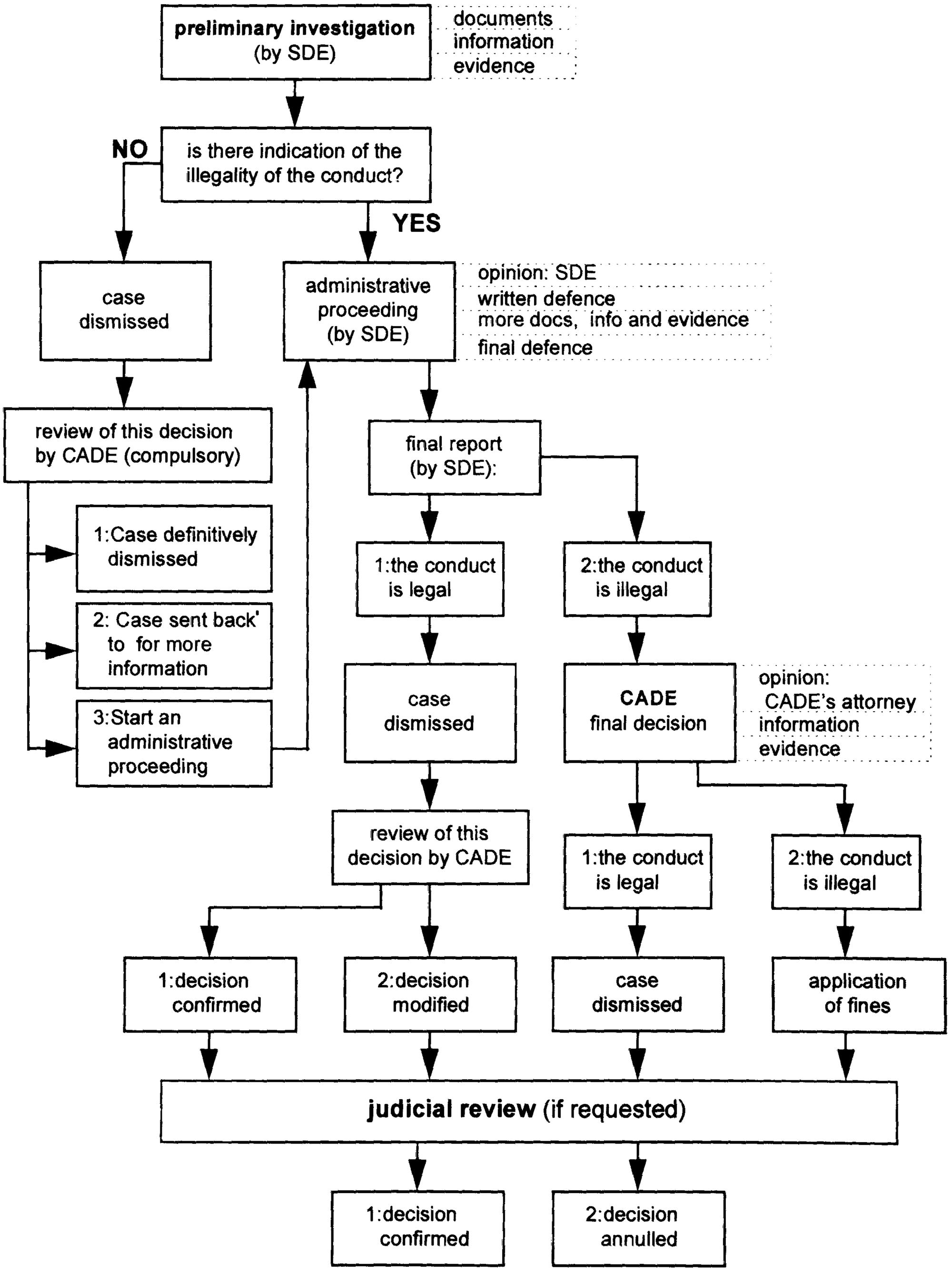

1
2
penalties applied by SDE
case submitted to CADE for final decision
the conduct is legal
case dismissed
appeal to the Minister of Justice
the conduct not is legal
suspend the penalty
maintain the penalty
application of penalties
appeal to the Minister of Justice
decision annulled
judicial review (if requested)
decision confirmed
case dismissed
decision confirmed
decision anulled

Figure 2 - PROCEDURE IN ADMINISTRATIVE PROCEEDINGS - LAW 8884/94



One of the issues that makes the procedure more complicated and lengthier is related to the start of the case. Both laws establish that any person - which includes SDE or any governmental body - can require SDE to commence an investigation of a conduct that may be anticompetitive. However, Law 8884/94 determines that this requirement has to be well based.

This provision puts an end to the anonymous denunciations that were sent to SDE before the enactment of Law 8884/94. They usually took the form of a typed letter, where in only a few lines the anonymous plaintiff would affirm that one or more companies were adopting types of conduct that caused anticompetitive effects in the market, but without sending any evidence or document proving it. SDE never paid much attention to these anonymous denunciations anyway, and usually dismissed the case on the basis that there was no proof and that it was not possible to contact the plaintiff to request more information. Nevertheless, this kind of denunciation usually took some time that could have been employed in a more productive activity. On the other hand, in the event of the anonymous denunciation being from a person who is involved in the activities of the company, the anonymity bestows protection from retaliation and is therefore useful in certain circumstances.

However, by establishing that any person can complain to CADE about restrictive practices, the law is extending the enforcement of competition law to third parties. Thus, the role of enforcer of the law is not circumscribed to the administrative agencies only.

Another characteristic of Law 8884/94 that brought flexibility to the procedure is that it establishes the limits and defines what must be done in the preliminary investigations. Preliminary investigations are the investigation conducted by SDE where all the documents, evidence and information related to the alleged anticompetitive practice are to be gathered. Law 8158/91 was very confusing about the preliminary investigations, making SDE decide about the legality of the conduct three times during the investigation, which only complicated the procedure.

Law 8884/94, on the other hand, eliminated it. It establishes that the purpose of the preliminary investigation is to find out whether there is an actual reason for the commencement of an administrative proceeding. It follows that the investigation has just a fact finding nature. It is only after SDE has gathered all the elements that the head of SDE will decide if the case will be dismissed or transformed into an administrative proceeding.

Law 8158/91 never established when an administrative proceeding should start, which brought uncertainty to the parties that were involved in the cases. If the law did not give a clear guidance in this matter, the same happens in relation to the analysis of the cases. SDE did not follow the same pattern always. For instance, it is not possible to affirm how the preliminary investigation should be conducted. In the *AMB* case,[282] SDE skipped the preliminary investigation and commenced the case as an administrative proceeding. It did not even request the opinion of SNE,[283] though there were reports from DPDE.

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[282] PA 61/92 - *Federação Nacional das Empresas de Seguros Privados e Capitalização v. AMB - Associação Médica Brasileira*

[283] *SNE - Secretaria Nacional de Economia* (National Office of Economy) was a body of the Ministry of Economy that had a similar role to that of SEAE.

In the *Coldex* case,[284] on the other hand, the preliminary investigation was conducted in a more careful way. DPDE requested extra information from the company that complained of the act in question, and required the company under investigation to present its estimate of costs as well as invoices. DPDE made an analysis of all the information gathered before it concluded that the administrative proceeding should be commenced. However, SNE's opinion, with information about the companies, their sales and annual turnover, as well as with a survey with their clients, arrived at DPDE only after the administrative proceeding had commenced.

In yet another case, the *Private Schools* case,[285] the complaint was made by the Department of Justice of the State of São Paulo, after which DPDE required information from those under investigation and then in a technical opinion concluded that the conduct was an offence and determined the commencement of the administrative proceeding. This shows that the procedure of both the preliminary investigation and the administrative proceeding overlapped.

In other investigations, SDE did not know what to do with the case. For instance, in a preliminary investigation where the Minister of the Economy accused Autolatina (a joint venture between Ford and Volkswagen) of increasing prices above inflation, one has the impression that SDE lost control of the case, because it passed from hand to hand in the Ministry of Economy and in the Ministry of Justice. At the end the Legal Adviser to the Minister of Justice, who had no jurisdiction in this

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[284] PA 40/92 - *Ind. e Com. de Evaporadores Refrio Ltda. v. Coldex Frigor Equipamentos S.A.*
[285] PA 121/91 - *Ministério Público do Estado de São Paulo v. Sindicato dos Estabelecimentos de Ensino no Estado de São Paulo e outro.*

matter, ordered that the case should be dismissed and shelved, which was done by SDE.[286]

Law 8884/94, in its turn, is clearer. The administrative proceeding starts with the decision of the head of SDE, when the preliminary investigation shows that there is an indication that the conduct may be anticompetitive. During the administrative proceeding, SDE will write its own opinion about the case, gather more documents, information and evidence if it thinks it is necessary, and ask the party to present its final defence.

Based on all these elements, SDE will write its final report, deciding on the legality or illegality of the conduct. If illegal, the administrative proceeding goes to CADE for a final decision. This is a point where the two laws diverge. According to Law 8158/91, once the administrative proceeding went to CADE, the only thing to do was to submit it to the board for the final decision, which should be based only on what SDE had found out. CADE had no power to adopt measures to clarify issues that it understood SDE had left unclear.

Law 8884/94, in its turn, establishes that CADE may request more information and documents if it understands necessary. In a way, this new provision stretched even more the procedure; however, it prevents CADE from having to decide based on partial information only, which gives the whole procedure a fairness that is necessary in any proceeding, be it administrative or judicial. According to Law 8884/94, CADE

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[286] Representação 183/90 - *Ministra da Economia v. Autolatina*

also has to request its attorney to write an opinion, and it is only then that the case shall be finally decided.

The comparison made so far between the two laws shows that there was an improvement from the previous to the present law. Though the procedure is still rigid, the new law made it more flexible. This rigidity is not a negative aspect, if we take into account that it provides a degree of certainty in relation to the steps of the proceedings, leaving the parties to worry only about the merits of the case. The flexibility in itself is an achievement that will probably make the proceedings speedier.

These positive aspects, however, are still on the theoretical ground; until March of 1996 CADE had not decided any case of restrictive business practices that had started after the enactment of Law 8884/94. The reason is that CADE still has a great number of proceedings that are waiting to be decided, so it will take some time until the outcome of the new cases are known. For instance, as for March of 1996, when the term of office of the members that formed CADE's previous composition finished, there were 244 cases (not including acts of economic concentration) at CADE that had not yet been decided.[287]

One drawback in the flexibility of the proceedings is related to the appeals provided by the laws against CADE's and SDE's decisions. Also in relation to this issue the two laws diverge. Law 8158/91 allowed appeals to the Minister of Justice on every decision that CADE or SDE adopted, which made the process very slow. However, these cases show that the parties appealed to the Minister almost only

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[287] in *Relatório Mensal de Andamento de Processos,* CADE, 01.03.96.

against CADE's decisions. On the other hand, Law 8884/94 does not permit any kind of administrative appeal against the decisions of both CADE and SDE. It only provides for a review, to be carried out by CADE, of SDE's decisions to dismiss the cases. It follows that the proceedings are likely to speed up in the future.

However, CADE's decisions are subject to review by the courts. As it was seen in subsection 2.2, the Brazilian administrative system adopts the rule of judicial control, according to which every act adopted by the administration can be reviewed by the courts. As CADE's decisions are administrative acts, they are subject to review by the judiciary.[288] Though this is necessary to avoid abuse of power by the administration, it certainly holds back the progress of the case. In Mexico, for instance, the judicial review of competition cases is limited, as only *CFC - Comision Federal de Competencia* (Federal Competition Commission) has jurisdiction to review its own acts - the courts are left only to determine if this review shall occur or not. However, there is a procedure in Mexico called *juicio de amparo* (writ of protection), which may be used to challenge CFC's decisions, as it is a protection of individual guarantees provided under the Constitution against acts or laws adopted by government authorities.[289]

Changes also occurred in relation to the procedure in acts of economic concentration. Under Law 8158/91, these acts should be submitted to SDE at most 30 days after they were formalised. This is as far as the law went - it did not provide for any procedural rule in that matter. This means that there was no rule to be followed by

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[288] on a discussion about the role of the judiciary in competition matters, see below, section 5.
[289] Garcia-Rodrigues, S., "Mexico's new institutional framework for antitrust enforcement, *De Paul Law Review*, vol. 44, Summer 1995, p. 1175.

SDE. As SDE itself was not very well organised, the control of acts of economic concentration was chaotic.

A clear picture of what used to happen with these cases at SDE is given by the *Gillette* case.[290] In 1992 Gillette do Brasil submitted to SDE a consultation where it inquired about the possibility of acquiring Wilkinson Sword da Amazônia, as part of an international transaction. Negotiations between Gillette and SDE were carried out and, before the transaction was approved at SDE, Gillette started the process of acquisition. As a matter of fact, SDE did not reach a decision at any time in this consultation. At a certain point, when replying an inquiry made by the Minister of Justice, the head of SDE wrote that the approval of the transaction was conditional to the compliance with a commitment undertaken by Gillette. However, there is no document, order or decision that says so. It was only six months after the acquisition was formalised that SDE wrote a statement saying that there was no reason to prevent the transaction.

With the enactment of Law 8884/94, an attempt was made to transform the control of acts of economic concentration into an efficient system (see figure n. 3). The jurisdiction to approve these acts was then transferred to CADE, while SDE's duties included only gathering documents and information related to the merger in question, requesting an opinion from SEAE, and writing its own opinion. When this is done, the case goes to CADE, and is distributed to one of the commissioners, who shall ask for more documents and information, carry out a hearing, request an opinion from CADE's attorney, and write a report on the case. The case is then submitted to

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[290] Consulta 03/92 - Gillette do Brasil e Cia. Ltda.

CADE's board of commissioners for approval or rejection of the act. In case of rejection, the company may ask CADE to review its own decision, but no other administrative appeal is allowed. However, as an administrative act, this decision is subject to judicial review as well.

A positive feature of this procedure is that the deadlines established by the law are quite strict, which allows for a rapid ~~progress~~ processing of the case and therefore a prompt decision. When a merger case arrives at SDE, SDE first asks SEAE to write its opinion. SEAE has 30 days to do so. Then SDE has other 30 days to write its own opinion. The case goes to CADE, which has 60 days to decide about the act. This deadline, however, is suspended while CADE waits for the parties to send the documents and information required. This procedure is very speedy. In average, a case dealing with an act of economic concentration takes 10 months to be decided. The quickest case was the *Brasilit* case,[291] spending only 3 months at SDE and CADE; the longest was the *Gerdau* case,[292] which took CADE 18 months to reach a decision.

Deadlines have also improved in relation to the administrative proceedings. A feature of Law 8158/91 was that deadlines were imposed only on the parties and on CADE, not on SDE. It follows that SDE could take as long as it wanted to carry out its duties. Once the administrative proceeding arrived at CADE, a decision should be given in 120 days, but this period could be extended for more 90 days. In this way, it would take on average about two years and a half between the complaint of the allegedly anticompetitive conduct and its final judgment at CADE.

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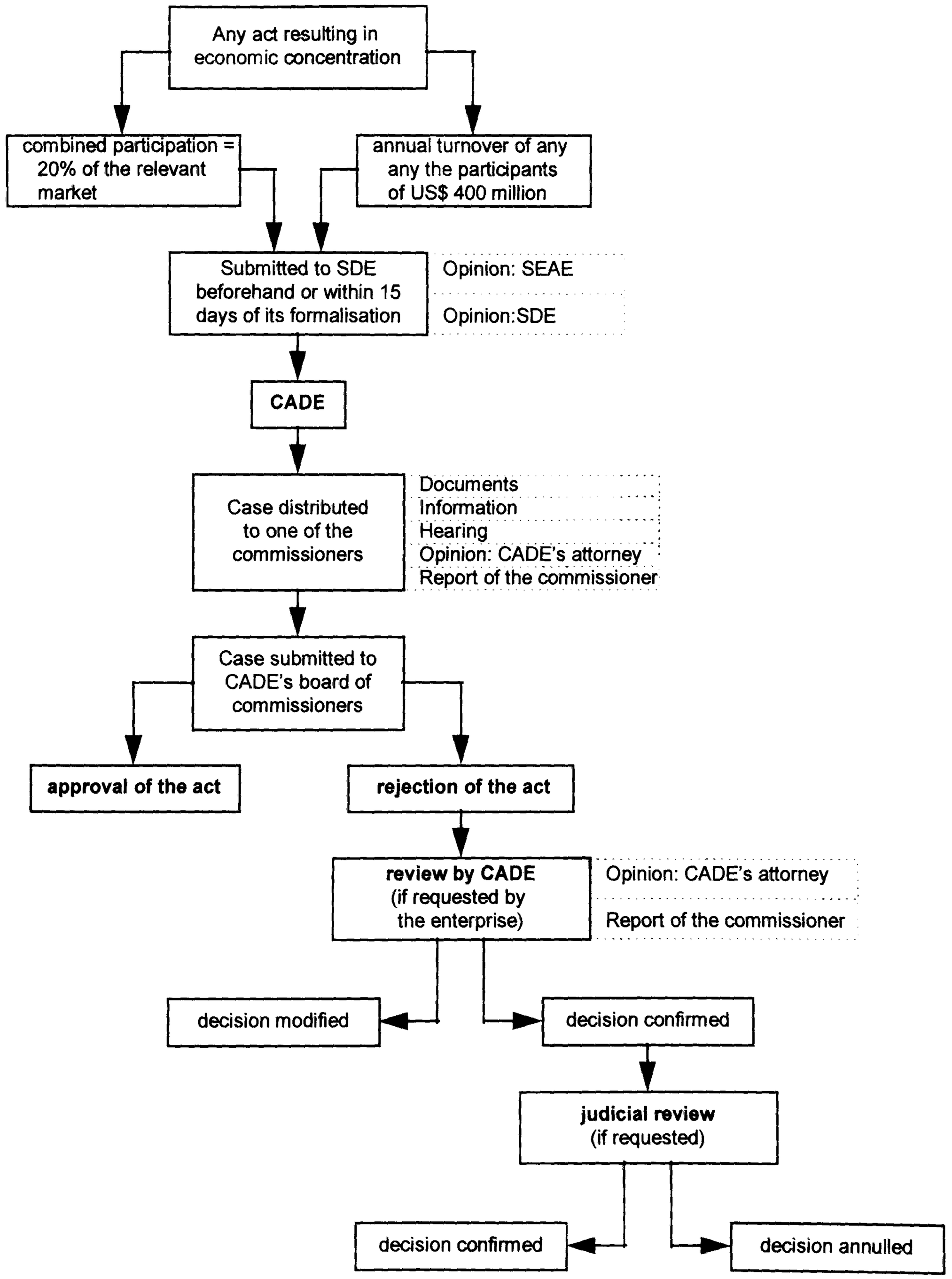
[291] AC 06/94 - Brasilit S.A. and Eternit S.A.

Figure 3 - ACTS OF ECONOMIC CONCENTRATION UNDER LAW 8884/94



[292] AC 16/9 - Siderúrgica Laisa S.A. and Grupo Korf GmbH..

The minimum amount of time it has ever taken for a case to be decided was one year, in the *Aché* case;[293] this case, however, was one of a series of similar cases where the President of the Republic accused the pharmaceutical industry of retaining medicines in order to push for price liberalisation.[294] As they were similar, once one of them was decided, the others just had to follow suit, this being the reason for such a speedy case. The maximum period of time a case has spent between SDE and CADE was four years and nine months, in the *Purina* case,[295] another case of disorganisation at SDE, which was not able to make up its mind about the right procedure to be followed.

These long periods of time to reach a decision about the legality of a conduct are likely to decrease with the present competition law, because it establishes deadlines not only for the parties but also to CADE and SDE. Moreover, these deadlines are not long. SDE has 60 days to make the preliminary investigation. During the administrative proceeding, the parties have the right to defend themselves only twice, first in the beginning and then in the end. Between these two defences, SDE has 45 days to gather more information and documents, but this period may be extended for more 45 days. Once at CADE, the commissioner has 20 days to write its opinion, but the law does not impose any deadline for CADE to reach a decision on the case.

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[293] PA 12/91 - *Presidente da República v. Laboratório Aché.*
[294] see below, Chapter 5, for an analysis of these cases.
[295] PA 08/91 - *Tsunehiko Higuchi v. Purina Nutrimentos Ltda. and Sul Mineira Alimentos S.A.*

5. Role of the courts in the implementation of competition law

Law 4137/62 established that CADE's decisions should be executed at the federal courts when they were not complied with voluntarily. Under that law CADE had the authority or discretion to require the courts to appoint an intervene in the company, in order to make sure that the company complied with the decision. Law 8884/94 retained these provisions. Compliance with the decisions has to be sought at the federal courts. Hence the system created by competition law is bipartite, where investigation and judgment of abuse of economic power are made in the administrative sphere, while execution of the decision is made in the judicial sphere if the company does not voluntarily comply with CADE's decision.

As it was seen above,[296] the system adopted in Brazil is that of judicial control, according to which every one is subject to the jurisdiction of the judiciary. This is established in the Constitution, which determines that it is not possible to exclude from judicial control any kind of injury or threat of injury.[297] This implies that every act of the administration, be it the direct or the indirect administration, is under the control of the judiciary, and the hierarchy of the administrative body that performed the act does not matter. In this way, the judiciary has the power to review every act of the administration, determining if the administration acts in accordance with the law (control of legality) and within its jurisdiction (control of legitimacy).[298]

Consequently, any person who believes that harm or injury has been caused by an administrative act can go to the courts to require the annulment of the act and even

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[296] see supra, subsection 2.2.
[297] Article 5, XXXV, Federal Constitution of 1988.

seek compensation. Thus, the company under investigation may go to the courts if it understands that the decision adopted by CADE in an administrative proceeding is illegal. The courts will deal with CADE's decision as the administrative act that it is. Therefore, the judiciary will only be able to annul the decision when it is not legal.

The illegality occurs when the decision is not in accordance with the law, or when it is the result of abuse of power. The courts cannot pass a judgment on the administrative ground of action, that is, on the convenience, efficiency or fairness of the decision; on the contrary, they have to circumscribe themselves to the pertinence and formality of the decision. In that way, the courts can only examine the existence of the facts, the veracity of the motives, and the submission of the basis of the decision to the law.[299] This means that the courts cannot examine the merits of the case.

One example of this review by the courts is the appeal in an execution of a decision where CADE had imposed a fine. The party did not voluntarily pay the fine, so CADE send the decision to the judiciary in order to be executed. The federal court of appeal reasoned that the decision did not define what was the violation committed by the party. Accordingly, there was no proof that a violation had occurred. Therefore, the federal court of appeal annulled the fine imposed by CADE.[300] This case shows that the lack of definition in relation to the allegedly illegal conduct in the administrative proceeding is enough to annul the decision, since it is not possible to condemn something that one does not know what it is. The court did not state whether

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[298] Meirelles, supra n. 250, p. 610/612.

[299] Meirelles, H.L., "Parecer", in Franceschini, J.I.G. and Franceschini, J.L.V.A. *Poder Econômico: Exercício e Abuso,* Ed. Revista dos Tribunais, São Paulo, 1985, p. 552/561.

[300] AC 418929/89, TRF 4ª Região

the conduct was fair or not, it just ruled that CADE did not define the conduct and therefore it was not possible to determine if it was legal or not.

However, the majority of the cases submitted to the federal courts that involve CADE are not about execution of CADE's decisions but about procedural matters. In one of these cases, the court ruled that CADE has jurisdiction to investigate the existence of abuse of economic power and therefore that the judiciary cannot prevent the exercise of this activity but only restrain any illegal act that CADE may adopt.[301] In another case, the federal court of appeal ruled that injunction is not the appropriate way to suspend an administrative proceeding.[302] Also, it has been decided that SDE could not impose a preventive measure on the party under investigation, as the application of fines was under CADE's duties; SDE had power only to investigate the case.[303]

It follows that the federal courts have not been asked to execute the decisions adopted by CADE, but only to decide matters related to procedural rules. There are two reasons for it. On one hand, the parties may have been voluntarily complying with CADE's decisions, which makes recourse to the judiciary unnecessary. On the other, the parties may not comply with the decisions, but the number of attorneys allocated to CADE was so limited - usually only one - that they were not able to carry out their duties, which includes sending to the judiciary the decisions that have not been complied with. These two factors together explain the lack of competition related cases in the judiciary. However, the number of attorneys allocated to CADE has been increasing, and nowadays CADE has about 20 attorneys, which means that

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[301] AMS 98627, TFR

the federal courts are likely to receive more requirements to execute CADE's decisions.

This situation poses one question: how will this interference of the courts affect the implementation of competition law? Up to now very few cases have been submitted to the courts, which makes difficult to answer it based on past cases. However, it is possible to make some considerations in that respect taking into account the behaviour of the judiciary in general. A more obvious consequence would be that the cases would be lengthier, making the enforcement of competition law not quite effective. If a case takes in average two years to be decided at the administrative level, with the submission to the courts two years more would be needed, though the law establishes that the execution of CADE's decision has priority over the other cases, except habeas corpus and injunction.[304]

The enforcement of competition law would be even more ineffective if we take into consideration that the decisions adopted at the administrative level have been frequently challenged at the judiciary. This has happened in relation to execution of fines imposed by SUNAB, the administrative agency responsible for price control, as well as to different kinds of taxes created by the government, among other issues. The reason for this challenge being usually successful lies in the fact that the administration is not very careful in relation to the legalities of its actions, which makes possible the annulment of the action based on a non compliance with the requirements established in the law governing that matter.

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[302] MS 3461/94, STJ

It is obvious that, if the administrative act respects all the provisions of the law, the courts are not able to annul or modify it. It follows that, by being cautions and giving attention to every aspect of the case, that is, by establishing the conduct adopted by the economic agent, determining the provision of the law that is being violated, giving the party the chance to defend itself, and complying with all the provisions of the law, including especially the procedural rules, the chances of CADE having its decision annulled will be small.

6. Conclusion

From what has been discussed in this chapter we can draw some conclusions in relation to how competition law has been implemented and the problems derived from it. One of the issues is concerned with the administrative system created for this purpose. Though CADE exists for more than 30 years, the system is not firmly established. The option for an administrative system, as opposed to the judiciary, seems to be definitive, but the way this system is to work is still uncertain. A proof of this lack of definition is the present proposition of transforming CADE, SDE and SEAE in one single autonomous agency to deal with competition. If this does not work out, it is very likely that new changes shall be made, because up to now the government has not shown the ability to create one system and support it for some time, until results can be seen.

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[303] AMS 106732/90, TRF 1ª Região
[304] Article 68, Law 8884/94.

This instability is a negative aspect in the implementation of the law, because it leads to uncertainty among the economic agents. What is necessary to do is to decide for one system and provide it with the means to perform well, without constantly trying to implement changes.

Still in relation to the administrative system, we can reason that the rivalry that exists between CADE and SDE is another aspect that contributes to the ineffectiveness of the law. These two agencies were created with the purpose of working together in order to avoid that anticompetitive conduct be adopted, so that abuse of economic power does not occur in the market. In this way, CADE and SDE should complement each other in order to achieve the objective they have in common.

This rivalry, as well as the instability of the administrative system, is the result of a lack of political will to implement the law. For almost 30 years CADE had only a pro forma role in the enforcement of the law, as it existed but did not have frequent chances to act. By recognising the importance of competition in the market, the government would give the administrative system for the protection of competition the necessary strength to efficiently carry out its duties, which would thus make unnecessary these constant changes in the institutions that are part of the system. It is imperative that CADE be given the chance to develop its work and thus create a case law on competition. Only after this will the law be properly enforced.

The implementation of the law is not affected only by the inefficiency of the system created for the protection of competition. As part of the administration, this system can suffer from the drawbacks inherent to the public administration, such as

bureaucracy, as discussed in subsection 2.2. Another drawback in the implementation of competition law is related to the lack of expertise of the personnel of the agencies. This lack of expertise contributes to the inefficiency of the system, because it holds back the development of the cases, as well as makes the outcome of these cases uncertain.

The factors discussed here - lack of political will, inefficient public administration, instability of the system, rivalry between the agencies, and lack of expertise - show that the system adopted to implement competition law is far from being ideal. Nevertheless, this does not mean that it is not likely to succeed in the future, as the problems found in there can be solved, as long as there is support from the government. We have to bear in mind that protection of competition is a relatively new issue in Brazil, which means that the development of competition is still in its infancy and therefore is supposed to make mistakes in order to find the best solutions for its problems.

However, CADE cannot forget that it has a role to perform in the implementation of the law, which has to be done notwithstanding these drawbacks of the public administration. Accordingly, being created as a board of commissioners to decide cases on competition, CADE has been given the opportunity to foster impartiality in the decision-making process, which must be pursued without hesitation.

An improvement has already occurred in relation to the procedure. As seen in section 4, there was an evolution from Law 8158/91 to Law 8884/94, as the latter not

only simplified but also clearly defined the procedural rules, as well as decreased the deadlines in both administrative proceedings and acts of economic concentration. As already pointed out, it is still not possible to see the results of these changes in relation to the administrative proceedings, as during the period of this research CADE had not yet decided any of the cases submitted after the enactment of Law 8884/94. However, the changes can be felt regarding acts of economic concentration, which are now dealt with in a more organised manner, resulting in less time consuming cases.

A doubt remains in relation to the role of the judiciary in the decisions adopted by CADE. As discussed above, few competition related cases have been submitted to the courts, which makes difficult an analysis of the approach adopted in these cases. It follows that it is not possible to assess the effect the judiciary may have on the implementation of competition law. However, it is not unlikely that the judiciary revert the decisions adopted by CADE.

On the whole, notwithstanding the drawbacks discussed here, the framework created for the implementation of competition law, be it in relation to the institutions or to the procedure, is ~~feasible~~ workable. The administrative system for the protection of competition can work in an efficient manner if there is support from the government. The procedure may give the impression of being complex, but it has already been simplified and is likely to be effective. Regarding the implementation of competition law, it is possible to argue that the legislation has created an institutional framework that is well structured and may perform well as long as there is political will to do so. The only problem is how the judiciary will affect competition law, and this is a serious problem, because the courts have the power to revert the decisions adopted by

CADE, and therefore are capable of rendering ineffective all the work developed by the administrative agencies. However, it is not possible to exclude the judiciary from this process, since Brazil adopts the system of judicial control of administrative acts

CHAPTER 4 - RESTRICTIVE PRACTICES: CADE'S APPROACH

1. Introduction

As discussed in Chapter 4, according to Brazilian competition law there are two kinds of business activities that are likely to affect competition and therefore should be submitted to the administrative agency with jurisdiction in these matters, CADE. One of them are acts of economic concentration, which comprise any kind of merger or acquisition that results in an increase in the economic power of a company. How CADE deals with acts of economic concentration is the subject of Chapters 6 and 7.

This chapter will deal with restrictive business practices, the other type of business activity that may impair competition. A restrictive, or anticompetitive, practice "refers to a wide range of business practices in which a firm or group of firm may engage in order to restrict inter-firm competition to maintain or increase their relative market position and profits without necessarily providing goods and services at a lower cost or of higher quality".[305]

The purpose of this chapter is, by investigating the application of competition law in practice, to contribute to the identification of the approach towards competition developed by CADE. This will be done through the analysis of cases on restrictive business practices, which have never been done before in Brazil.[306] The question to be answered in this chapter is: what does CADE seek to achieve when deciding cases concerning anticompetitive practices? In order to answer this question, it is necessary to define the main approaches developed in the debate on how competition can achieve consumer welfare.[307]

On one hand there is the efficiency approach, according to which competition law should seek efficiency, both allocative and productive.[308] Thus, when examining restrictive practices, competition authorities should have in mind that, even if it impairs competition, a restrictive practice should be allowed, as long as it results in efficiency. On the other hand, the social approach understands that competition should be used to achieve social goals, such as the protection of small companies, maintenance of employment, and income distribution.[309] In the middle of these two approaches we can find the competitive approach, according to which competition law should protect the competitive process.[310] There is a concern with efficiency, but

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[305] in Khemani, R. S., and Shapiro, D. M., *Glossary of Industrial Organization Economics, Competition Law and Policy Terms*, OECD, Paris, 1991.

[306] as mentioned in the Introduction, section 5, there are no studies, commentaries or systematic analysis of the cases decided by CADE, which means that references cannot be made to such studies throughout the development of the next two chapters.

[307] see Chapter 1, subsection 3.3.

[308] see Posner, R.A., *Antitrust Law - an Economic Perspective,* Chicago, The University of Chicago Press, 1976; Bork, R.H., *The Antitrust Paradox,* New York, Basic Books, 1978; Shepherd, W.G., "Three 'efficiency school' hypotheses about market power", *The Antitrust Bulletin,* vol. 33, Summer 1988; Posner, R.A., "The Chicago School of Antitrust Analysis", *University of Pennsylvania Law Review,* vol. 127, 1979, p. 925/928

[309] Baker, D. and Blumenthal, W., "Ideological cycles and unstable antitrust rules", *The Antitrust Bulletin,* vol. 31, Summer 1986, p. 324.

[310] Fox, E., "The modernization of antitrust: a new equilibrium", *Cornell Law Review,* vol. 66, 1981, p. 1140/1192

not as an end in itself. Efficiency, as well as social goals, are considered positive only when they do not disturb the competitive process.

Having this debate in mind, this chapter will attempt to establish whether CADE has been developing a coherent approach towards restrictive practices, and, if the answer is positive, which is this approach. In the case of a negative answer, we will try to delineate CADE's main concerns in this issue, in order to determine a possible future development in relation to CADE's approach. This chapter will be based on the analysis of five cases concerning four types of restrictive practices: price-fixing, exclusivity agreement, tie-in sale and predatory pricing, which were decided between March of 1993 and March of 1996.[311] Thus, section 2 will provide an overview of the legal provisions regarding restrictive practices, while section 3 will show the context within which the application of competition law is applied. Section 4 will be directed to the analysis of the cases themselves.

The analysis of anticompetitive practices in Brazil requires the inclusion of cases dealing with the issue of price control, even though they are not usually regulated by competition law. The reason lies in the fact that price control cases were submitted to CADE during the period investigated here. However, for the sake of clarity, this analysis will be carried out in the next chapter.

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[311] PA 53/92 - *Ministério Público do Estado de Sergipe v. Associação dos Hospitais do Estado de Sergipe;* PA 32/92 - *SNDE v. Valer Alimentação e Serviços Ltda;* PA 23/91 - *Repro Materiais e Equipamentos de Xerografia e outros v. Xerox do Brasil S.A*; PA 01/91 - *Interchemical Ind. e Com. Internacional Ltda. v. Sharp Ind. e Com. Ltda*; and PA 40/92 - *Indústria e Comércio de Evaporadores Refrio Ltda. v. Coldex Frigor Equipamentos S.A.*

2. Abuse of economic power - overview of the legal provisions

Before starting the discussion on the legal provisions, it is necessary to recall that the development of competition law in Brazil evolved around three laws: Law 4137/62, Law 8158/91, and Law 8884/94. The first one covered the period between 1962 and 1994, while the second was in force between 1991 and 1994. In June of 1994, the first two laws were abrogated by Law 8884/94, which is the competition law in force now.

From 1962 to 1991, the period when only Law 4137/62 was in force, 81 administrative proceedings (PA) were submitted to CADE. It was only after the enactment of Law 8158/91 that the number of cases increased. From 1991 to 1994, 123 PAs were submitted to CADE. However, until March of 1996 only 25 of these 123 cases were decided. The law applied to these 25 cases were Laws 4137/62 and 8158/91, because by the time that the conduct under analysis occurred, Law 8884/94 was not yet in force (Table 2).

Accordingly, until March of 1996 none of the types of conduct that occurred under Law 8884/94 had yet been analysed by CADE, since the investigations are quite time consuming. It follows that this chapter will have to focus on the approach towards restrictive practices adopted by both Laws 4137/62 and 8158/91. Overall the substantives issues are very much the same in all the laws. Therefore the analysis of the cases is not hindered. The main characteristics of Law 8884/94 have already been discussed in Chapter 2.

Table 2 - CASES SUBMITTED AND DECIDED BY CADE UNDER LAWS 4137/62 AND 8158/91

	Cases submitted	Cases decided
Law 4137/62 (1962/1991)	**81**	**79**
Laws 4137/62 and 8158/91 (1991/03.1996)	**123**	**25***
TOTAL	**204**	**104**

Source: author's research at CADE

2.1 Law 4137/62 - Article 2

Law 4137/62 established five main types of abuse of economic power[312] (Figure 4). According to the first type, any conduct that created any kind of difficulty to one company could be considered an abuse of economic power, as long as it resulted in market domination or partial or total elimination of competition. The same would happen with any kind of agreement between companies that achieved the same result. For instance, an agreement between competitors to fix prices could be inserted in that type.

The second type considered an abuse to increase prices without a sound justification in cases of monopoly, with the purpose of increasing profits in an arbitrary manner, without increasing production. This means that any increase of price that was not based on costs would be considered an abuse of economic power, provided that it was in the context of a monopoly.

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[312] Article 2, Law 4137/62.

The third type of abuse was also related to prices: creation of "monopolistic conditions"[313] or abusive speculation which had as its purpose the temporary increase of price through the destruction or retention of production or consumer goods, or the use of artificial ways to make prices oscillate. The difference between the second and the third type was that, in the former the act had to be exercised by a company that had monopoly power, while in the latter the company did not necessarily have to be a monopolist.

Another type of abuse established in the law was the creation of an economic group through aggregation of companies. The law established two ways through which this could be achieved. While the first way involved price and service discrimination, the second involved the subordination of a good or service to the acquisition of another good or service. However, these two practices would only be considered an abuse if as a result an economic group was formed. It follows that price discrimination and tie-in sales imposed by a monopolist would not be considered an abuse of economic power. As it is, this provision is practically redundant, because the possibility of a tie-in sale resulting in an economic group is highly improbable, since this kind of conduct is usually performed by one single company alone. The same happens in relation to price discrimination, which is a way to yield or protect the monopoly power of a company. Both price discrimination and tie-in sales are a kind of vertical restraint, that is, a restrictive conduct imposed not at the same level of production but by the seller on the buyer or vice versa. It follows that the effects of vertical restraints may be impairing competition, but not necessarily forming economic groups.

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[313] Law 4137/62 defined "monopolistic conditions" as those circumstances where a company or a

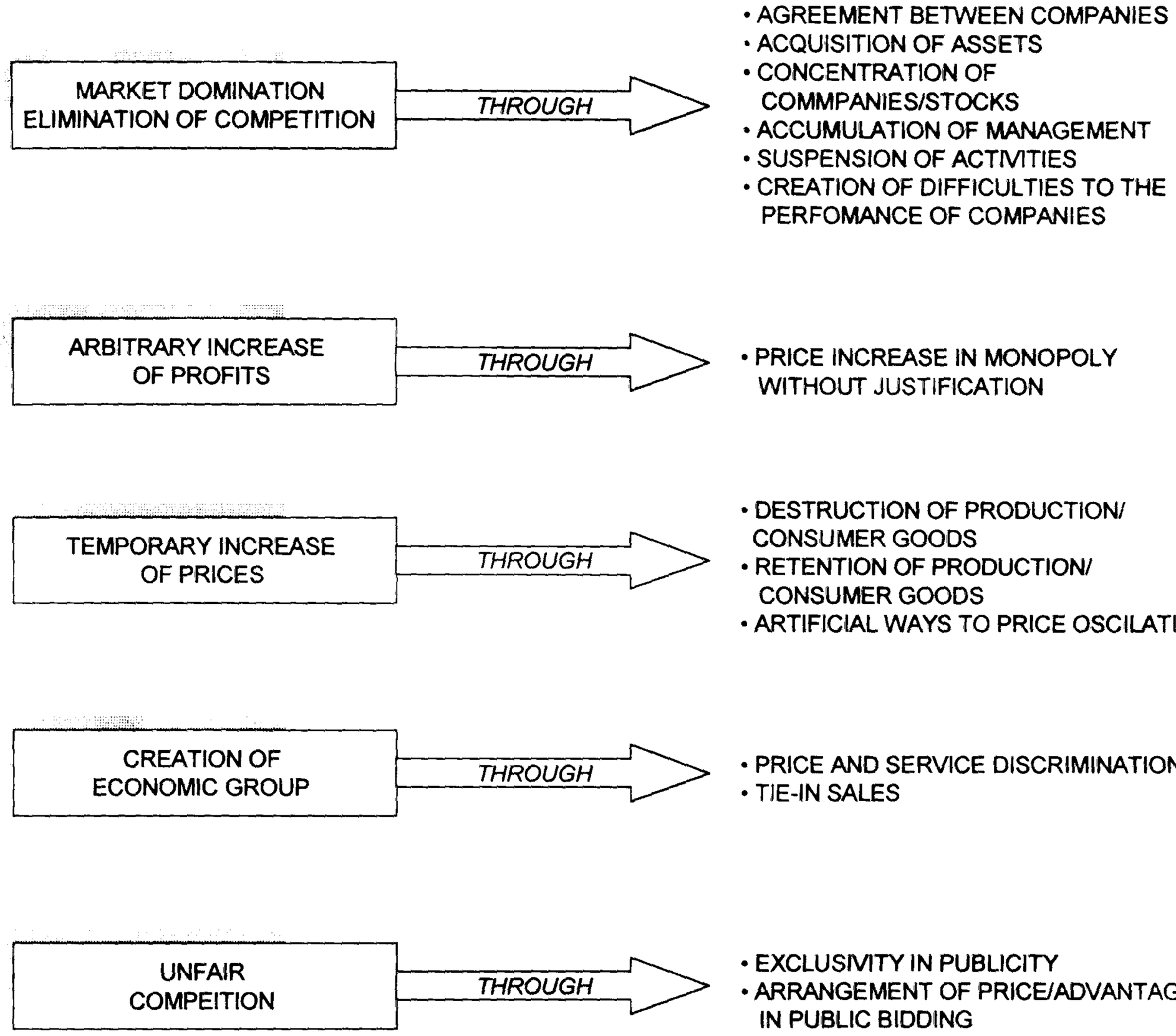
Finally, the last type of abuse was unfair competition through exclusivity in publicity and previous arrangement of prices or advantages in public bidding. This provision in an antitrust law is quite peculiar. It is obvious that legislators see unfair competition as anticompetitive, but it is not so clear why it is an abuse only unfair competition imposed through exclusivity in publicity and price fixing in public bidding.

The only conclusion to be drawn from this brief examination of Law 4137/62 is that it mixed general practices with specific practices and misunderstood several concepts, thus making difficult its application in practice.[314]

group of companies controls production, distribution and sales of a product or service in such a way that it preponderantly influences prices (article 5).

[314] The legislative history of Law 4137/62 provides an explanation for this mishmash of antitrust issues. The bill of the law spent 14 years in Congress, and thus was submitted to several amendments. One of them referred to the types of conduct that were considered abuse of economic power, which were more coherent in the original bill. For instance, the bill defined as abuse of economic power any kind of agreement between companies or persons linked to these companies that has as effects, among others, the elimination of competition, obstruction of distribution or production, and exclusivity of production or distribution. Another illicit conduct was the acquisition of assets or stocks of companies when it resulted in elimination of competition or exclusivity of production or distribution. Mergers would also be illegal if it had those same effects.

Figure 4 - TYPES OF ABUSE OF ECONOMIC POWER - LAW 4137/62



2.2 Law 8158/91

As seen in chapter 2, a new competition law was enacted in 1991. One of the reasons for the creation of a new law was that the 1988 Constitution required that the law should prevent the abuse of economic power whose purpose was market domination, elimination of competition and arbitrary increase of profits.[315] Moreover,

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[315] Article 143, paragraph 4, 1988 Constitution.

a new law was necessary to follow the transition from a controlled and regulated economy to a liberal economy.[316] So Law 8158/91 was enacted. However, as Law 8158/91 did not abrogate Law 4137/62, both laws were in force at the same time. In relation to the substantive issues, this did not constitute a problem, because Law 8158/91 did not conflict with Law 4137/62.[317]

It is possible to argue that Law 8158/91 was clearer in relation to restrictive practices. Basically, there were two provisions that dealt with the issue. First, it established that SDE should prevent the occurrence of six distortions in the market:

a) prices fixed below cost, as well as sales and production fixed in an artificial manner;

b) barriers to entry;

c) obstruction of access to raw materials, technology or distribution;

d) market division;

e) supervision of net of distribution or supply; and

f) formation of economic groups.[318]

This provision determined that SDE's role had also a preventive nature, in the sense that the agency had to be attentive to what was occurring in the market, in order to prevent those distortions from happening.

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[316] Salgado, L.H., "Politica da concorrência: tendências recentes e o estado da arte no Brasil", *Texto para discussão n. 135*. IPEA, October 1995, p. 17.

[317] As it was seen in Chapter 2, conflicts arose in relation to jurisdiction to implement the law, procedure and acts of economic concentration.

[318] Article 2, Law 8158/91.

On the other hand, article 3 of the law defined what constituted a violation of the economic order: any agreement of companies, act, conduct or practice whose purpose or effect was to dominate the market, harm competition, or increase profits in an arbitrary manner, even if the aims were not achieved. The article then listed 18 practices that could be a violation. This list, however, was not exhaustive, but was constituted of examples of practices, which means that any practice that produced or intended to produce the effects above could be considered a violation. Among the practices of article 3, it was included price fixing, creation of barriers to entry, market division, refusal to sell, tie-in sales, sales without profits, dumping.[319]

The comparison of the two laws shows that Law 8158/91 was more unambiguous and clearer. Any conduct that intended to produce the effects described in article 3 was a violation of the economic order. Law 4137/62, on the other hand, created a more complex system which in some cases conditioned vertical restraints to effects of horizontal restraints and vice versa. The positive aspect was that, as the two laws were in force at the same time, they complemented each other. For instance, even if a tie-in sale did not create an economic group, as required by Law 4137/62, it would still be a violation, provided that it resulted in market domination, elimination of competition or arbitrary increase of profits, because Law 8158/91 established so.

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[319] The 18 types of conduct of article 18 are: imposition of prices or condition of sales; limiting the access of new companies to the market; market division; price fixing; market regulation viewing to supervise research and technological development; creation of obstacles to investments in production of goods or services; refusal to sell; tie-in sales; interruption of business aiming to dominate the market or to create difficulties to the functioning of another company; obstructing the exploitation of industrial or intellectual property rights; abandonment or destruction of plantation in order to harm competition or obtain arbitrary profits; destruction of raw material and consumer goods as well as machinery; sale of goods without profit; dumping; concerted practices between competitors; obstructing the constitution, functioning and development of companies; taking part in associations that aimed at practices forbidden by the law; and performing or avoiding to perform acts, in agreement with competitors, that could be considered one of the practices provided for in the law.

If Law 4137/62 looked for inspiration in the Sherman Act, it seems that Law 8158/91 is based in article 85(1) of the EEC Treaty,[320] in the sense that the latter prohibits practices that result or intend to result in the prevention, restriction or distortion of competition. If we look at the competition laws of Latin American countries, we will find out that they all sought inspiration from foreign competition laws. The Mexican law, for instance, is clearly based on the American law, especially in relation to the distinction between absolute and relative monopolistic practices, which are equivalent to the American "per se" prohibition and rule of reason analysis, respectively.[321] The Argentine antitrust law, however, is influenced by the EEC law, and not by the American law, because, according to Cabanellas, the latter is based in court decisions, which is incompatible with the Argentine legal system.[322]

3. Context for the application of competition law - an overview

As already presented in the beginning of this thesis,[323] in order to assess Brazilian competition law it is necessary to have in mind four hypothesis on the

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[320] Article 85(1): The following shall be deemed to be incompatible with the Common Market and shall hereby be prohibited any agreement; between enterprises, any decisions by associations of enterprises and any concerted practices which are likely to affect trade between the Member State and which have as their object or result the prevention, restriction or distortion of competition within the Common Market, in particular those consisting in:
(a) the direct or indirect fixing of purchase or selling prices or of any other trading conditions;
(b) the limitation or control of production, markets, technical development or investment;
(c) market sharing or the sharing of sources of supply;
(d) the application to parties to transactions of unequal terms in respect of equivalent supplies, thereby placing them at a competitive disadvantage; or
(e) the subjecting of the conclusion of a contract to the acceptance by a party of additional supplies which, either by their nature or according to commercial usage, have no connection with the subject of such contract.

[321] Garcia-Rodriguez, S., "Institutional framework for antitrust enforcement", *De Paul Law Review,* Summer 1995, p. 1166/67.

[322] see Cabanellas, G. and Etzrodt, W., "The new Argentine antitrust law - competition as an economic policy instrument", *Journal of World Trade Law,* vol. 17, 1983, p. 36/37.

[323] Introduction, section 3.

adoption and enforcement of the law. According to the first hypothesis, developing countries cannot adopt models of competition law that already exist in other countries; on the contrary, it is necessary to take into account the especial needs of the country when regulating competition. The second hypothesis is that the legislation has to clearly define the approach towards competition as well as the anticompetitive practices, the acts of economic concentration and the procedure. A third hypothesis concerns the system for enforcement of the law: a institutional framework that is well structured and effective has to be created. Finally, the last hypothesis is that competition law must be inserted into a coherent economic framework.

Chapter 3 has demonstrated that all the antitrust laws ever enacted in Brazil did not adopt a particular approach towards competition. They reflected the different points of view of Congressmen representing different parties and ideologies. Accordingly, the government has not been issuing policies regarding competition. The only reason to regulate competition, from the government point of view, would then be to complement to the trade liberalisation measures,[324] which are necessary to attract foreign investment to the country. To have a competitive market would not be a goal in itself, but just an instrument to reach another aim. Moreover, the Brazilian competition laws have been including several issues that are not necessarily related to competition.

It follows that there has not been a clear guidance towards the application of the law. Though an administrative system was created to enforce the law, the competition authorities were not given a clear legal framework in which to base the

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[324] Introduction, subsection 2.1.

application of the law, which means that CADE has had to face this enormous and difficult task of developing the whole process of implementing competition law in Brazil.

The alternatives faced by CADE in relation to the approach to be adopted are various. The main goal of competition is consumer welfare, and it is possible to divide in three main approaches the several theories on how this should be achieved. The efficiency approach argues that the only way to reach consumer welfare is through practices that result in efficiency; therefore, practices that may be anticompetitive but nevertheless are efficient should be allowed. The social approach, in its turn, supports the theory that competition should include social goals, such as protection of small firms, income distribution and maintenance of employment. The third approach can be called the "competitive" approach, and it understands that consumer welfare can be achieved through the maintenance of a competitive market, which may include efficiency concerns and social goals, but only as part of the competition process.

The existence of these approaches does not necessarily mean that competition authorities should opt for one of them only and adhere to it forever. In the majority of the cases, the approach adopted reflects the political, economic and ideological situation of the country in that specific time.

The identification of the Brazilian approach to restrictive business practices necessarily includes the background to the period where the cases were decided. This period goes from March of 1993 to March of 1996. However, it is beyond the purpose of this thesis to make a deep analysis of the period in question. It will suffice to

narrow this analysis to a brief outline of the main events that occurred in the political and economic areas.

This was a time of transition in Brazil. In the political sphere, the transition was from a military dictatorship that lasted more than 20 years to a democracy. It was a gradual process that started in the mid-1980s and culminated with the presidential elections in 1989, the impeachment of the president in 1992 due to accusations of corruption, and the peaceful transfer of office to the vice-president. Since then, democracy seems to be established in the country.

In the economy, however, the situation is not so stable. In the beginning of the 1990s, as the interventionist model had proved to be ineffective, the government started to adopt measures towards the liberalisation of the economy. Thus, privatisation of State enterprises began to take place, imports were liberated, control of prices was being relaxed. The country was moving from a State controlled economy to a liberal economy. One of the major concerns of the government was inflation, which was very high at the time.[325] In July of 1994 a new economic plan, the *Plano Real*, was adopted, which sought to combat inflation and put the country again in the process of economic growth. By controlling the interests and linking the national currency to the dollar, among other measures, the government succeeded in reducing inflation. On the other hand, social problems such as poverty and unemployment have not been controlled.

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[325] For instance, the 1993 inflation was 2708.3% (source: IGP-DI)

Based on this background, one can argue that competition law was also facing a period of transition, as the changes in politics and economy were reflected in competition as well. The process of liberalisation in the economy expanded the field of action of competition law, since State intervention in the economy had not left much space for the existence of a competitive market. With the adoption of trade liberalisation measures, and the withdrawal of the State from direct interference in the market, the role of competition law becomes more important because there are now conditions for the proper application of the law, since the economic agents have more freedom of action. It is with this background in mind that the analysis of cases of restrictive business practices should be made.

4. CADE's approach to four restrictive practices

As mentioned above, during the period that both Laws 4137/62 and 8158/91 were in force, that is, from 1991 to 1994, 123 administrative proceedings were submitted to CADE. Between 1991 and March of 1996, the period to which this research is circumscribed, only 25 of these 123 cases were decided. The restrictive practices that were most often found in the cases already decided were exclusivity agreements, tie-in sales, price fixing, predatory pricing and price control. This section will analyse CADE's approach to the first four practices. Price control, as mentioned in the introduction, will be discussed in the next chapter.

Table 3 - CASES DECIDED UNDER LAWS 4137/62 AND 8158/91 UNTIL MARCH OF 1996

	DISMISSED	CONDEMNED	T O T A L
EXCLUSIVITY	02	-	02
TIE-IN SALES	-	02	02
PRICE FIXING	02	03	05
PREDATORY PRICING	02	-	02
PRICE CONTROL	04	08	12
OTHERS	02	-	02
T O T A L	**12**	**13**	**25**

Source: author's research at CADE

4.1 Price fixing

Since it was created, CADE has not seen many cases related to price fixing. One reason can be found in the policy of price control adopted by the government until recently.[326] Tables with maximum prices were issued by the price control agency, and each economic sector had to comply with it. In a situation of price control, there is little space for market rules, because the economy has to follow the rules imposed by the government. Consequently, it was not really necessary for the companies to make agreements among themselves in relation to the prices of their products or services.

From the point of view of the consumer, there would be no reason to complain of price fixing because, if the agreement existed, it would either adopt the same price of the government, which was not a rational strategy for the companies, or fix the

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[326] as seen in the Introduction, section 2.1.

price below that of the government, which could be beneficial to the consumer. What consumers were keen to complain of was those increases of price that were above inflation or that did not comply with the price tables imposed by the government.

However, with the end of price control in the beginning of the 1990s, five cases on price fixing agreements were submitted to CADE.[327] These agreements were usually proposed by unions or associations of a determined sector, as a way not only to protect their affiliates from the hazards of the economic crisis but also to gain from it.

This was the situation in the *Sergipe Hospitals* case.[328] The Association of Hospitals of the State of Sergipe prepared price tables which fixed the prices of the services rendered by the hospitals, as well as of the materials used by them. These tables were then approved and adopted by the hospitals. Because of this conduct, the Association was accused by the Department of Justice of the State of Sergipe of eliminating competition.

The defence put forth by the Association was mostly factual. It argued that the prices were not imposed, since they were adopted after discussion with the hospitals. Another argument was that the associates were not compelled to charge the exact price fixed by the Association, because, as the price fixed was only the maximum price the hospitals could charge, they were free to adopt prices below that. The

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[327] PA 109/89 - *Elmo Segurança e Preservação de Valores S.A. v. Sindicato das Empresas de Segurança e Vigilância do Estado de São Paulo e outros;* PA 53/92 - *Ministério Público do Estado de Sergipe v. Associação dos Hospitais do Estado de Sergipe;* PA 61/92 - *Federação Nacional das Empresas de Seguros Privados e Capitalização v. Associação Médica Brasileira;* PA 62/92 - *DNPDE v. Associação dos Hospitais de São Paulo.*

Association also argued that the anticompetitive practice could not be proved, as there was no evidence that the hospitals had adhered to the tables.

CADE based the analysis of the case on five major points. The first two points were related to the existence of the agreement and the necessity of proving that the hospitals had adopted the price tables. CADE held that the fact that the Association did not deny the existence of the tables proved that the agreement really occurred. Accordingly, CADE reasoned that there was no need to prove that the hospitals had adopted the tables, not only because the Association had influence enough on the hospitals to make sure that they would adopt the price tables, but also because the Association's decisions reflected the hospitals' will. The mere existence of price tables was an evidence of the anticompetitive conduct.

In order to emphasise the per se illegality of price fixing, CADE quoted the *Maricapa* case,[329] where the American Supreme Court ruled that the anticompetitive potential inherent to all price fixing agreements justifies its per se invalidity, even if pro-competitive reasons are presented.

The third point developed by CADE was the effects caused by the conduct. CADE found out that, by establishing the prices to be charged by the hospitals, the Association was intending to eliminate competition. There were two reasonings that led CADE to that conclusion. In the first place, the price tables removed the possibility of the hospitals negotiating prices and conditions of their services and materials with their clients, which means that there was no competition between the

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[328] PA 53/92 - *Ministério Público do Estado de Sergipe v. Associação dos Hospitais do Estado de*

hospitals. Secondly, the price tables made available for all hospitals the information about the prices of each other, which, according to CADE, was harmful to competition, because the uncertainty about the price of competitors is necessary to maintain competition.

CADE then proceeded to the fourth point of the analysis, the Association's argument that the prices established by the tables were maximum prices, and therefore the hospitals were free to adopt prices below that of the table. CADE held that it did not matter if the prices fixed were minimum or maximum, because the effect would always be anticompetitive, since prices would not be determined by the rules of the market. CADE used the decision of the American Supreme Court in *US v. Trenton Potteries,*[330] to point out that prices that are reasonable in the present may not be so in the future. Moreover, the Commission held that minimum prices may discourage the entry of new competitors in the market, while maximum prices may be transformed into minimum prices later.

Finally, CADE investigated whether the price tables would eventually bring benefits for consumers. It found out that the prices adopted in the tables did not correspond to the real costs of each hospital, which meant that the users of the hospitals would have access to different services but would pay the same price. Accordingly, the medical assistance companies would not benefit from the practice, as they were not able to individually negotiate prices, terms and conditions of payment with the hospitals. Price tables would then bring benefits only to the

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Sergipe, distributed to Commissioner Carlos Eduardo Vieira de Carvalho and decided on 30.06.93.
[329] *Arizona v. Maricapa County Medical Society*, 457 US 332, 102 S.Ct. 2466, 73 L.Ed. 2d 48 (1982).
[330] 273 US 392 (1927)

hospitals, as they did not have to compete among themselves. Therefore, there were no reasonable justifications for the practice.

Based on this analysis, CADE considered the conduct anticompetitive and imposed a fine of approximately US$ 130,000.00.

The analysis of the case demonstrates that CADE develops a tendency to consider price fixing as illegal per se. At a certain point in the decision, CADE held that "price fixing results in anticompetitive effects, as it prevents the prices from being formed according to the rules of the market, which is one of the most important purpose of competition".[331] Moreover, by quoting the *Maricapa* case, CADE is strengthening that view. This shows that CADE has been seeking inspiration in the approach towards price fixing adopted in the US, where price fixing has been generally regarded as illegal per se.[332]

However, in Brazil price fixing cannot be considered illegal per se because the law adopts a rule of reason approach to competition in general.[333] It follows that price fixing would be considered an offence against the economic order by article 3 of Law 8158/91 only when it had as its purpose or effect market domination, elimination of

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[331] opinion of Commissioner Carlos Eduardo Vieira de Carvalho, p. 10.

[332] See, for instance, the *Trenton Pottery* case, supra n. 330, where the American Supreme Court established that price fixing is illegal per se and therefore "no evidence of the reasonableness of the prices fixed need be heard by courts or submitted to juries" (Neale, A.D., *The Antitrust Laws of the USA*, 3rd ed., Cambridge University Press, Cambridge, 1980, p. 37); the *Socony-Vacumm* case [310 US 150 (1940)], where court went further and ruled that the argument that a price fixing agreement was adopted to defend a group of companies from others cannot be used as a justification for that practice, as well as that it did not matter if the parties involved in the price fixing agreement did not have the power to control the market, because they would directly interfere with market forces; and the *Maricapa* case, supra n. 329, where the Supreme Court reaffirmed the adoption of the per se rule in relation to agreements fixing maximum prices.

[333] A practice is illegal only when it results (or has the intention of resulting) in market domination, elimination of competition or increase of profits in an arbitrary manner. Article 3, Law 8158/91.

competition or increase of profits in an arbitrary manner. Law 4137/62, on the other hand, did not specifically prohibit price fixing, though the conduct could be seen as an agreement between companies to dominate the market or eliminate competition, which is prohibited by article 2, I, a. It follows that both laws required the occurrence of certain conditions in order to characterise the illegality of the practice, which means that price fixing cannot be considered illegal per se.

The investigation carried out by CADE covered the main aspects involved in price fixing, but nevertheless it was made in a quite theoretical fashion, as it took into consideration the effects that price tables in general have on competition, but not the specific elements of that particular case.[334] This does not necessarily mean that CADE was not willing to do a thorough analysis of the case. It may have been that the preliminary investigation carried out by SDE did not gather enough elements. As it was seen in Chapter 3, Law 8158/91 did not allow CADE to request more information either from SDE or from the parties. It follows that CADE was compelled to reach a decision based only on the data SDE had gathered.

Finally, in relation to the question of evidence, CADE was right to conclude that the decisions adopted by the Association reflected what the hospitals themselves wanted, because the Association was an entity created by the hospitals to represent them. However, it might have been necessary to prove that the tables were actually adopted and applied by the hospitals. By not doing so, CADE was showing it favoured a per se approach to price fixing, which is not allowed by the law.

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[334] For instance, there is no data or information about how the conduct affected the relations with the medical assistance companies. The decision said that the clients of one of these companies were not accepted in a hospital because they paid prices below that of the tables, but CADE did not explore this issue.

As mentioned above, the three cases of price fixing were considered illegal by CADE. However, in a similar case to the *Sergipe Hospitals* case, the decision was not unanimous.[335] The dissident opinion argued that, since the preliminary investigations, the practice was seen as illegal per se, and therefore the elements of the case were not taken into consideration, which could not happen, because Law 8158/91 adopted the rule of reason approach to restrictive practices. Therefore, the opinion continued, it was necessary to investigate if the adoption of the price tables resulted or had the purpose of resulting in elimination of competition, market dominance or arbitrary increase of profits. As the Association decided to give up the adoption of the price tables, the Commissioner argued that it did not aim at any anticompetitive purpose, which only proved that the practice was not illegal. This approach, however, did not prevail, and the practice was considered illegal.

The analysis carried out by CADE demonstrates that CADE understands the concept of price fixing and knows that it is a highly anticompetitive practice that does require strong justification in order to be cleared. It follows that CADE would be willing to consider price fixing as illegal per se; it however does not do it because it is not permitted by the law. However, CADE seems to be less stringent as regards the evidence required for the analysis of the case, in the sense that it does not require material evidence of the practice, and takes the effects of price fixing for granted. This approach, on the other hand, may not be desirable, because the decision may be annulled by the courts on the grounds that CADE did not comply with the requirements of the law.[336]

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[335] PA 67/92 - *DNPDE v. Associação dos Hospitais de São Paulo,* distributed to Commissioner Neide Teresinha Malard and decided on 09.11.94.

[336] As seen in Chapter 3, subsection 2.2, Brazil adopts the system of judicial control, where the acts of the administration are subject to review by the Judiciary.

4.2 Exclusivity agreements

From 1962 to 1996, CADE decided seven cases related to exclusivity agreements, of which five were subject only to Law 4137/62,[337] and two to both Laws 4137/62 and 8158/91.[338] The peculiarity in this practice is that neither laws made any specific reference to exclusivity agreements. The only mention can be found in Law 4137/62, which considered as unfair competition exclusivity arrangements in publicity. This means that, for instance, a company could not sponsor with exclusivity a show to be broadcast on TV. Apart from that, both laws were silent.

However, exclusivity agreements are agreements made between companies. It follows that, as Law 4137/62 considered an abuse of economic power the agreement between companies that seeks to dominate the market or eliminate competition, exclusivity agreements could be included in this provision. In relation to Law 8158/91, the list of conduct that may be considered an offence against the economic order does not specifically include exclusivity agreements; however, the practices included in this list do not exhaust themselves. They are only examples, thus exclusivity agreements can be included here.

CADE understands that exclusivity agreements have a restrictive nature but nevertheless cannot be considered anticompetitive per se, thus an analysis of the practice is always necessary. In the *Valer* case,[339] for instance, CADE's analysis was

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[337] PA 12/73 – *Cia. Alterosa de Cervejas v. Distribuidora de Bebidas Mineira Ltda. e outra*, PA 17/75 - *Águas Minerais Vontobel S.A. e outra v. Refrigerantes Sul-Riograndense S.A. Ind. e Com.*, PA 18/75 - *Cury e Cury Ltda. v. Shell do Brasil S.A.*, PA 40/77 - *Marchesan Implementos v. Ford do Brasil S.A.*, PA 71/83 - *Dispave S.A. v. Volkswagen do Brasil S.A. e outros.*

[338] PA 30/92 - *Seara Agrícola Comercial e Industrial Ltda. v. ICI do Brasil S.A*, and PA 32/92 - *SNDE v. Valer Alimentação e Serviços Ltda.*

[339] PA 32/92 - *SNDE v. Valer Alimentação e Serviços Ltda*, distributed to Commissioner Neide Teresinha Malard and decided on 22.04.93.

based on two aspects: the intention of the company when adopting the conduct and the effects of the practice on competition.

Valer was the only luncheon voucher company that accepted a proposal from the Association of Supermarkets of the State of Santa Catarina of reducing the period of time in the exchange of vouchers for money. A contract was then written, and it included a clause according to which the supermarkets agreed to accept only Valer's vouchers. Only seven supermarkets signed for the contracts. Soon after the contracts became effective, the exclusivity clause was withdrawn, and just three months later the contracts were cancelled.

In relation to the intention of the company, CADE understood that the exclusivity clause inserted in the contract was just a concession given by the supermarkets to Valer for having agreed to decrease the period of time for payment of its luncheon vouchers. Valer did not impose the conduct on the supermarkets, nor refused to deal with supermarkets that did not accept Valer's proposal. This was enough to make CADE conclude that Valer was only trying to increase its small share in the market, and not to dominate the market or harm competition.

Notwithstanding the fact that the company did not intend to dominate the market, CADE considered necessary to analyse the effects that the conduct caused in the market. However, CADE found that the investigation made by SDE had not

gathered enough elements to assess the impact of the conduct, which made impossible the analysis.[340]

In order to overcome that deficiency, CADE sought help in economic theory, according to which a company must have market power if its conduct are to cause any effect in the market. Companies that have a small participation in the market are not likely to affect that market, even if they have that intention. Data concerning the market of luncheon vouchers demonstrated that only six companies held 95% of the market. Valer, however, was not one of them. On the contrary, it was among the small companies that divided the remaining 5% of the market. By applying the economic theory to the case, CADE concluded that Valer did not have power enough to affect the market, so the case was dismissed.

In this case, CADE demonstrated that it has a clear understanding of the rudiments involved in exclusivity agreements. Exclusivity agreements occur where a manufacturer does not allow his/her distributors to use or deal in the goods of the manufacturer's competitors. Thus, the distributors can only sell the products manufactured by this producer. The most immediate effect is that the manufacturer is foreclosing the opportunity for his/her competitors to sell to those distributors. This means that other producers are excluded from the geographic market represented by the distributors. By excluding his/her competitors, the manufacturer will then obtain a monopoly in that market, and therefore will be able to impose monopoly prices.

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[340] As seen in Chapter 3, the procedural rules did not allow CADE to send the case back to CADE for more investigation nor permit CADE to gather data by itself.

On the other hand, exclusivity agreements may bring benefits to all the parties involved. Through an exclusivity agreement, the distributor has an assured source of supply, while the manufacturer is sure that his/her products have a market. The producer may offer some advantages to the distributor, such as training of personnel, and in exchange the distributor will concentrate his/her energy in promoting only the manufacturer's goods. An exclusivity agreement may also result in cost saving for both parties, as the producer will be able to eliminate selling expenses, and the distributor will gain from having a stable stock. It follows that exclusivity agreements are not necessarily a way to achieve monopoly.

CADE saw the practice as a conduct that is not necessarily harmful to competition, and that only a case-by-case analysis can determine the legality of the conduct. Thus, CADE proceeded to analyse the intention of the party and the effects of the conduct, not only because the law determined that this should be done but also because this was the only possible way of finding out whether the practice was anticompetitive or not.[341]

CADE proved that it is prepared to accept reasonable justifications for a conduct that may be anticompetitive. CADE applied the economic theory to establish the effects of the conduct, as the case provided no other elements to allow such

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[341] Commenting on the treatment given to exclusivity agreements by the EEC Treaty, Whish argues that it is not possible to affirm if an agreement infringes article 85(1) without an economic analysis of the market, in order to establish the effects of such agreement on the market. This analysis must include "the structure of the market, alternative sources of supply, the legal and economic context in which the agreement operates", to then "speculate upon its possible effects" (see Whish, R., *Competition Law*, 3rd edition, Butterworths, 1993, p. 607).

analysis. It understood that only exclusivity agreements adopted by a company with market power are capable of producing a harmful effect in the market.[342]

In a case decided a few months before, the *ICI* case,[343] CADE had to analyse a case that involved refusal to sell as well as an exclusivity clause inserted in a contract of distribution. Regarding the exclusivity, CADE held that, though the practice by itself presents elements of anticompetitivity, such as the obligation of one of the parties to buy and sell goods of only one producer, which eliminates competition and restricts consumption, it is not possible to consider it illegal per se. On the contrary, CADE understands that a rule of reason analysis has to be made in order to find out if the practice corresponds to an authentic interest and does not harm the market.

Moreover, CADE pointed out that exclusivity clause cannot be understood as an instrument to reach monopoly, as it may be an attempt to harmonise the parties involved as well as the consumers. CADE concluded that, in this case, the exclusivity clause was adopted as a way to rationalise the commercialisation of products and services of the company, and dismissed the case.

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[342] In the US, the question discussed in the analysis of exclusivity agreements is the share of the market that is affected by the practice. Thus, the courts consider exclusivity agreements illegal if competition is foreclosed in a substantial share in the line of commerce affected [*Standard Oil Co. of California v. US*, 337 US 293 (1949)]. In the *Tampa* case [*Tampa Electric Co. V. Nashville Coal Co.*, 365 US 320 (1961)] Mr Justice Clark set the rules for establishing this "substantiality" requirement, and this case has been the basis for more recent decisions, which take into consideration three criteria when assessing the reasonableness of the exclusivity agreement: extent of market foreclosure; duration of the exclusivity agreement; and height of entry barriers (see Gellhorn, E. and Kovacic, W. *Antitrust Law and Economics*, 4th ed., West Publishing, St. Paul, 1994, p. 344/345).

[343] PA 30/92 - *Seara Agrícola Comercial e Industrial Ltda. v. ICI do Brasil SA*, distributed to Commissioner José Matias Pereira and decided on 01.03.93.

4.3 Tie-in sales

Tie-in sale was prohibited in Brazil by Laws 4137/62 and 8158/91, as long as it resulted in the creation of an economic group,[344] or in market domination, elimination of competition or arbitrary increase of profits.[345] From its creation in 1962 until March of 1996, CADE decided five cases of tie-in sales. Three cases were under Law 4137/62,[346] while the other two were under both Laws 4137/62 and 8158/91.[347]

Tie-in sales occur when the seller of a product conditions the sale of its product to the purchase of a second product. By tying the purchase of a product to another, the manufacturer will be impairing competition in the market of the tied product, as other manufacturers of the product will not be able to sell their goods. However, this restriction of competition will depend on the market power of the manufacturer in the market of the tying product. If the manufacturer has a monopoly in that market, he/she may be using the tie-in sale to extend this monopoly power to the market of the tied product.

CADE has developed a contradictory approach to tie-in sales. Though CADE has demonstrated that market power is a necessary requirement to render the practice illegal, it has also ruled that a company without market power can harm competition in the market of the tied product. An analysis of two cases will illustrate this point.

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[344] Law 4137/62, article 2, IV, b.
[345] Law 8158/91, article 3, VIII.
[346] PA 05/67 - *Sindicato dos Hotéis e similares de Belo Horizonte e outro v. Cia. Antártica Paulista e outras*, PA 16/74 - *Duarte Rodrigues Ltda. e outra v. Procosa - Produtos Cosméticos Ltda. e outra*, PA 28/76 - *Hece Máquinas e Acessórios Ind. e Com. Ltda. v. Máquinas Sheldahl e outra.*
[347] PA 01/91 - *Interchemical Ind. e Com. Internacional Ltda. v. Sharp Ind. e Com. Ltda.*, and PA 23/91 - *Repro Materiais e Equipamentos de Xerografia e outros v. Xerox do Brasil S.A.*

In the *Xerox* case,[348] Xerox rented the photocopying machines it manufactured to its clients. The maintenance of these photocopying machines could only be made by Xerox, which conditioned the maintenance services to the use of other materials it produced. This meant that customers who rented Xerox's photocopying machines were only entitled to maintenance services if they purchased toner, developer, photoreceiver and other materials from Xerox.

Xerox's argument was that it was trying to protect its own property, because products of other companies might impair the performance of the photocopying machines. Xerox also argued that the maintenance of the machines was part of the rental deal, and not an independent contract that resulted in the tie-in sale.

CADE's approach to the case was to establish Xerox's position in the markets of photocopying machines, services and material goods. In the first market, Xerox had a share of 77%. In the market of services, Xerox was also the leader, with 91% of the market. Xerox's participation in the market of material goods (toner, developer and roller), which depended on the model of the photocopying machine, varied from 74% to 100% of the market. This was enough to make CADE conclude that Xerox had economic power in the three relevant markets. However, CADE ruled that it was not because Xerox had economic power that the conduct should be considered illegal, since it is the manner according to which a dominant company acts that determines the legality or illegality of the conduct.

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[348] PA 23/91 - *Repro Materiais e Equipamentos de Xerografia e outros v. Xerox do Brasil S.A*, distributed to Commissioner Marcelo Monteiro Soares and decided in 31.03.93.

In this case, CADE held that the conduct adopted by Xerox prevented its clients from choosing their suppliers and thus acquiring materials from other companies. CADE then concluded that the conduct impaired competition in the market of consumer goods, created barriers to entry of new competitors, and threatened the existence of the small and medium companies of that market. Xerox was penalised a sum of one million dollars approximately.

Both legal and economic reasoning seems to be correct in the Xerox case: tie-in sales are not illegal per se because the law established that the purpose and effects of the conduct should be examined, and the analysis of the market showed that Xerox was a monopolist and therefore the tie-in could eliminate the little competition that remained in the market.

However, the approach adopted by CADE in relation to tie-in sales was different in the *Sharp* case.[349] This case was decided a few months after the *Xerox* case and is very similar to it. It is a tie-in sale where Sharp, also a manufacturer of photocopying machines, conditioned the maintenance of the machines to the acquisition of the material goods it also produced. The main difference, however, was that Sharp had a share of only 3.5% in the market of rental and maintenance of photocopying machines.

In its analysis of this case, CADE established first that tie-in sales are harmful to competition because they do not allow the consumer to freely choose the product or service that suits him/her better; consequently, competition in the market of the tied

product is impaired, as actual or potential competitors are eliminated due to difficulties created for the performance or development of companies in that market. Based on this assumption, CADE reasoned that, by adopting this conduct, Sharp would be driving its competitors out of the market because buyers would already be committed to Sharp products. This would give Sharp the power to fix the price of material goods above the competitive level, which would result in arbitrary profits to Sharp. Accordingly, not only would the conduct not allow the market to grow, but also would not bring any operational advantage to the consumers.

The fact that Sharp did not have market power did not prevent CADE from concluding that the conduct was anticompetitive. This conclusion was based on the existence of a highly concentrated market, the effects of tie-in sales in that market, as well as on the fact that, in the *Xerox* case, the conduct was considered anticompetitive. CADE then imposed a fine of approximately US$ 200,000.00, holding that it was not as high as the fine imposed on Xerox because Sharp had a smaller share in that market.

By comparing the two cases, it is obvious that the approaches are different. In the *Xerox* case, the dominant position of the firm in the market was essential for establishing the illegality of the conduct. In the *Sharp* case, on the other hand, CADE departed from that approach by condemning the conduct notwithstanding Sharp's small participation in the market.

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[349] PA 01/91 - *Interchemical Ind. e Com. Internacional Ltda. v. Sharp Ind. e Com. Ltda*, distributed to Commissioner Carlos Eduardo Vieira de Carvalho, and decided on 28.05.93.

The economic reasoning in this case does not seem to be appropriate, because it sustained that the conduct of a firm with no market power is likely to affect the market. Tie-in sale impairs competition because it restricts the options available to consumers and eliminates the competitors of the company that imposes the practice. What must be taken into consideration is the extent to which the market will be affected if the company in question does not have market power. In that case, only a small number of consumers would have their options reduced. If they were not in accordance with the terms of the agreement, they could turn to any other company that rented photocopying machine. The same would happen in relation to competitors. If they were not able to sell their products to the small number of consumers who were already dealing with the company, they could direct their sales to other consumers. Thus, from an efficiency point of view, it would be better not to challenge the practice.

The legal reasoning is accordingly questionable, because CADE seems to favour a per se approach to tie-in sales, thus not taking into consideration the legal provision that asks for a rule of reason approach to the practice. On the whole, the *Sharp* case leaves the impression that CADE has difficulties in applying the concept of tie-in sale.

On the other hand, one can argue that the *Xerox* and *Sharp* cases have one point in common, that is, both cases are trying to protect consumers from an anticompetitive conduct adopted by firms in a highly concentrated market. This argument explains the fact that CADE ignored Sharp's lack of market power. CADE opted for ruling that, in a highly concentrated market, any conduct is likely to affect

the market and therefore harm the consumers. Based on this reasoning, it is possible to affirm that CADE's approach to tie-in sales is directed towards consumer protection, to the detriment of an economic approach.

4.4 Predatory pricing

As was the case with price fixing, Law 4137/62 did not prohibit predatory pricing. Further, in this case the law did not even refer to the conduct. This would lead one to believe that predatory pricing was a commercial practice not prohibited by competition law until the enactment of Law 8158/91, which considered predatory pricing as an offence against the economic order. The list of conduct that were prohibited included two practices that involved predatory pricing. One of them was the establishment of prices through artificial ways, and the other the selling of goods or rendering of services without profit. However, these two types of conduct should have as their purpose or effect market domination, elimination of competition, or arbitrary increase of profits.[350]

During the time that Law 8158/91 was in force, CADE decided only two cases of predatory pricing.[351] In both cases the conduct under investigation was not considered anticompetitive.

In the *Coldex* case,[352] Coldex was accused by one of its competitors, Refrio, of adopting predatory prices and thus creating difficulties for the operation and performance of its competitors in the sector of industrial refrigeration.

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[350] Article 3, I and XIII.

Refrigeration equipments are formed by two main components: a set of condensation which is called "partial set", and an open compressor. These two components together are called "condensation unit". Refrio used to manufacture the partial set, which was used together with Coldex's open compressor in refrigeration equipments like cold storage chambers. 70% of the refrigeration equipments were assembled in this way, with the components of the two companies.

Coldex, however, also manufactured the partial set and the whole condensation unit. In relation to prices, the price of Refrio's partial set was lower than that of Coldex. On the other hand, the price of the two components manufactured by Coldex was inferior to the price of the whole equipment. As this was not a logical and rational strategy for Coldex to maintain, the company decided to adopt a new price strategy, where it increased in a higher degree the price of the components (partial set and compressor) and in a lower degree the price of the complete condensation unit. In that way, it would be cheaper for the customers to buy the whole unit instead of the separate component and assemble them themselves. This resulted in an increase in Coldex's sale of the whole unit and a decrease in the sale of compressors. As a consequence, the sale of Refrio's partial set also decreased.

CADE based the analysis of the case on the examination of Coldex's intention when establishing the new prices for its products, and on the effects that the conduct caused on competition. In relation to the first part of the analysis, CADE found out that Coldex was the leader in the market of condensation units and compressors, with

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[351] PA 10/91 - *Fogarex Artefatos de Camping Ltda. v. Lumix Química Ltda.*; PA 40/92 - *Indústria e Comércio de Evaporadores Refrio Ltda. v. Coldex Frigor Equipamentos S.A*

[352] PA 40/92 - *Indústria e Comércio de Evaporadores Refrio Ltda. v. Coldex Frigor Equipamentos S.A*, distributed to Commissioner Carlos Eduardo Vieira de Carvalho and decided on 15.06.94.

a market share of 55%. Though CADE held that this market power would enable Coldex to fix prices above the market, it accepted Coldex's argument that the new prices were necessary to reverse an anomalous situation, where the sum of the prices of the components was inferior to the price of the complete condensation unit, which had been causing a decrease in sales.[353] According to CADE, this was a reasonable explanation for the conduct adopted by Coldex, which was not related to the adoption of predatory prices in order to dominate the market or eliminate competition.

CADE then intended to examine the effects of the conduct in the market, because it held that a company, when adopting new policies and strategies, must take into account not only the gains it will bring to the company itself but also the effect it will cause in the market. However, CADE found it impossible to do so because the preliminary investigation took into account only the effects that the conduct caused on Refrio, and not on the whole market. CADE reasoned that competition law is interested in the conduct that attempts to dominate the market, eliminate competition or increase profits in an arbitrary manner, and not in the difficulties faced by one economic agent, as these difficulties are part of the risks of any business activity. Moreover, in relation to the losses suffered by Refrio, CADE held that they were prior to the strategy adopted by Coldex. The case was then dismissed.

The analysis of this case allows us to conclude that CADE had difficulties with the concept of predatory pricing. In the first place, it did not define the practice

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[353] This situation was actually reverted, as three years after the adoption of these measures there was an increase in the sale of condensation units of 165.53%, while the sale of compressors decreased 36.29%. - see opinion of Commissioner Carlos Eduardo Vieira de Carvalho, p. 06.

nor made any analysis of its possible effects, as it did in the *Valer* case, for instance.[354]

Also, CADE did not take into consideration the elements that are involved in the concept of predatory pricing. When establishing the price of a product, the seller includes all the costs involved in the production as well as the profits he/she wants to obtain. The price will be predatory when the seller fixes prices below costs. By doing so, the seller will incur losses. However, these losses may be compensated if the seller's intentions are to drive his/her competitors out of the market. Once he/she achieves this objective, he/she raises the prices above competitive level and consequently obtains monopoly profits. The temporary losses would then be rewarded by these monopoly profits.

The only reference that CADE made to this issue was that the practice adopted by Coldex was an adoption of price that could have affected competition, without saying how this could be done. CADE did not develop the concept of predatory pricing, and therefore was not able to conclude whether the practice discussed in the case could be inserted in that concept.

Moreover, CADE reasoned that, as Coldex had 55% of the market, it was able to fix price <u>above</u> competitive level. This conclusion is correct, but the case was discussing the establishment of prices <u>below</u> costs. CADE examined the case from the wrong point of view. It should have taken into consideration that Coldex had market power and therefore was able to fix prices below costs in order to eliminate the

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[354] As seen in subsection 4.2, in its analysis of the *Valer* case CADE developed a theoretical

remaining competitors. Accordingly, it should have examined whether Coldex could afford losses for a certain time, which would have proved that Coldex had the means to adopt a strategy of predatory pricing.

Nevertheless, CADE went directly to investigate the intention of Coldex when adopting the conduct, and it was convinced that it was just a rational business strategy to combat decrease in sales. However, there are no reasons that demonstrate how CADE reached that conclusion. The data provided do show that Coldex sales were decreasing, and that after the adoption of the conduct sales increased, but it does not mean that this was the only conduct that Coldex could have adopted, nor that Coldex did not intend to eliminate its competitors. It certainly is an explanation, but it is questionable.

Accordingly, CADE did not establish whether the price adopted by Coldex reflected its costs or not. The only mention to this issue was made by DPDE in its report, where it argued that it was not logical that the price of the compressor was almost the same of the condensation unit, since the former was a part of the latter. The only reason for this, DPDE concluded, was that Coldex fixed prices without taking into consideration the costs it incurred to manufacture the product. CADE, however, ignored this argument and fixed its attention in the intention and the effect of the practice. The question of cost analysis would have been fundamental to establish the existence of a potentially anticompetitive conduct.

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discussion of the concept of exclusivity agreement.

As predatory pricing involves the establishment of prices below cost, the element that is inherent to this concept is how prices are formed. If prices are below costs, then the practice is anticompetitive, as it will drive competitors out of the market. This happens even if the company did not intend to do so, even when the practice was just a normal business activity. This approach is supported by the law, which defines anticompetitive practices as those that result in, or have as their purpose, elimination of competition, market domination and arbitrary increase of profits. Thus, what is necessary to examine when the analysis shows that prices are below costs, is the extent to which the practice affect the market. Once again, it all depends on the market power of the company. CADE limited its analysis to the intention of the company, without even establishing what was the conduct, or the effects it caused. It also ignored DPDE's argument that the price did not reflect the costs. This shows that, in relation to predatory pricing, CADE was not able to apply the concept in a real situation.

In relation to the effects of the conduct, it is understandable that CADE could not reach any conclusion because there were no elements about the relevant market, and the law did not allow CADE to collect more data.

5. Conclusion

It was shown in section 3 of this chapter that, at the time that the cases examined here were decided, Brazil was going through a process of transition. It was also recalled the hypothesis in the adoption and enforcement of competition law. With

this background to competition established, and having already examined the legal provisions in section 2, we then proceeded to the analysis of cases concerning restrictive practices. The conjunction of these four points enables us to draw some conclusions regarding CADE's approach to restrictive practices.

The first conclusion is that CADE carries a clear legal analysis in each case that it is confronted with. As the law establishes that it is illegal only the conduct that results in, or has as its purpose, the elimination of competition, domination of the market or arbitrary increase of profits, CADE examines in each case the intention of the companies as well as the effects of the conduct in the market. Legal reasonings are therefore well developed by CADE.

However, there is one criticism to be made. In some situations, it does not seem necessary to carry out such an extensive analysis, because an economic reasoning is enough to demonstrate that the practice is not anticompetitive. In the *Valer* case, for instance, after a first analysis of the case, CADE found out that the market power of the company was too small to cause any harm to competition, but nevertheless it carried on with the analysis to examine the consequences of the conduct in the market.

In relation to the concepts, it is possible to argue that there are circumstances where CADE does not demonstrate a firm control of the rudiments of the concept. This happened in relation to predatory pricing, for instance, where CADE examined the intention of the parties and the effects of the conduct, but did not take into account how the price was established, which is the main element to establish the legality of

the practice. This lack of command can be seen also in CADE's application of the concept of tie-in sale. Though in the *Xerox* case CADE conditioned the illegality of the conduct to the market power of the company, in the *Sharp* case CADE considered anticompetitive a tie-in sale imposed by a company with no market power. It is then difficult to conclude whether CADE sees the conduct as illegal per, or cannot grasp the elements of the concept, or whether it is just trying to protect consumers from the hazards of a concentrated market.

On the other hand, CADE has shown good command of the concepts of price fixing and exclusivity agreement. In the first case, it understands that price fixing does not follow the rules of the market, may be the result of a cartel, and therefore is likely to be highly anticompetitive. CADE was not able to consider price fixing illegal per se because the law does not allow it, but nevertheless CADE was not so strict in its analysis, in the sense that it did not require evidence of the practice. In relation to exclusivity agreements, CADE considers the practice as not necessarily harmful to competition, and takes into account not only the intention of the parties and the effects of the conduct in the market but also any reasonable explanations for the adoption of the practice.

It is difficult to draw conclusions in relation to the approach adopted by CADE towards restrictive business practices. The cases of tie-in sales and predatory pricing do not shed any light on the issue, as CADE itself is not sure about the concepts. The tie-in cases only give a hint that there is a concern with consumer protection. However, it may be that CADE sees the practice as illegal per. There are no elements on which to base any hypothesis.

The cases of price fixing, in its turn, may be more helpful to identify CADE's approach, because it was here that CADE demonstrated more knowledge of competition. CADE's analysis of price fixing definitely does not allow for an efficiency approach. As mentioned, CADE shows the tendency to consider price fixing as anticompetitive per se. If CADE favoured an efficiency approach, it would have been more careful in its analysis, trying to find out possible efficiencies that would compensate the anticompetitive effect of the practice in the market. At the same time, CADE does not analyse the practice taking into account social goals that could be achieve through the practice. It follows that the only possible conclusion is that CADE favours a competitive approach, since it is more interested in how the practice could affect competition.

The approach adopted in CADE's analysis of the exclusivity agreements, on the other hand, is not so straightforward. CADE sees the practice as not necessarily anticompetitive, which means that CADE will always examine the case thoroughly, in order to gather elements that will demonstrate the effects of the practice. In the case discussed here, the lack of market power of the company was enough for CADE to dismiss the case, thus not being necessary to adopt a particular approach towards exclusivity. Had CADE had the chance of going further in this case, it would have been able to follow any path it wanted.

The problem with the implementation of competition law in relation to restrictive business practices is that, as the legislation does not define with rigour the approach towards competition nor the anticompetitive practices, it becomes difficult

for CADE to enforce the law with a certain coherence, even though there is support from the procedural rules.

From what has been discussed until now, it is possible to conclude that CADE is also going through a period of transition, which has not enabled it to follow a coherent approach towards restrictive business practices. However, the discussion is not complete without examining the cases of price control, which will be done in the next chapter. Only after that analysis it will be appropriate to reach a final conclusion in that aspect.

CHAPTER 5 - SPECIAL FEATURES OF BRAZILIAN COMPETITION LAW: THE CASE OF PRICE CONTROL

1. Introduction

In the previous chapter we have discussed the "traditional" practices regulated by competition laws in general that have been submitted to CADE, and attempted to identify CADE's approach towards these restrictive business practices. As pointed out in that chapter, the Brazilian competition law presents some peculiarities that are not usually covered by competition laws. A recurring conduct that best represents this aspect of the law is cases where some kind of price control is involved. It follows that it is not possible to identify CADE's approach towards competition without examining these cases of price control.

This chapter thus complements Chapter 4. By analysing the cases of price control submitted to CADE, we will try to answer the same question proposed in that chapter: what does CADE seek to achieve when deciding cases concerning anticompetitive practices? We will also have in mind the three approaches to competition discussed in Chapter 4: the efficiency approach, the competitive approach and the social approach.

Section 2 of this chapter will provide a background related to the adoption of price control measures in Brazil, as well as examine the existence of provisions in competition law regarding price control. The following section will analyse two cases of price control that CADE has decided, while the conclusion will bring together the issues discussed in both chapters and attempt to identify CADE's approach to restrictive business practices.

2. Price control and competition policy

It is not unusual to use competition law to control the prices adopted by industries. In the UK, for instance, the MMC deals with excessive pricing in monopolies under the Fair Trading Act 1973, and the Competition Act 1980 may catch excessive pricing by a dominant firm. Moreover, regulatory bodies have been created in order to deal with the problems arising from sectors that have been privatised, such as telecommunications. Among the powers given to these bodies the control of prices is included, and the technique used to fix the level of prices (the "rpi minus x" formula) might be used in monopoly investigations.[355]

On the other hand, other legislations prefer to protect competition, in order to have a competitive market that by itself controls excessive pricing. This is the case of the USA, where antitrust law does not have a provision on excessive pricing. In the EEC, on the contrary, excessive pricing can be caught by Article 86(a) of the Treaty

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[355] See Whish, R., *Competition Law*, 3rd ed., Butterworths, London, 1993, p. 346-348, 499.

of Rome, which considers an abuse to impose "unfair purchase or selling prices or other unfair trading conditions".

In Brazil the concern is focused mostly in the non compliance with prices fixed by the government, rather than with excessive prices being adopted by firms. The Brazilian government has a tradition of adopting policies of price control. It started in the 1950s, with the creation of the Federal Council for Supply and Prices - COFAP, which was an agency whose purpose was to establish the maximum prices that each industry or agriculture sector was allowed to charge for their products. There are several reasons for adopting this policy of price control, but usually its main purpose was to attempt to control inflation.

COFAP was later substituted by the Interministerial Council of Prices - CIP. CIP would determine the prices and the economic sector should comply with it. Supervision would then be made through the National Superintendency of Supply - SUNAB, which was an agency linked to the Ministry of Treasury. Once SUNAB found out that a certain economic agent was charging prices above the established by CIP, SUNAB would apply a fine. During the 1990s, when price control was being gradually relaxed, the government dismissed CIP and created another agency, the Sectorial Chamber of Monitoring, which would have similar functions. Compliance with the prices under control would be supervised by the Department of Supply and Prices, of the Ministry of Economy.

However, though there was a proper structure to deal with control of prices - at the executive level, with the adoption of such policies by the federal government, as

well as at the administrative level, with specialised agencies to execute the policy and supervise the compliance - both government and the population in general sought other means to make sure that businessmen would follow the policy imposed by the government. One of these means was competition law. It was thought that, as competition law would regulate the relations of the economic agents in the market, this would obviously include the prices adopted by them, therefore competition law would act as a kind of control on the compliance with the prices fixed by the government.

Accordingly, when Law 8884/94 was enacted, which occurred when a policy of price liberalisation was being adopted, the main criticism that the business community made was that the new law was a substitute for the price control policy that had recently been abandoned.[356] CADE, it was believed, would be one of the competent agencies to deal with the situation. Both the government and the population would try to use CADE to achieve its goal to keep business under surveillance in relation to prices. Whether CADE accepted this role is one of the issues we will discuss here.

The competition laws enacted in Brazil never prohibited explicitly this increase of price above that established by the government. However, it was possible to find loopholes in the law that would allow the inclusion of the conduct among the prohibitions. Law 8158/91, in its article 3, I, considered a violation of the economic order the "imposition of prices of acquisition or reselling, discounts, conditions of payment, quantities and profits, as well as imposition of prices by artificial means". In

the cases submitted to CADE, it has been argued that these circumventions to price control would be "an imposition of prices by artificial means".

During the time that Law 4137/62 was in force, no case involving price control was submitted to CADE. However, after the enactment of Law 8158/91, twelve cases of price control were examined by CADE. Four of them were dismissed,[357] while in the remaining eight cases a fine was applied.[358] We will examine here two cases, the *Akzo* case and the *Medicine Shortage* case. Both of them involved the pharmaceutical industry which was under price control, but different approaches were adopted.

3. Two approaches to cases involving price control

3.1 disregarding the effects of price control

The *Medicine Shortage* case[359] involved price control in pharmaceutical products. Merrell Lepetit was a company that produced some medicines that were of compulsory and continuous use in certain illnesses. These medicines - as well as all pharmaceutical products - were under price control by the government, and increases

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[356] "Produzir pode dar cadeia", in *Folha de São Paulo,* 15.06.94, p. 1-3. See also the legislative debate in Bill 3712-C (later Law 8884/94), specially the speech of Mr. Marcelino Romano Machado, from the PPR, in *Diário do Congresso Nacional,* Seção I, 08.06.94, p. 8991.

[357] PA 35/91 - *Ministério Público do Estado do Paraná v. Outboard Marine Motores da Amazônia e outros*, PA 73/92 - *Departamento de Abastecimento e Preços v. Dorsay Indústria Farmacêutica Ltda.*, PA 74/92 - *Departamento de Abastecimento e Preços v. Laboratórios Wyeth Ltda.*, and PA 76/92 - *Departamento de Abastecimento e Preços v. Akzo Ltda.*.

[358] PA 12/91 - *Presidente da República v. Laboratorio Aché SA*, PA 13/91 - *Presidente da República v. Prodome Química e Farmacêutica Ltda.*, PA 15/91 - *Presidente da República v. Laboratórios Silva Araújo-Roussel S.A.*, PA 17/91 - *Presidente da República v. Laboratórios Pfizer Ltda.*, PA 18/91 *Presidente da República v. Laboratório Merrell Lepetit Farmacêutica Ltda.*, PA 19/91 *Presidente da República v. Knoll S.A. Produtos Químicos e Farmacêuticos*, PA 20/91 *Presidente da República v. Laboratório Glaxo do Brasil.*

[359] PA 18/91 - *Presidente da República v. Merrell Lepetit Farmacêutica Ltda.*, distributed to Commissioner José Matias Pereira and decided on 22.07.92.

of prices had not been allowed for some time then. In the first half of 1991, the medicines produced by Merrell Lepetit could not be found in the market. It was argued that Merrell Lepetit decreased its output and caused a shortage of medicines in the market, in order to push for price liberalisation. This was the case submitted to CADE.

CADE started its analysis of the case by first making some considerations about the market of medicines. It held that this market is a "peculiar" oligopoly, because medicines have specific characteristics, which allow the manufacturer to obtain market share through product differentiation. This means that competition is not usually made through price, as it happens in other markets, but through the characteristics of the products. Thus competitors try to attract the fidelity of the consumer to a specific medicine. Once this is achieved, the manufacturer has power over that market, and therefore is able to control it. CADE then concluded that the market of medicines is highly concentrated and presents a high level of profits.

The second part of the analysis consisted in investigating whether the shortage of medicines really occurred. By comparing the production of the first half of 1991, when the medicines disappeared from the market, and the production of the first half of 1990, when supply was normal, CADE found out that there was a difference - that is, a decrease - in both production and sale of medicines. This decrease in output, according to CADE, was enough to prove that Merrell Lepetit intended to arbitrarily increase its profits - one of the effects required by the law to consider a conduct a violation of the economic order.

CADE reached this conclusion based on the assumption that it is not rational to adopt a strategy of reduction of production without a reasonable motive. Therefore, by decreasing its output, Merrell Lepetit was trying to influence the government to determine an increase of price, so that Merrell Lepetit would be able to obtain the profits it considered appropriate. This did happen, as in the second half of 1991 an increase in the price of medicines was allowed by the government.

An aggravating factor was found by CADE, since the case had an ethical aspect. As a manufacturer of medicines, Merrell Lepetit did not have the right to adopt a conduct that resulted in the shortage of three irreplaceable medicines and therefore put in risk the health of the population. According to CADE, the case was even more serious if it was taken into account that the pharmaceutical industry was not compelled to produce medicines for disadvantageous prices, as it was possible to suspend production as long as the Ministry of Health was informed beforehand.

CADE then concluded that a situation of shortage in the market of medicines of continuous and compulsory use was created in order to force the government to increase prices, which was later achieved. This conduct was an abuse of economic power and therefore a fine of around US$ 80,000.00 was imposed.

The most important element of the analysis carried out by CADE in this case is that CADE simply ignored the effects of price control on competition. It examined the case as a "retention of production", which is prohibited by art. 2, III, c, of Law 4137/62. In fact, CADE was able to prove that such a retention did occur, by comparing the production in different periods. CADE could not find a reasonable

explanation for the decrease in production, therefore it concluded that the motive behind the practice was to increase profits in an arbitrary manner.

The intention of the company (increase of profits) and the effect of the conduct (shortage of medicines) were thus established, and the practice was considered illegal. The case would be simple if the industry was not under control of prices by the government. This element, however, changes the perspective of the case. This will be discussed after the analysis of another case which occurred under price control.

3.2 lack of competition in situations of price control

The second case that involves price control is the *Akzo* case,[360] which also concerns the pharmaceutical industry. The facts in this case are quite simple. Akzo Ltda. changed the quantity of tablets in the packet of one of the medicines it produced. Instead of 30 tablets, the new packet contained 28. There were technical reasons for this alteration, which were approved by the competent agency of the Ministry of Health. The change in the quantity of tablets resulted in a change also in the price of the medicine. The Department of Supply and Prices, however, saw this modification of contents as a "make up" of products, that is, a way to circumvent the control of prices by changing the quantity of tablets and increase the price of the medicine, and complained of Akzo's conduct to SDE.

The first aspect that CADE analysed in this case was the conduct itself, the establishment of prices by artificial means. According to CADE, this conduct is an

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[360] PA 76/92 - *DAP v. Akzo Ltda.*, distributed to Commissioner Neide Teresinha Malard and decided on 23.11.94.

attempt to revoke market rules as the natural way of price formation. The instrument used in this case was the make-up of product, that is, a slight modification in the product, which in this case was the reduction in the quantity of tablets in each packet. According to CADE, in the regime of freedom of prices, the make-up of products is part of the game between producer and consumer; in the regime of price control, on the other hand, it is a way to deceive the governmental agency. The company would promote small modifications in its product in order to obtain a new product, what would allow it to increase its price, thus being possible to recover the profits lost as a result of the control.

In this case, however, CADE understood that the modification was technically justified and approved by the competent agency. The excessive increase of price, in its turn, could not be proved, because CADE understood that the criterion adopted by the Ministry of Treasury, which compared the price of the product before and after its commercialisation, was useless and artificial for the purposes of competition law, as it did not take into account the costs of production.

The other aspect developed by CADE was the jurisdiction to deal with cases that involve price control. According to CADE, price control is contrary to the purposes of competition law, which needs prices reflecting costs of production and fluctuations resulting from the supply and demand rule. It is only logical that competition law is not applied to what occurs outside the competition environment. CADE held that when policies of control of prices are adopted, the freedom given to the economic agent to act in the market is minimal. CADE's and SDE's jurisdiction applies only to this small share of freedom. This means that they do not have

jurisdiction to deal with the effects of the price control policy. The case was dismissed.

In this case, CADE discussed the practice, establishment of prices by artificial means, using make-up of products, from two perspectives: a competitive market and a market under price control. The outcome would be different in each situation. In the first one, make-up of products could be accepted, while in the second it could be an attempt to circumvent price control. In the present case, CADE did not have to develop a detailed analysis of the concept, because it did not assert its jurisdiction. According to CADE, price control does not leave space for competition in the market, therefore competition law cannot be applied. Even if CADE had ascertained its jurisdiction, CADE would not have proceeded to an analysis of the concept, because it held that the modification made by Akzo was allowed by the Ministry of Health.

It is not possible to completely agree with CADE's ruling in this case. CADE held that the practice discussed here, establishment of prices by artificial means, could not be proved because, by adopting price control measures, the government itself did not allow formation of prices in another manner than by artificial means. In a situation of price control, market rules did not apply.

This reasoning may be correct, but it only applies to price formation. There are other aspects of competition that do occur even in situation of price control. For instance, tie-in sales may be adopted by companies in any situation, and it is not because the government controls the price that monopolists will not try to extend their power to other markets. The same applies to exclusivity agreements. Therefore, the

economic agents do have a share of freedom to act in the market, and this is where competition law applies. CADE was correct in not ascertaining its jurisdiction in this case only because it was related to price formation. The same reasoning could not have been applied to restrictive business practices that do not involve price formation.

3.3 two approaches compared

The analysis of the two cases shows an inconsistency in CADE's approach to cases involving price control. While in the *Akzo* case CADE held that, in situations of price control, competition does not exist, therefore CADE has no jurisdiction to deal with such cases, in the *Medicine Shortage* case CADE did not mention the question of jurisdiction and treated the case as a normal restrictive business practice. The discussion of the motives behind this discrepancy is necessary to help in the identification of CADE's approach to competition.

It is undeniable that the market involved in the *Medicine Shortage* case was under price control. However, CADE did not discuss the question of its jurisdiction. On the contrary, it examined the case in the same way that it did in other cases where the issue of price control was not involved. It analysed the market in question and it investigated the intention of the party. This analysis made by CADE could prove the theory that market rules still apply under a situation of price control. However, though the theory is correct, it is not a conclusion that can be drawn from the analysis of this case.

Merrell Lepetit was under the same situation of Akzo, i.e., suffering the consequences of the control of prices. Merrell Lepetit believed that the price of its

medicines should increase, but the government did not allow such increase. The solution available to Merrell Lepetit was to withdraw these medicines from the market because, as there were no substitutes for them, the government would be forced to negotiate a solution with Merrell Lepetit, which would result in the expected increase of prices. It is thus evident that the practice was an attempt to circumvent price control, in the same way that the practice in the *Akzo* case was.

The explanation for CADE ascertaining its jurisdiction has to be found somewhere outside economic or legal reasoning. More exactly, only ethical and political reasons can explain the decision. The products that were kept from the market were medicines that could not be substituted for any other, and CADE understood that the pharmaceutical industry had a moral responsibility towards the population and should comply with it. Besides, it was not only Merrell Lepetit that was adopting this conduct, but most of the companies in the pharmaceutical industry, which means that there were not many medicines available in the market.

Also, the press was following the case and pushing the government to find a solution for the shortage of medicine. And, finally, the complaint to SDE was made by the President of the Republic, which means that there was pressure from the government on CADE to reach a decision - and preferably a decision against the pharmaceutical industry, which would be a kind of retaliation imposed by the government on that industry, for not complying with the rules. Putting all these factors together, CADE had no option but to ascertain its jurisdiction and analyse the case.

However, CADE took advantage of the next case involving price control that it was submitted to it to establish that it would not assert jurisdiction in this situation. This was the *Akzo* case, which did not catch the attention of the media or the government and thus allowed CADE to demonstrate that it had nothing to do with the price control policy adopted by the government, and that the cases that involved price control were not under its jurisdiction.

By doing this, CADE was trying to show that it did not consider itself as part of the framework created by the government to implement its policies, that it would not accept the role of a price control agency. This was to be left to the specialised agencies. CADE is an administrative agency that is autonomous from any other governmental body, be it from the executive or the legislative power. Its members are checked by the Congress, but it is only in relation to the way they conduct their jobs. CADE's only function is to apply competition law with impartiality and neutrality, and the government's policies are not of its concern. This view was confirmed in the *Wyeth* case,[361] where it was pointed out that social policies were not to be taken into consideration by CADE when deciding cases.

4. Conclusion

The analysis of the cases of price control allows us to draw some important conclusions. In the first place, it was shown that the government is prepared to use CADE for other purposes that not those related exclusively to competition, especially

[361] PA 74/92 - *DAP v. Laboratórios Wyeth Ltda.*

in cases where the government's image is at stake. Moreover, it is not certain that CADE is able to resist these attacks. However, one has to bear in mind that these attempts to misuse CADE occurred in the beginning of this transitional period through which the country is passing, where the interventionist approach was still strong. It is possible that, by supporting a more liberal economy, the government will leave CADE to comply with its role of competition authority.

This is especially true if we take into account that the present competition law was enacted as part of the trade liberalisation measures adopted by the government in 1994. Thus, being inserted into an economic policy framework, it is more likely that competition law be effective.[362]

In relation to CADE's analysis of price control cases, the contradiction found in those cases does not authorise a categorical assertion about its approach to the issue. The situation in the *Medicine Shortage* case was not normal, in the sense that CADE was being monitored by both the government and the media to reach a decision. The *Akzo* case, in its turn, demonstrated that CADE considers that policy of price control is against the market rules, thus impairing the maintenance of the competitive process. In the *Wyeth* case it was only mentioned that social goals were not to be taken into account in CADE's decision.

It follows that CADE's analysis of the price control cases only corroborates the conclusion reached in the previous chapter, i.e., that until March of 1996 CADE had not yet adopted a coherent approach towards restrictive business practices. One

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[362] As proposed by one of the hypothesis on which this thesis is based – see Introduction, section 3.

can speculate that during this period CADE would be willing to favour a competitive approach, especially if we take into account CADE's rejection to an efficiency approach in the *Valer* case (the exclusivity agreement case), and to a social approach in the *Wyeth* case.

Despite the fact that this assertion is based only on speculation, it has to be argued that such an approach would be welcome. Being inserted in the context of a developing country, with a market economy that is still in its infancy, it is not possible for CADE to adopt a more severe approach to competition, such as that defended in the efficiency approach, because it relies mostly on the market's ability to solve its own problems, which may prove ineffective in the case of Brazil. Though efficiency is a significant goal to be pursued, it must not be the only one. To seek a competitive market is a more rational goal for a country which is only starting to learn the rules of the market.

It has to be stressed that this lack of coherence in CADE's approach to restrictive business practices does not mean that CADE has not achieved good results in the implementation of the law. In the first place, one has to take into account the fact that the law does not provide a clear guidance to its application. Secondly, the effective enforcement of competition law has started only in the beginning of this decade. Finally, it is not possible to forget that the government has not been allowing CADE to find its own path, due to unjustified interference as well as to a lack of coherence in its policies.

It follows that CADE has been alone in its attempt to enforce the law. It has then been necessary to seek guidance in other legislations, in order to learn the rudiments of competition analysis. By examining the decisions of the American courts and the European Court of Justice in relation to competition cases, CADE has been able to develop an analytical framework that takes into account the major elements found in antitrust analysis. In this way, the examination of the cases in these two last chapters shows that CADE favours a rule of reason approach[363] to the analysis of the restrictive practices, by weighing the pro- and anticompetitive effects of these practices.[364] Accordingly, CADE has been basing its analysis on the intention of the company that adopted the practice, and the effects that such practice caused in competition.[365] Moreover, CADE has been giving much emphasis to the question of market power and its relevance to the legality of the practice, [366] which is an important element of antitrust analysis.

However, it is not possible to forget that the cases decided in other jurisdictions have to be used only as lessons on the mechanisms of competition, which are to be adapted to the Brazilian reality.

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[363] The rule of reason approach to restrictive practices was first developed in the US in relation to cases involving section 1 of the Sherman Act, which prohibits any contract that results in restraint of trade. As in its essence every contract is a restraint of trade regarding the parties involved, the American courts were left with the task of determining in each case whether the contract was a restraint of trade or not. In order to do so, the courts had to weigh the pro- and anticompetitive effects of each contract, and the balance would determine the legality of the contract. This is the rule of reason approach. See Gellhorn, E. and Kovacic, W., *Antitrust law and economics,* 4th ed., West Publishing, St. Paul, 1994, p. 165 et seq.; Whish, supra n. 355, p. 19/20, and Neale, A.D., *The antitrust laws of the USA,* 3rd ed., Cambridge University Press, Cambridge, 1980, p. 23 et seq.

[364] See, for instance, the *Valer* case.

[365] See the *Valer* case, the *Coldex* case, and the *Sergipe Hospitals* case.

[366] See the *Xerox* case and the *Valer* case.

CHAPTER 6 - CONTROL OF ECONOMIC CONCENTRATIONS: ANALYTICAL FRAMEWORK

1. Introduction

Competition law does not have a remedial character only, in the sense that its purpose is not only to prevent those types of conduct that constitute an abuse of economic power. Competition law has also a prophylactic nature, as it tries to prevent the acquisition of economic power that may harm the market and the economic relations resulting from it. The remedial characteristic was examined in the last two chapters; the prophylactic nature will be discussed in this and the next chapter.

Before the enactment of Law 8884/94, cases of control of economic concentration were under the jurisdiction of SDE.[367] However, as the law was not very clear in that matter, and as SDE was not well structured to deal with those cases, not many cases concerning economic concentration can be found. From 1990 to 1994, 17 cases on this matter were submitted to SDE (Table 4). Not one of them was disallowed, though two cases were suspended because the parties did not present the documents they were required to. Three cases were approved because SDE failed to

[367] Article 13, Law 8158/91. See supra, Chapter 3, section 4.

reach a decision within the deadline provided by the law. The remaining 12 cases were approved after a proper analysis.[368]

Table 4 - MERGERS CASES BEFORE LAW 8884/94 (1990/1994)

Number of cases submitted to SDE			**17**
Mergers approved		15	
After analysis	12		
Due to SDE's lack of compliance with deadline	03		
Cases suspended due to lack of interest of the merging companies		02	
Total			**17**

Source: author's research at SDE

With the enactment of Law 8884/94, the jurisdiction and the procedure related to the control of acts of economic concentration became clearer and CADE was given the power to enforce the legal provision. By transferring from SDE to CADE the jurisdiction to deal with acts of economic concentration, Law 8884/94 was applied immediately to merger cases. This means that, contrary to what happened in the cases of restrictive practices, CADE did not have to analyse the mergers that were submitted to SDE under the previous law.

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[368] However, one of these cases is the Gillette case, which was discussed in chapter 3, section 4, and is an example of procedural misunderstandings and administrative inefficiency.

approved because a decision was not reached before the deadline.[369] Four mergers were disallowed,[370] though one of them was submitted again later with new facts and efficiencies, which allowed CADE to approve it.[371] Of the four cases that were rejected, the mergers in two of them had already been formalised, and CADE determined they should be unscrambled. The remaining 19 cases were approved by CADE after an analysis of the merger. The approval of 12 mergers, however, was subject to a performance commitment. (Table 5)

Table 5 - MERGERS CASES AFTER LAW 8884/94 (1994/1996)

Number of cases submitted to CADE				68
Number of cases decided			**25**	
Mergers not approved		04		
Mergers approved		21		
Due to CADE's lack of compliance with deadline	02			
After analysis	19			
Total			**25**	

Source: author's research at CADE

The purpose of this chapter and the next chapter is to assess the treatment given by CADE to merger control. This assessment will de done through the analysis

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an example of procedural misunderstandings and administrative inefficiency.

[369] AC 46/95 - Yolat Ind. e Com. de Laticínios Ltda. e SPAM S.A. - Sociedade Produtora de Alimentos Manhuaçu and AC 48/95 - SKF e Dormer Tools S.A..

[370] AC 01/94 - Rockwell do Brasil e Albarus S.A. Ind. e Com., AC 06/94 - Brasilit S.A. e Eternit S.A., AC 12/94 - Rhodia S.A. e SINASA S.A. Adm., Participações e Comércio and AC 16/94 - Siderúrgica Laisa S.A. e Grupo Korf GmbH.

of nine cases decided between June of 1994 and March of 1996,[372] and will allow to establish whether CADE has already found a coherent approach to merger control or whether it is still acting in a case by case basis.

This chapter will deal with the legislation as well as with the analytical framework of merger control. Thus, section 2 will provide an overview of what the law establishes in relation to mergers, while section 3 will explain how CADE develops the analysis of a merger case. It will follow in section 4 an analysis of the two main approaches to merger control and how CADE has been applying these approaches. Section 5 will discuss the criteria that CADE takes into account when analysing a merger case, which include market definition, market share and concentration, barriers to entry and the historical behaviour of the merging companies.

The conclusion will summarise the main points developed in this chapter, which will then be taken again in the next chapter, in order to contribute to the definition of CADE's treatment to acts of economic concentration. As pointed out in the Introduction and Chapter 4, reference cannot be made to other studies and commentaries on the merger cases, since systematic analysis of the cases decided by CADE has never been developed.

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[371] AC 01/94, supra. n. 370, which was not approved, was submitted again one year latter and received the number AC 26/95.

[372] It was in June of 1994 that Law 8884/94, which gave CADE the jurisdiction to analyse acts of economic concentration, was enacted.

2. Overview of the legal provisions

2.1 Main aspects of Article 54

According to Article 54 of Law 8884/94, the acts that may limit or restrain competition, or result in control of the relevant market, must be submitted to CADE in order to be approved.[373] These acts comprise any kind of act adopted by enterprises

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[373] Article 54. - Any acts that may limit or otherwise restrain open competition, or that result in the control of relevant markets for certain products or services, shall be submitted to CADE for review.
Paragraph 1. - CADE may authorise any acts referred to in the main section of this article, provided that they meet the following requirements:
I. - they shall be cumulatively or alternatively intended to:
(a) increase productivity;
(b) improve the quality of a product or service; or
(c) cause an increased efficiency, as well as foster the technological or economic development;
II. - the resulting benefits shall be equally distributed between their participants, on the one part, and consumers or end-users, on the other;
III. - they shall not drive competition out of a substantial portion of the relevant market for a product or service; and IV. - only the acts strictly required to attain an envisaged objective shall be performed for that purpose.
Paragraph 2. - Any action under this article may be considered lawful if at least three of the requirements listed in the above items are met, whenever any such action is taken in the public interest or otherwise required to the benefit of the Brazilian economy, provided no damages are caused end-consumers or -users.
Paragraph 3. - The acts dealt with in the main section of this article also include any action intended for any form of economic concentration, whether through merger with or into other companies, organisation of companies to control third companies or any other form of corporate grouping, when the resulting company or group of companies accounts for twenty percent (20%) of a relevant market, or in which any of the participants has posted in its latest balance sheets an annual gross revenue equivalent to R$ 400,000,000 (four hundred million of Reais).
Paragraph 4. - The acts dealt with in the main section of this article shall be submitted to SDE--duly accompanied by three counterparts of the corresponding documentation--in advance or no later than fifteen business days after the occurrence thereof, and SDE shall promptly forward one such counterpart to CADE and another to SEAE.
Paragraph 5. - Non-compliance with the deadlines set forth in the preceding paragraph will be punishable with a fine in an amount between 60,000 (sixty thousand) UFIR and 6,000,000 (six million) UFIR, imposed by CADE without prejudice to the opening of an administrative proceeding pursuant to article 32 hereof.
Paragraph 6. - Upon receipt of the SEAE technical report issued within thirty days, SDE shall pronounce thereon within this same period and then send the case and evidentiary documents on to the CADE Board, which shall resolve thereon within sixty days.
Paragraph 7. - The effectiveness of any acts dealt with in this article will be conditioned to approval thereof, which approval shall be retroactive to the date of occurrence of such acts; if not looked into by CADE within the sixty-day period established in the preceding paragraph, the acts referred to above will be deemed automatically approved.
Paragraph 8. - The terms set forth in paragraphs 6 and 7 hereof will be stayed while the clarifications and documents considered essential for review of the case by CADE, SDE or SEAE are not submitted as requested.
Paragraph 9. - In the event the acts specified in this article are subject to suspensive conditions or have already caused fiscal or other effects to third parties, the CADE Board--if it elects to deny approval thereof--shall determine that all applicable action be taken to totally or partially revert--by way of dissolution, spin-off or sale of assets, partial cessation of activities, among others--any action or

that may result in an increase in the economic concentration of the relevant market. In this way, the law considers as "acts of economic concentration" mergers, organisations of companies to control third companies, or any other form of corporate grouping. CADE's jurisdiction over these acts are limited to the acts that results in a market share of 20% or more of the relevant market, or when one of the companies has a gross turnover of around US$ 400 million.[374]

A positive aspect of this definition is that it is broad, thus allowing the inclusion of any kind of act or contract engaged by enterprises. By not specifying each act that is likely to result in economic concentration, the law facilitates its own enforcement by the administrative agencies, which are thus not compelled to stick to those established acts. This same approach was adopted by the Mexican Economic Competition Law which, in its article 16, defines a concentration as "a merger with or acquisition of control over another firm, or any other act joining together companies, associations, stockholders, business partnership, trust companies or assets in general, which is carried out between competitors, suppliers, customers, or any other economic agents whose purpose or effect is to diminish, harm or impede competition with respect to identical or substantially similar goods and services".

This broadness in the definition of concentration is not a characteristic of only the Mexican and Brazilian laws. In fact, the legislation of these countries were

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procedure damaging to the economic order, notwithstanding any civil liability for losses and damages caused third parties.
Paragraph 10. - Without prejudice to the obligations of the parties involved, any change in the stock control of publicly-held companies or registration of amalgamations shall be reported to SDE by the Securities Commission - CVM and by the Brazilian Commercial Registry Department of the Ministry of Industry, Trade and Tourism - DNRC/MICT, respectively, within five business days for the SDE review, if applicable.

[374] Article 54, paragraph 3 . See below, subsection 2.2

inspired by foreign laws that had already been dealing with concentration issues for a much longer time. If we take the American law, for instance, we will find out that Section 7 of the Clayton Act, which is entitled "acquisition by one corporation of stock of another", prohibits any person engaged in commerce of acquiring assets, stocks or other share capital from another person also engaged in commerce, when it results in monopoly or in a reduction of competition.

The law does not establish the forms such acquisitions should take, which means that any kind of acquisition is under the jurisdiction of the law. This was the reason why the Clayton Act was enacted - to cover a greater range of mergers and reach horizontal, vertical and conglomerate mergers, which did not happen under the Sherman Act. The definition of concentration adopted in the EEC Merger Regulation[375] is not so liberal in expression, but nevertheless it allows for the inclusion of mergers or any kind of acquisition of control.[376]

On the other hand, the Mexican law conditions the existence of concentration to the purpose behind the concentration or the negative effects it is likely to cause in the market, that is, "to diminish, harm or impede competition". The Brazilian law does not explicitly require these effects. It does, however, establish requirements for an act of economic concentration to be approved.[377] These requirements are related to the beneficial consequences of the concentration. In this way, the merger has to result

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[375] Council Regulation (EEC) 4064/89.

[376] Article 3(1) A concentration shall be deemed to arise where:
(a) two or more previously independent undertakings merge, or
(b) - one or more persons already controlling at least one undertaking, or
- one or more undertakings
acquire, whether by purchase of securities or assets, by contract or by any other means, direct or indirect control of the whole or parts of one or more other undertakings.

[377] Article 54, paragraph 1.

in an increased efficiency, expansion of productivity, or improvement in the quality of goods or services, as well as in fostering of technological or economic development. Also, the benefits resulting from the merger have to be equally distributed between the participants of the mergers and the consumers.

Another requirement is that the merger cannot eliminate competition in a substantial part of a relevant market. Finally, only the acts strictly required to attain an envisaged objective shall be performed for that purpose (Figure 5). On the other hand, if the merger is in the public interest or required to the benefit of the Brazilian economy, then at least three of the requirements listed above must be met.[378]

Law 8884/94 establishes that the application for approval of the act of economic concentration and all the documents related to it have to be filed before SDE by the merging companies before it is formalised or at most 15 days after its formalisation.[379] Failure to apply may result in fines between UFIR 60,000 and UFIR 6,000,000.[380] SDE will then send one copy of the application to SEAE and another for CADE. SEAE has 30 days to write its technical opinion, after which SDE has another 30 days to prepare its own opinion. This documentation will then be sent to CADE, which has 60 days to reach a decision about the merger.[381] If CADE does not reach a decision in that period, the merger will be automatically approved.

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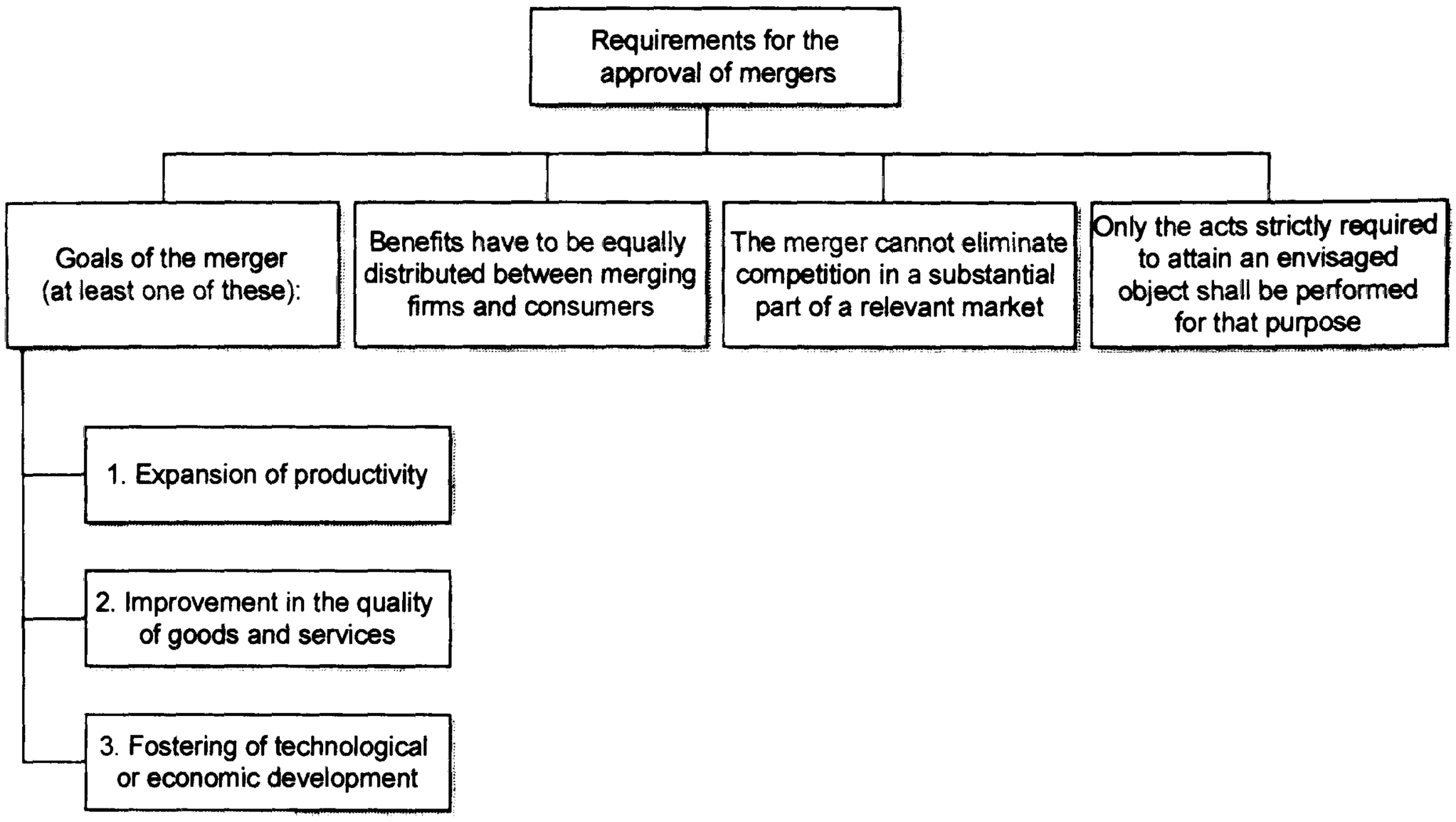
[378] Article 54, paragraph 2.
[379] Article 54, paragraph 4.
[380] Article 54, paragraph 5.

Figure 5 - ARTICLE 54(1): REQUIREMENTS FOR MERGERS



In order to bring more certainty for the economic agents in relation to the analysis of acts of economic concentration, in August of 1996 CADE issued Resolution n. 5, which, among other issues, details the procedure to be followed regarding mergers and acquisitions. Among other procedural aspects, it provides also for hearings during the proceedings in order to facilitate the comprehension of the terms of the transaction.[382] During these hearings, which may be requested by SDE and SEAE in the initial phase of the case or by CADE at any time, it will be possible

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[381] See Chapter 3, section 4, figure 3, for a more detailed explanation of the procedure related to acts of economic concentration.

[382] Resolution n. 5, Article 17 - The Reporting Council member may, at the request of SDE or SEAE, attend at the initial evidentiary hearings held by such offices, whenever it may be deemed proper for a more comprehensive understanding of the intended transaction.
Article 20 - The Reporting Council member may call a hearing, at any time, for the attendance of the applicants: the SDE and SEAE representatives shall also be invited to take part thereat.
Sole Paragraph - The hearing may also be attended by the Attorney-General of CADE and by the Chairman of the quasi governmental agency, or an assistant appointed thereby

for the merging parties to discuss and negotiate with the administrative agencies the terms involved in the merger.

Though it is not provided for in the law, the merging companies can bargain with CADE and change the conditions of the merger in order to have it approved. It is also possible to submit again a merger to CADE after it has been disallowed, as long as new facts have occurred and more efficiencies arise from the merger.[383]

Finally, Article 54, paragraph 9 gives CADE the power to break up a merger if it understands necessary. As seen in section 1, during the period of this research only two mergers had to be unscrambled.[384] In the *Rhodia* case,[385] CADE did not approve the merger and thus determined the discontinuation of the acts that had already occurred, which were related to the incorporation by Rhodia of the activities in the production of polyester and acrylic synthetic fibres.

The companies then submitted to CADE a proposal for the discontinuation required in the decision. The two enterprises would create a new company, to which they would transfer assets for the production of polyester and acrylic fibres. This new company would have an independent administration until it was sold to a third party not related to the merging companies. The following steps would be taken:

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[383] This happened in AC 01/94, Rockwell do Brasil e Albarus S.A. Ind. e Com., which one year later, when it was submitted again, received the number AC 26/95.
[384] AC 12/94 - Rhodia S.A e Sinasa S.A Adm., Participações e Comércio; and AC 16/94 - Siderúrgica Laisa S.A e Grupo Korf GmbH.
[385] AC 12/94. See Chapter 7, subsection 3.1.

a) a new company in the industrialisation and commercialisation of acrylic and polyester fibre would be created in two months, with its capital divided between Rhodia (82%) and Sinasa and others (18%);

b) after four months of its creation, this new company would be put on sale;

c) the procedure to be adopted in the sale would be similar to that of a public bidding;

d) the two companies would transfer to the new company plants with a production capacity equal or superior to the effective production intended for the national market of one of the competitors before the transaction, so that competition is restablished between two companies.

CADE accepted the proposal and the companies created the new company - Polifiatex - Fibras Têxteis Ltda., which was later divided in two in order to be sold to two different companies.

2.2 The question of thresholds

As mentioned above, CADE has jurisdiction over mergers when the market share resulting from it is at least 20% of the relevant market, or when one of the companies has a gross turnover of around US$ 400 million. The companies involved in such mergers are thus compelled to inform CADE about the transaction, so that the merger can be analysed and, if in accordance to the law, approved. By establishing these two conditions for notification, the law ensured that all the three kinds of merger - horizontal, vertical and conglomerate mergers - are to be submitted to CADE. The threshold related to market share involves especially horizontal mergers, while the

gross turnover test includes vertical and conglomerate mergers as well.[386] Moreover, by fixing a threshold, the law defines the limits of its jurisdiction, which allows businessmen and lawyers to make a safer assessment of the possibility of a merger being challenged.

Establishing thresholds for qualifying mergers for investigation is a common practice in competition law. What usually differ in the law of each country, however, are the test adopted and the quantitative limits imposed. It is this limit that establishes how stringent the law is. For instance, if we take the market share test into account,[387] we will see that, the lower the established market share, the more severe is the law, in the sense that more mergers shall be investigated.

The EEC Merger Regulation adopts an aggregate turnover test, where the world-wide turnover of the companies involved must be more than ECU 2500 million, the turnover in each of at least three Member States must be more than ECU 100 million (where each of at least two of the companies must have a turnover of more than ECU 25 million), and the Community-wide turnover of each of at least two of the companies must be ECU 100 million.[388] This test is purely quantitative, as it does not take into account the market power of the companies involved.

Just as in the USA, it is the Hart-Scott-Rodino Antitrust Improvements Act that establishes the threshold for pre-merger notification. The HSR Act adopts a

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[386] However, as it will be seen in Chapter 7, section 3, CADE puts much more emphasis on the analysis of horizontal mergers, as opposed to vertical and conglomerate mergers.
[387] For a discussion on market share, see below, subsection 5.2.
[388] Article 1(3) of the Merger Regulation, as amended by Council Regulation n. 1310/97. ECU 2500 million is equivalent to approximately US$ 2.75 billion; ECU 100 million, to US$ 110.2 million; and ECU 25 million, to US$ 27.55 million.

sale/assets test as well as a price test. In this way, a pre-merger notification is required when: a) one of the parties to the transaction has annual net sales (or revenues) or total assets of more than US$ 100 million and the other party has annual net sales (or revenues) or total assets of more than US$ 10 million; and b) the acquisition price or value of the acquired assets or entity is more than US$ 15 million. This is also a quantitative test, as it involves the size and value of the companies, but not their market power.

The adoption of thresholds and the definition of the quantitative limits by the law depend on the characteristics of the market of the country in question, as well as on what the law intends to achieve with merger control. It follows that competition law and policy cannot blindly adopt the quantitative limits of other legislations, otherwise the law could result ineffective.

In relation to the Brazilian law, it has been argued that the figure of US$ 400 million for the gross turnover test was established at random, and that it should have been left for CADE to establish a threshold in a case-by-case basis.[389] However, it is not possible to agree with this argument, since it would annul exactly the main reason for having thresholds, that is, to establish a limit for mergers to be investigated. If thresholds were abolished, the amount of work submitted to CADE would be immense and moreover unavailing, because the majority of the mergers does not cause any effect whatsoever in competition. The non existence of a threshold would result in the inefficient use of an administrative agency.

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[389] in Fonseca, J.B.L., *Lei de Proteção da Concorrência,* Forense, Rio de Janeiro, 1995, p. 150.

3. Structure of the analysis

In order to better understand how the opinion of the Commissioner is structured and developed, it would be helpful to refer to an actual case already decided by CADE, the *Ajinomoto* case.[390] The analysis started with a report of the case, where the merger as well as the procedural development of the case were described. Also, the Commissioner outlined the main points of the opinions prepared by SEAE, SDE and CADE's attorney. It also referred to a "preliminary analysis" prepared by the Commissioner before the final opinion. This preliminary analysis was sent to the merging companies with the request to clarify some points that the Commissioner understood that were not satisfactory.

After the report, the opinion proceeded to the analysis of the case. The first issue to be taken into account was the relevant market, which was then defined and analysed, taking into account the companies that act in that market, their market share, behaviour, prices, demand for the product, supply, and exports. An analysis of barriers to entry of new competitors thus followed. It included not only the existence of such barriers but also the effect they had caused in the market, so that it would be possible to conclude whether they would prevent the entry of new competitors after the merger had occurred.

The next issue to be discussed were the efficiencies involved in the merger. In the Ajinomoto case the merging companies argued that a series of efficiencies would be achieved with the merger, so the Commissioner proceeded to analyse each of these

efficiencies, taking into consideration the requirements established by article 54 of Law 8884/94,[391] as well as the likelihood of occurrence of such efficiencies. The Commissioner then assessed the reply given by the merging firms to the preliminary analysis, where they clarified the points arisen by the Commissioner.

Based on the analysis of the issues discussed, the opinion of the Commissioner reached a conclusion about the merger, which in the present case was approved, as long as the new company complied with a "performance commitment", according to which the company should guarantee the supply of the domestic market as well as transfer the productivity gains to consumers.

4. The approach to merger control adopted by CADE

The main purpose of merger control in general is to prevent the concentration resulting from the merger from affecting the market in a negative manner. As it is inherent to mergers the elimination of competition between the merging enterprises, the role of merger control is to assess the possible benefits resulting from the merger.

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[390] AC 19/94, required by Oriento Indústria e Comércio S. A. on 05.10.94, distributed to Commissioner Carlos Eduardo Vieira de Carvalho, and decided on 13.11.95. For a detailed analysis of the case, see below, subsection 5.3.

[391] Article 54. - Any acts that may limit or otherwise restrain open competition, or that result in the control of relevant markets for certain products or services, shall be submitted to CADE for review.
Paragraph 1. - CADE may authorise any acts referred to in the main section of this article, provided that they meet the following requirements:
I. - they shall be cumulatively or alternatively intended to:
(a) increase productivity;
(b) improve the quality of a product or service; or
(c) cause an increased efficiency, as well as foster the technological or economic development;
II. - the resulting benefits shall be equally distributed between their participants, on the one part, and consumers or end-users, on the other;
III. - they shall not drive competition out of a substantial portion of the relevant market for a product or service; and

If they overcome the elimination of competition, the merger may be approved, or conditions related to these benefits may be imposed. Merger control has thus a prophylactic nature.

It is the emphasis given to the different types of benefits that will determine the approach adopted by the competition authorities in relation to merger control. If they understand that benefits such as increase in employment or protection of small companies are more important, then they will be favouring a social approach to competition. If more weight is given to economic efficiencies, then the competition authorities will be adopting an efficiency approach. Finally, if competition authorities are concerned with mergers that lessen competition in the market, they will adopt a competitive approach.

The best illustration of this discussion can be found in the USA. Until the 1960s, the Supreme Court adopted a more social approach to merger control. For instance, in *US v. Von's Grocery Co.*,[392] the Supreme Court understood that the goal of antimerger law was to ensure that the market be composed of small companies. This approach was confirmed by other cases, such as *US v. Pabst Brewing Co.*,[393] where the allowed market share resulting from the merger was so low that only insignificant mergers were to be approved, thus favouring the existence of small companies in the market.

However, there was a change in the composition of the Supreme Court in the 1970s, which resulted in a change of approach as well. The existence of a market

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IV. - only the acts strictly required to attain an envisaged objective shall be performed for that purpose.

composed of small companies was not supported anymore, as the Supreme Court started to take into account qualitative factors and develop more elaborated economic analysis, thus favouring mergers that result in economic efficiencies. The first case to develop this new approach was *US v. General Dynamics Co.*,[394] where the Supreme Court ignored the market share of the companies (which by itself would be enough to consider the merger illegal under the previous approach) and took into account other factors related to the merger, such as the situation of the industry in the national economy, and the effects of the merger in the industry.

Bringing this discussion to the Brazilian context, one question has to be asked: what is the approach adopted by CADE in relation to merger control? The answer to this question is not easy to find. The law itself is not clear. The requirements it establishes for the legality of mergers do not provide any solution to this problem, as they include both economic efficiency and consumer welfare to be taken into account in the analysis.[395] In addition, unlike the Department of Justice and the Federal Trade Commission in the USA, CADE has never issued any kind of guidelines related to its treatment of mergers. The legislative debates in the Congress do not bring any light to the question either, as the Congressmen themselves had different opinions about the purpose of competition law in general,[396] and none whatsoever about merger control.

The only instrument to which we can turn in order to answer that question is the merger cases decided by CADE. It is necessary to point out that CADE has been deciding these cases for only three years, which means that the jurisprudence is not

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[392] 384 US 270, 86 S.Ct. 1478, 16 L.Ed. 2d. 555 (1966).
[393] 384 US 546, 86 S.Ct. 1665, 16 L.Ed. 2d. 765 (1966).
[394] 415 US 486, 94 S.Ct. 1186, 39 L.Ed. 2d. 530 (1974).
[395] See article 54, paragraph 1.

yet firm and is likely to change in the future. Nevertheless, the case law does constitute the best source of analysis available, as it indicates how CADE has been developing its approach to merger control in practice.

4.1 Social approach

A social approach to merger control means that mergers that bring benefits to consumers, increase employment, protect small firms, among other issues, are likely to be approved by the controlling agency. It has been argued that in Brazil importance is given to benefits brought to the consumers by the merger.[397] This approach can be found in the analysis of the *Brasilit* case.[398] In this case, Eternit S.A. and Brasilit S.A. wanted to create a new company through the merger of their two subsidiaries located in the states of Rio Grande do Sul (Brasilit's) and Paraná (Eternit's). The two plants would continue to manufacture fibrocement products, maintain their own commercial policy and preserve their trademarks and the characteristics of their products. However, the new company would be given the trademarks Eternit and Brasilit and the know-how of the companies, and would produce for the markets of the states of Rio Grande do Sul, Santa Catarina and Paraná.

The reason given to justify the merger was that it would result in efficiencies and therefore in lower prices for consumers. CADE however did not approve the merger, because it understood that it would not bring benefits to consumers - only the two companies would gain from it. Based on the historical behaviour of the

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[396] For a discussion on the legislative debates, see above, Chapter 2, subsection 2.3.1.

[397] Malard, N., "The political background to the adoption of an effective competition law - the Brazilian experience" - paper given at the Competition Policy 1994 OECD Workshop with Dynamic Non-Member Economies, Paris.

companies, which showed that the prices of the main products of the companies had been rapidly increasing in the previous four years, CADE concluded that it was hardly likely that prices would decrease after the merger. Another fact that allowed this conclusion was that the companies presented high spare capacity and incurred high costs.

Accordingly, CADE found out that, though the market of fibrocement products was dominated by the two merging companies, it was quite competitive, due to the presence of small and medium enterprises in that market, which offered better condition of payment, lower prices, transport and discounts to consumer. By allowing the merger, the company would achieve such a dominant position that it would be likely to affect this competitive environment. CADE then opted for protecting the small companies of the market, as their existence benefited consumers, situation which would not be the case after the creation of the new company.

This case shows that CADE takes into consideration consumer protection and small enterprises when analysing mergers. However, it does not prove that this is CADE's major concern, as the case did not present the possibility of choosing between two different approaches. It was not a question of deciding if it was better to protect consumers and small enterprises or to support the economic efficiencies resulting from the merger, because the merger brought about no efficiencies at all.

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[398] AC 06/94, required by Brasilit S.A. and Eternit S.A. on 04.08.94, distributed to Commissioner Neide Teresinha Malard, and decided on 25.11.94.

4.2 Efficiency approach

If a socially oriented analysis of mergers does not seem to find much support in CADE, we will have to examine what is the position in relation to an efficiency approach to merger control, where economic criteria are developed in order to assess a merger.

An example of how CADE applies this approach can be found in the *Belgo Mineira* case.[399] It involved the acquisition of 49% of the stock shares of Dedini Siderúrgica, a company that operated in the sector of lamination of iron and steel, producing mainly heavy iron bars, by Belgo Mineira, a metallurgical company that operates in all the phases of the production process.

The relevant market was highly concentrated, with only three companies sharing 70% of the market: Gerdau with 41.1%, Belgo Mineira with 18.8%, and Mendes Jr. with 13.4%. Dedini had a share of 5%, which means that after the transaction Belgo Mineira would have 23% of the market. However, there was a chance of concentration increasing even more, because Mendes Jr., one of the top three companies on the market, was facing a series of problems and therefore entered into a one-year contract of leasing with Belgo Mineira. This contract included an option to buy after the contract terminated. If Belgo Mineira decided to buy Mendes Jr., there would be a situation of duopoly in the market of regular long steel, where Gerdau would have 41% and Belgo Mineira 37.2%.

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[399] AC 14/94, required by Cia. Siderúrgica Belgo Mineira and Dedini S.A. Siderúrgica in September of 1994, distributed to Commissioner Marcelo Monteiro Soares, and decided on 16.02.96.

Notwithstanding this concentration, CADE decided to approve the merger, because the transaction aimed at an increase in the competitive level of the two companies by the complementation in their line of products, which would improve their performance and increase the supply of the market. Another reason for the approval of the merger was that the efficiencies resulting from the merger outweighed the anticompetitive effects of the transaction. These efficiencies included increase of production and the consequent increase of supply to the domestic market, reduction of costs, rationalisation of distribution, increase in the quality of goods and services, and investments in technology.

In order to reach this conclusion, CADE defined the relevant market, established the level of concentration in that market, examined the companies acting in the market, analysed the metallurgical industry in general and the Brazilian metallurgical sector in particular, assessed the existence of barriers to entry the market, and analysed the efficiencies involved in the merger.

CADE's reasoning in this case favoured the creation of a competitive company even if it meant the existence of a highly concentrated market. This reasoning was reached through a complete economic analysis of the case, which involved not only quantitative criteria such as market share but also qualitative factors like the performance of the companies and their post-merger behaviour.

Analysis of other cases shows that CADE does favour the efficiency approach,[400] but at the same time it does not disregard completely the social criteria. Accordingly, none of the cases developed a competitive approach. Above all, it is important to notice that, in these first three years, CADE was not faced with choosing between the social and the efficiency approach. Most of the time CADE has been able to find a compromise between the two approaches, by taking into consideration the economic factors but also putting some weight on the social effects of the merger. It follows that CADE has not yet decided which path it has to follow in merger control. More weight is given to economic issues, but it is not possible to affirm with certainty that this trend will be developed in the future. It is obvious that, at such an early stage, CADE should not be expected to have defined its approach to merger control.

5. Criteria for evaluation of mergers

5.1 Market definition

Law 8884/94 establishes in its article 54 that "any act that may limit or otherwise restrain free competition, or that result in the control of the relevant market for certain products and services, shall be submitted to CADE for review". It follows that, in every case of merger to be analysed by CADE, the relevant market has to be defined. The necessity of this definition lies in the fact that it is the relevant market that will be the basis for all the analysis of the merger.

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[400] See, for instance, the *Melitta* case (below, subsection 5.1, and chapter 7, subsection 2.1), the *Ajinomoto* case (below, subsection 5.3, and chapter 7, subsection 2.4), and the *Hoebras* case (below, subsection 5.1, and chapter 7, subsection 2.3).

As properly stated in a report about market definition required by the UK Office of Fair Trading, market definition "sets the scene for the analysis of competition, and tells the competition authority where it must focus its main attention".[401] As Posner pointed out, "...given enough flexibility in market definition a surprising number of innocuous mergers can be made to appear dangerously monopolistic".[402] The outcome of the case will thus vary according to what constitutes the relevant market. For instance, the bigger the relevant market, the greater the number of companies acting on it, and therefore the less concentrated the market will be. In a less concentrated market, the chances of collusion and of a merger limiting competition are not high, which means that the merger is likely to be approved. On the other hand, if the relevant market is defined in a narrower manner, than the possibility of the merger being challenged is higher.

Despite the importance of the concept of relevant market, the Brazilian law does not define what is a relevant market nor establish the elements CADE should take into consideration when analysing the market. It follows that CADE has to define the market according to its own understanding of the issue.

CADE developed some theoretical aspects of the relevant market in the Melitta case.[403] It established that the definition of the relevant market is necessary to determine the level of economic concentration and the potential harm that an act of concentration may cause. In order to determine the relevant product market, CADE

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[401] National Economic Research Associates (NERA), *Market definition in UK Competition Policy,* Office of Fair Trading, February 1992, p. 6.
[402] Posner, R.A., *Antitrust law - an economic perspective,* The University of Chicago Press, Chicago, 1976, p. 125.
[403] AC 46/95, required by Jovita Indústria e Comércio Ltda. and Melitta do Brasil Indústria e Comércio Ltda. on 11.11.94, distributed to Commissioner Marcelo Monteiro Soares, and decided on 19.12.95.

held that it is necessary to take into consideration the characteristics of the product, which include its uniqueness or interchangeability, its use, its price and its level of technology development, as well as its geographical dimension and temporal aspect.

In relation to the geographic market, CADE established that its concept includes the spatial area where an economic agent is able to increase the price of its product without making consumers look for other suppliers in other areas. The geographic market also includes suppliers from other areas that can rapidly enter that market with substitutes. According to CADE, a reasonable time for that entry would be one year. The relevant market would also be based on potentiality, that is, the possibility of identifying the economic agents that would compete in that market if certain conditions occurred.[404]

In the *Belgo Mineira* case,[405] CADE went further and held that, in order to define the market, it would have to take into account not only the demand for the product but also the supply because, if only the former was taken into consideration, the relevant market would not be technically correct. By including the supply, it would be including companies that do not manufacture the product but that may do so if the market becomes attractive. In this way, though the product manufactured by the acquired company was "heavy iron bars", CADE defined the relevant market as that of "regular long steel", which included heavy iron bars.[406]

From these two cases it is possible to determine the elements CADE will consider when defining the relevant market. Basically it includes establishing the

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[404] Opinion of Commissioner Marcelo Monteiro Soares.

characteristics of the product, determining the existence of substitutes for that product, and defining the possibility of other companies entering that market. This cause of action followed by CADE demonstrates that CADE is on the right track. However, these are just the first steps to be taken to reach a proper definition of relevant market.

If we turn to the American situation, we will find in the 1992 Merger Guidelines more detailed and elaborated criteria to define the relevant market. In the first place, the Guidelines define market as "a product or group of products and a geographical area in which it is produced or sold such that a hypothetical profit-maximising firm, not subject to price regulation, that was the only present and future producer or seller of those products in that area likely would impose at least a 'small but significant and nontransitory' increase in price, assuming the terms of sale of all other products are held constant".[407] Based on this concept and on the probable responses to both demand and supply, the relevant market is to be defined. According to the Guidelines, this shall be done in the following manner:

> "...the Agency will begin with each product (narrowly defined) produced or sold by each merging firm and ask what would happen if a hypothetical monopolist of that product imposed at least a "small but significant and nontransitory" increase in price, but the terms of sale of all other products remained constant. If, in response to the price increase, the reduction in sales of the product would be large enough that a hypothetical monopolist would

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[405] AC 14/94, supra n. 399. For a discussion on the case, see supra, subsection 4.2.
[406] Opinion of Commissioner Marcelo Monteiro Soares, p. 18.

not find it profitable to impose such an increase in price, then the Agency will add to the product group the product that is the next-best substitute for the merging firm's product.

(...)

The price increase question is then asked for a hypothetical monopolist controlling the expanded product group. In performing successive iterations of the price increase test, the hypothetical monopolist will be assumed to pursue maximum profits in deciding whether to raise the prices of any or all of the additional products under its control. This process will continue until a group of products is identified such that a hypothetical monopolist over that group of products would profitably impose at least a "small but significant and nontransitory" increase, including the price of a product of one of the merging firms. The Agency generally will consider the relevant product market to be the smallest group of products that satisfies this test."[408]

The Guidelines explain that the definition of "small but significant and nontransitory increase of price" depends on the industry, and establish relevant evidence that should be given particularly weight when assessing substitutes for the product.

The report required by the UK Office of Fair Trading on market definition understands that this standard adopted by the DOJ Merger Guidelines is "a sensible

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[407] US Department of Justice Antitrust Division Federal Trade Commission, 1992 Merger Guidelines, subsection 1.0.
[408] id., subsection 1.11.

way to go about the task of defining the relevant market",[409] as it draws a line between the products that are in the market and those that are outside the market, without forgetting the influence that the products outside the market may exert on the effective competition of the relevant market. This report holds that the notion of the relevant market can be applied to different problems faced by the competition authorities.

However, they argue that there are situations where an economically rigorous definition is not necessary, in which case an informal approach to market definition is more adequate. The report establishes thus four points that it considers important in the process of market definition. One of them is "supply-side substitutes", which are products manufactured through a system that could easily switch to produce another product. Another point is the "continuous chains of substitution", meaning that a market definition can be wider when there are products that are linked to one another by these unbroken chains of substitution. One more issue to be taken into account is the existence of "captive consumers", who are not likely to switch products. The report argues that, "as long as there is enough scope for substitution between two products to ensure that suppliers of neither could afford to allow their prices to drift up of line with the other's product",[410] the existence of captive consumers does not mean that these two products should constitute separate markets. The last point to be considered is "product differentiation", where absolute differences in prices and characteristics of products do not allow for the establishment of different markets.

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[409] supra n. 401, p. 5.
[410] id., p. 108/109.

Demand substitution and supply substitution are the basic principles for market definition adopted by the EC Commission.[411] The Commission notice summarises the process of definition of the relevant market:

> "on the basis of the preliminary information available or information submitted by the undertakings involved, the Commission will usually be in a position to broadly establish the possible relevant markets within which, for instance a concentration or a restriction of competition has to be assessed. In general, and for all practical purposes when handling individual cases, the question will usually be to decide on a few alternative possible relevant markets. For instance, with respect to the product market, the issue will often be to establish whether product A and product B belong or do not belong to the same product market. It is often the case that the inclusion of product B would be enough to remove any competition concerns".[412]

By comparing the Merger Guidelines, the OFT report and the Commission Notice to the standard adopted by CADE, it is possible to conclude that CADE has the right insight of the matter and that in theory it does understand what constitutes a market and the economic elements to be considered when defining the relevant market. The problem however lies on the manner that CADE applies these elements in the concrete case. The two cases discussed above - Melitta and Belgo Mineira - constitute the only two cases where CADE elaborated more clearly the definition of

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[411] Commission Notice on the definition of the relevant market for the purposes of Community competition law, published in OJ 372 on 09.12.97.
[412] id.

the market. This, however, is an exception. In the majority of the cases, CADE adopted a more "informal" approach to market definition.

For instance, in the *Yolat* case,[413] where Yolat acquired 90% of the stock shares of Cilpe, a producer of pasteurised skimmed milk, CADE defined the relevant market as that of pasteurised skimmed milk because that was the product produced by Cilpe. CADE held that longlife milk could not be considered a substitute product because it was more expensive. However, CADE did not consider the fact that Yolat was a producer of longlife milk and other dairy products and therefore could have been a potential competitor. Had the market been defined in a broader manner, Yolat and Cilpe would have been considered competitors, and the outcome of the case could have been different. What is important, though, is that CADE failed to take into account the economic elements necessary for the definition of the market. To establish a market based only on the product manufactured by the acquired firm is a too much informal way to tackle the issue, even if there is no doubt about the product and its analysis does not seem to present complexities.

In the *Hoebras* case,[414] where a joint venture was created in order to produce nylon and polyester filaments, CADE established that the relevant product market was that of polyester filaments, because it was there that the joint venture caused horizontal concentration, since the two companies manufactured the product. It is not possible to define a market based only on the coincidence of products manufactured, and this is what CADE did. CADE started with a conclusion, and then develop the

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[413] AC 11/94, required by Yolat Indústria e Comércio de Laticínios Ltda. on 11.03.94, distributed to Commissioner Marcelo Monteiro Soares, and decided on 23.11.94.
[414] AC 41/95, required by Hoechst do Brasil Química e Farmacêutica S.A. and Rhodia S.A. in July of 1995, distributed to Commissioner Neide Teresinha Malard, and decided on 06.03.96.

issue. Even this analysis, which consisted only of an examination of possible substitutes for the product, did not indicate how it was possible to arrive to that conclusion.

This discussion allows us to conclude that CADE does have the notion of what market definition requires and what are the elements involved in it, but does not know how to define the relevant market in practice. CADE's approach to market definition thus is not based on solid economic grounds.

The same can be said in relation to the definition of the geographical market. If we turn again to the Merger Guidelines, we will find that the same standard adopted in the product market applies to the geographical market. Thus, the target is to "delineate the geographic market to be a region such that a hypothetical monopolist that was the only present or future producer of the relevant product at locations in that region would profitably impose at least a 'small but significant and nontransitory' increase in price, holding constant the terms of sale for all products produced elsewhere".[415] The method applied is also the same, defining the area where the merging firms are located and establishing if "in response to the price increase, the reduction in sales of the product at that location would be large enough that a hypothetical monopolist producing or selling the relevant product at the merging firm's location would not find it profitable to impose such an increase in price".[416] This is to be done until it is identified a group of locations where a hypothetical monopolist could profitably impose a "small but significant and nontransitory" increase of price is identified, which will be the geographical market.

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[415] Merger Guidelines supra n.407, subsection 1.21.

When defining the geographical market, CADE usually takes into consideration the area to which the merging companies supply the relevant product. It also attempts to examine the role of exports and imports in that market in order to establish if it affects the definition of the area. However, on the whole CADE defines the geographical market as the Brazilian territory, because usually the mergers deal with companies that supply the whole country. This was the situation in the *Melitta* case, where the domestic market was considered the geographical market, since exports and imports were not significant.

The same happened in the *Belgo Mineira* case, where the geographical market would be the whole country, because the companies that act in the market had a well structured net of distribution, and imports were not significant. In the *Brasilit* case,[417] where two manufacturers of fibrocement products decided to merger two of their companies which were located at the South area of the country, CADE concluded that the geographical market was the Brazilian territory because, though the supply was concentrated in the South and Southeast areas of the country, it met the demand of the whole country. It follows that the most important element for CADE in geographical market definition lies in the area where the merging companies distribute the product.

This approach is confirmed even by a case where the geographical market was not the domestic market, but the metropolitan area of the city of Recife. This happened in the *Yolat* case.[418] As the relevant product market was defined as that of pasteurised skimmed milk, the geographical market - based on the supply approach - could only be the city of Recife, because it was only to this area that the acquiring

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[416] id.

company sold the product. Had it included longlife or powdered milk, the geographical market would have been different.

The approach to geographical market definition can be also considered informal, but in general it does not do much harm when the geographical market is the Brazilian territory, though it should be given more weight to the possibility of foreign companies entering the market. However, this approach is not correct when a smaller area is defined as the geographical market, because it does not take into account the possibility of consumers switching to other areas or of producers from other areas entering that market.

5.2 Market share and concentration

The main reason for CADE to define the relevant market in a merger case is that it will be the basis for an analysis of the concentration in that market, which is the basic purpose of merger control. Therefore, after defining the market, CADE will investigate which companies are part of that market, and then infer the share that each company has in that market. Based on this market share, it will be possible to determine how concentrated is the market. This is a process that CADE adopts in every merger case.

The examination of one of those cases will help to understand how this works in practice. The *Carborundum* case[419] dealt with the acquisition of the abrasive sector of Carborundum, a company acting in several economic sectors, by Norton, a

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[417] AC 06/94, supra n. 398.
[418] AC 11/94, supra n. 413.

manufacturer of abrasive products. In this case, CADE established that two markets were involved: the market of sandpaper and the market of grindstone, as they are different products. CADE then proceeded to determine the market share of the companies in each market. In the sandpaper market, for instance, Norton had a share of 55.39%, while 3M do Brasil had 34.36%, Gothard had 6.28%, and Carborundum had 3.97%. The market of grindstone, in its turn, is more atomised, and it includes 33 small, medium and big companies. Here Norton had 25.91% of the market, while São João Abrasivos had 13.61%; Carborundum, 13%; and Icder, 10.68%.

By comparing the two markets, it is possible to conclude that, in the first case, the market shares themselves show that the market is highly concentrated, with only two companies controlling almost 90% of the market. In relation to the second market, however, it is more difficult to determine its level of concentration. In this situation, CADE makes use of the Herfindahl-Hirschman Index (HHI), a method for measuring the concentration in a market, which is adopted by the US Department of Justice in the analysis of mergers. The Merger Guidelines hold that "the HHI reflects both the distribution of the market shares of the top four firms and the composition of the market outside the top four firms", as well as "gives proportionately greater weight to the market shares of the larger firms, in accord with their relative importance in any collusive interaction".[420]

According to this method, the squared market share of the participants of the market are to be summed, and the result will show how concentrated the market is, which can go from 0 to 10000 points, the latter representing a case of pure monopoly.

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[419] AC 05/94, required by Carborundum do Brasil Ltda. and Norton S.A. Indústria e Comércio on

A non concentrated market has as index of 1000, a moderately concentrated market reaches between 1000 and 1800 points, and a highly concentrated market has an index superior to 1800 points. In the first case, the merger would not be considered anticompetitive. In the second case, a merger could cause anticompetitive effects in the market if the transaction increased the index in 100 points. By applying the HHI to the market of grindstone, the result will be 1391 points before the acquisition, which means that the market is moderately concentrated. After the acquisition, the HHI would reach 2065 points, far above the increase considered acceptable. Nevertheless, as it will be seen below, the merger was allowed.[421]

As it was pointed out, the HHI is used to measure the concentration of a market, showing the difference in the level of concentration after the transaction, a factor that helps in the evaluation of the merger. However, if we take into account the Brazilian context, with highly concentrated markets, the utilisation of the HHI seems pointless, since it generally indicates that the market is concentrated and that the merger will increase even more this concentration. If we take the market of sandpaper in the Carborundum case, for example, we will see that the HHI in that market was 4304 points before the acquisition, and 4774 points after the transaction.

The same happened in other mergers. In the *Yolat* case, before the transaction the HHI was 3990 points. In the Hoebras case, 2286 points before the creation of the joint venture, and 3298 afterwards. Since these markets are concentrated, CADE should not put too much weight on this criteria - and, as it will be seen below, this is exactly what CADE does. The Merger Guidelines establish that, when the post-

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25.07.94, distributed to Commissioner Marcelo Monteiro Soares, and decided on 19.10.95.

merger HHI is above 1800 points, with an increase exceeding 100 points, it is very difficult that these other factors to be considered will provide evidence that the merger will not lessen competition.[422] If we apply this reasoning to the Brazilian situation, the only possible conclusion is that all the mergers submitted to CADE impair competition.

5.3 Barriers to entry

One of the possible anticompetitive effects of mergers is that they may create barriers to entry of new competitors in the market. It is the threat of other companies entering the market that prevents a company with market power from increasing its prices. Therefore, the analysis of mergers must include an investigation on the existence of such barriers to entry. The initial questions to be asked in such case are: what are these barriers? Which elements can be included in the concept?

In a broader concept, barriers to entry can be understood as anything that makes difficult for a company to enter a market. This, however, is not an economically accurate concept, as it includes as barriers to entry the superior efficiencies achieved by companies already in the market, and this is not accepted in economic analysis, because these efficiencies are considered inherent to the tasks of the companies, and therefore cannot be objected to.[423] However, there is no unanimity in relation to what constitute barriers to entry. They may be defined taking into account the effects they cause, or they may be seen as cost asymmetries between the companies already in the market and the potential entrants.

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[420] Merger Guidelines supra n. 407, subsection 1.5.
[421] see Chapter 7, subsection 2.2.

Laws and guidelines do not usually define barriers to entry nor determine what can be considered as such. What they do discuss is how easy it is to enter a market, so that the merging companies would not be able to increase prices above pre-merger levels. In this way, the Merger Guidelines establish how to assess entry to the market, but are not specific about which types of conduct or factors may impair entrance to that market. Even the American case law on mergers do not develop the issue. It follows that merger control in the USA puts more weight on defining how easy it is for a potential competitor to enter a market, without considering in particular the factors that make the entrance more difficult.

In the UK there is also a lack of guidelines in that respect. However, the Monopolies and Mergers Commission (MMC) and the Office of Fair Trading (OFT) have been issuing internal documentation, information to the public as well as annual reviews and reports that bring some light to this issue. One of these documents explains the MMC's approach to the competition acts, which includes the approach to barriers of entry.[424] It considers barriers to entry as a relevant factor for assessing competition because, among other aspects, they are a threat to the entry and growth of competitors. The document also produces a list of what MMC understands as the most important barriers, which includes limited supplies, institutional and regulatory barriers, economies of scale, economies of scope, economies of vertical integration, sunk costs, excess capacity, product differentiation, and retaliation of incumbents, predation and reputation.

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[422] Merger Guidelines, supra n. 407, subsection 1.51.
[423] Bork, R., *The antitrust paradox,* Basic Books, New York, 1978, p. 310/311.
[424] MMC, "Assessing competition", in London Economics, *Barriers to Entry and Exit in Competition Policy: a Report for the Office of Fair Trading*, p. 89.

Merger control in Brazil puts a relative weight on the existence of barriers to entry as a condition for approving a merger. After defining the relevant market and establishing the level of concentration of the market, CADE analyses the barriers to entry that may result from the merger. CADE has never developed any theoretical analysis of the importance of easy of entry for competition nor evaluated the various types of barriers and their effect on competition. Its approach to the issue has been practical, examining in a case-by-case basis the aspects of the merger that may difficult the entry of other competitors in that market.

Among these aspects, there are two that CADE sees as more likely to deter the access of other companies to a certain market, namely the investments and the technology necessary to start a business. It has been argued that the capital needed to enter the business cannot be considered a barrier. According to Bork, "[c]apital requirements exist and certainly inhibit entry - just as talent requirements for playing professional football exist and inhibit entry. Neither barrier is in any sense artificial or the proper subject of special concern for antitrust policy".[425] This assertion may be true if applied to markets that work efficiently. However, this is not the case of emergent economies, where Brazil is included. Due to the instability of these markets, the costs of investments have to be considered as a significant barrier to entry. The *Carborundum* case,[426] which deals with the acquisition of the abrasive sector of a company, shows CADE's approach to barriers to entry.

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[425] Bork, supra n. 423, p. 320.
[426] AC 05/94, supra n. 419.

This approach is followed in most of the cases, though other kinds of barriers are also discussed.[427] In the *Ajinomoto* case,[428] an acquisition of a producer of a food seasoning called monosodium glutamate (MSG) by another manufacturer of MSG, CADE held that there were several barriers to entry that market. High investments to install a plant was one of them. Technology would not be a barrier because it was in public domain, but the problem was that Ajico, the Japanese mother company of Ajinomoto, developed technology to increase productivity and reduce costs, and transferred it to Ajinomoto, which gave the company more advantage in relation to potential competitors. Other barriers were also found, such as the distribution net already developed by Ajinomoto in the country, the identification between the product and Ajinomoto's trademark, as well as the fact that the product is not an essential good in Brazil.

One characteristic of the way CADE treats barriers to entry is that, although CADE does take them into consideration by themselves, they are not - or at least have not been - enough to prevent a merger from occurring, even when the barriers are quite strong. For instance, in the *Belgo Mineira* case,[429] CADE found out that they were very significant. It included the necessity of high investments to install a metallurgical plant, overcapacity of the present plants, solid financial and economic situation of the companies already operating in the market, as well as a well structured net of distribution.

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[427] See, for instance, the *Melitta* case (supra, subsection 5.1, and Chapter 7, subsection 2.1), the *Belgo Mineira* case (supra, subsection 4.2), and the *Rhodia* case (Chapter 7, subsection 4.1).
[428] AC 19/94, supra n. 390.
[429] AC 14/94, supra n. 399.

Despite these barriers, the merger was approved. One can thus conclude that the examination of barriers to entry are just a pro forma act conducted by CADE, as part of what it understands as the economic analysis of the merger that should be carried out in these cases. However, this examination does not have any role on the final assessment of the merger.

5.4 Historical behaviour

There is an aspect of the economic analysis of mergers that is significant for the assessment of the legality of the merger. This aspect is the analysis of the behaviour that the merging companies have been adopting during the whole of their existence. By examining the previous behaviour of the companies, the competition authorities are able to predict the types of conduct that they may adopt in the future, and therefore to assess how they are likely to affect competition. This behaviour is related to the strategies concerning mainly prices, employment and management. When the companies have already been involved in previous mergers, their post-merger behaviour in these cases is an essential factor for the approval of the merger.

CADE gives particular weight to the historical behaviour of the companies. In the *Brasilit* case,[430] such behaviour was decisive for the outcome of the case. As it was seen above, this case dealt with the merger between two subsidiaries of two manufacturers of fibrocement products, Eternit and Brasilit. One of the reasons given by the companies to justify the merger was that it would result in lower prices for the consumers. The two enterprises, however, own together three other companies, and one of them, Eterbras-Tec, manufactures fibrocement products. By examining the

post-merger conduct of Eterbras-Tec, CADE found out that the prices adopted by the companies did not fall. The same happened in relation to one of the other firms. This factor, together with the lack of efficiencies resulting from the merger, made CADE decide not to authorise the merger.

The historical behaviour of the companies can also work in favour of the companies. For instance, in the *Carborundum* case,[431] CADE examined the previous behaviour of the acquiring company in particular, in order to gather evidence that would allow for a prediction of its future conduct. CADE found out that the methods used by Norton, the acquiring company, when attempting to increase its production capacity, included expansion of plants and building of new factories. It did not do it by eliminating competitors, which would increase the concentration, create barriers to entry and reduce competition. This behaviour was one of the factors that concurred for the approval of the merger.[432]

Though CADE gives particular attention to this aspect of merger analysis, it will be very difficult to find a merger approved or rejected based only on the behaviour of the companies, because it lacks the necessary economic grounds to support such decision.

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[430] AC 06/94, supra n. 398.
[431] AC 05/94, supra n. 419.
[432] for a more detailed analysis of this case, see Chapter 7, subsection 2.2.

6. Conclusion

The discussion carried out in this chapter makes evident that CADE has the right insight of how the analysis of a merger should be conducted. CADE defines the relevant market, examines the concentration of that market, analyses the previous behaviour of the companies involved in the merger, investigates the existence of barriers to entry the market, and examines the efficiencies resulting from the merger.

Notwithstanding this thorough assessment of the merger, CADE has not been able to draw the proper conclusions from the analysis. Cases were approved where the analysis provided evidence that the merger would adversely affect the market due to the increase of concentration and the existence of entry barriers. The question here is that, though CADE has the necessary skills to develop the analysis, it has not yet found the right approach to the issues involved in merger control. For instance, CADE's approach to market definition seems to be quite instinctive, in the sense that it is never clear how CADE reaches the definition. There is not an economic basis to this market definition, as in some cases it seems that CADE establishes the relevant market based only on the product manufactured by the merging companies, without considering its substitutes, the possibility of other companies starting to produce that product, or consumers shifting to other markets.

This lack of criteria in the definition of the relevant market does not conform to the hypothesis that competition law should clearly define its approach to competition as well as establish the aspects related to competition. The enforcement of the law would then be enhanced.

In relation to barriers to entry, the situation does not change much. CADE makes an extensive evaluation of the barriers created by a merger, but they do not seem to be an obstacle for the approval of a merger, because in the end CADE always finds efficiencies that compensate for these barriers.

Another issue that concurs to this conclusion is related to CADE's approach to market concentration. In the majority of the cases CADE uses two tests to establish how concentrated is the market: the market share test and the HHI test. Both tests usually show that the market is highly concentrated, but CADE does not give much weight to this aspect when reaching its decision. It seems that CADE sees the HHI test just as a step in merger analysis, a kind of test that must be done but that does not exert much influence in the final result. However, as the existence of highly concentrated markets is a characteristic of the Brazilian economy, there is no use in applying a test that only shows what is obvious. Thus, the application of the HHI test is just a tool used in antitrust analysis that CADE has copied from the American law, without taking into account the Brazilian reality.

A more accurate conclusion towards CADE's treatment of acts of economic concentration can only be reached after the analysis of the defences accepted by CADE, as well as the treatment given to horizontal and non horizontal mergers and privatisation, which will be done in the next chapter.

CHAPTER 7 - ACTS OF ECONOMIC CONCENTRATIONS: CASE ANALYSIS

1. Introduction

The previous chapter examined the elements that CADE takes into consideration when analysing cases of mergers. This chapter will concentrate on the analysis of the cases themselves, in order to determine CADE's treatment of acts of economic concentration.

Thus, in section 2 it will be examined the defences that CADE accepts to approve mergers that present anticompetitive effects. These defences comprise the existence of efficiencies that counterbalances the anticompetitive effects of the merger; the fact that one of the merging companies is not financially stable; the presence of foreign competitors in the market; the necessity of competing in the international market, as well as the fact that the merging companies belong to the same economic group. An analysis of the treatment given to both horizontal and non horizontal mergers will be carried out in section 3. Finally, section 4 will examine how CADE has been dealing with the question of privatisation. The conclusion will then bring together all the issues discussed in both chapters and attempt to determine how far has CADE gone in merger control.

2. Exception arguments

2.1 Efficiencies

One argument largely accepted by CADE to allow mergers that present evidence of being anticompetitive is when there are efficiencies resulting from that merger. CADE gives so much importance to this issue that it examines the possible efficiencies of each merger submitted to the agency, whether the companies have argued this defence or not. It follows that efficiencies are in a kind of grey area in merger analysis in Brazil. It is more than a defence to be argued by the companies, it is almost an issue of obligatory analysis to be carried out by CADE. This approach in part comes from the law, as it establishes that acts resulting in economic concentration may be approved if, among other conditions, they yield efficiencies.[433]

By accepting efficiencies as a counterbalance for anticompetitive mergers, CADE is following the approach adopted in the USA. According to the Merger Guidelines, "[e]fficiencies generated through merger can enhance the merged firm's ability and incentive to compete, which may result in lower prices, improved quality, enhanced service, or new products".[434] However, it will only be considered efficiencies that can be verified by the Department of Justice or the Federal Trade Commission and that will be achieved exclusively through the merger.

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[433] Another reason for this stress on efficiencies results from a tendency to adopt an efficiency approach to merger analysis. See Chapter 6, subsection 4.2.

[434] US Department of Justice Antitrust Division and Federal Trade Commission, 1992 Merger Guidelines, section 4.

Nevertheless, efficiencies have not always been accepted by the American courts. In *US v. Philadelphia National Bank,*[435] a bank merger would result in a firm with 30% of the relevant market and a combined post-merger market share of the two top banks of 59%. Philadelphia National Bank argued that the merger would bring more business to the area and increase its economic activities. The Court did not agree with the bank, holding that "a merger the effect of which 'may be substantially to lessen competition' is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial".[436]

The EEC Merger Regulation is silent about this issue. Its article 2(1) establishes the aspects to be taken into account when assessing a concentration, which include market structure, market position of the companies involved, and barriers to entry, all compatible with, and inserted into, a common market context. There is no reference whatsoever to efficiencies that may result from the merger. The most important aspect here is to preserve competition within the Community.

However, paragraph 13 of the Preamble to the Regulation states that, when assessing the compatibility of a merger with the common market, the Commission should consider the goals of the EEC Treaty, which includes the strengthening of the Community's economic and social cohesion. According to Whish, it is not possible to affirm whether the Commission will consider non competition aspects when assessing a merger, especially if we take into account that this provision was inserted in the Preamble, and not in the Regulation itself.[437]

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[435] 374 U.S. 321, 83 S.Ct. 1715, 10 L.Ed. 2d. 915 (1963)
[436] in Gellhorn, E., and Kovacic, W.E., *Antitrust Law and Economics in a Nutshell,* 4th edition, West Publishing Co., St. Paul, 1994, p. 381.
[437] Whish, R., *Competition Law,* 3rd ed., Butterworths, London, 1993, p. 719.

Bringing the discussion back to the Brazilian context, the question to be asked is how CADE deals with the efficiency defence in practice. We have seen that CADE follows the American example and accepts efficiencies as an argument for the approval of the merger. However, it still has to be examined which are the efficiencies that CADE considers as capable of offsetting the adverse effects of the mergers.

Here again CADE follows to some extent the American example. The 1984 Merger Guidelines held that "[c]ognizable efficiencies include, but are not limited to, achieving economies of scale, better integration of production facilities, plant specialisation, lower transportation costs, and similar efficiencies relating to specific manufacturing, servicing, or distribution operations of the merging firms".[438] It could also be considered efficiencies related to reductions in general selling and administrative and overhead expenses. The 1992 Merger Guidelines, however, refrain from determining "cognizable efficiencies", establishing only that they are "merger specific efficiencies that have been verified and do not arise from anticompetitive reductions in output or service".[439]

The case law gives a clear idea of how CADE treats efficiencies. The Melitta case[440] dealt with the acquisition of Jovita by Melitta. Jovita was a producer of paper filters for coffee, while Melitta was a vertically integrated company that acted not only in the coffee sector but also in the paper filter sector. By acquiring Jovita, Melitta would increase its share in the submarket of paper filters from 69.6% to 87.3%, and eliminate a company that had been growing since its creation. Melitta argued that the

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[438] 1984 US Department of Justice Merger Guidelines, p. 22.
[439] 1992 Merger Guidelines, supra n. 434, section 4.
[440] AC 46/95, required by Jovita Indústria e Comércio Ltda. and Melitta do Brasil Indústria e Comércio Ltda. on 11.11.94, distributed to Commissioner Marcelo Monteiro Soares, and decided on 19.12.95.

acquisition would result in several efficiencies. One of them was that there would be an expansion of production of 37.9% between 1996 and 2000, and, as a result, the sales of paper filter would increase 38% in that period.

CADE considered this efficiency feasible, because the history of the company demonstrated that it had been performing satisfactorily. Another efficiency would be the investments of US$ 15 million that Melitta would make in that period, which CADE understood to be consistent with the estimate of production. Also, Melitta argued that, by acquiring Jovita's equipment, Melitta would be able to reorganise the production process, which would result in productivity gains. One more efficiency was that Melitta would increase the supply of trademarks for third parties, which, according to CADE, would help to increase competition in the submarket of paper filter, because consumers would thus have new options at lower prices. The last efficiency argued by Melitta was that the acquisition would result in reduction of costs of 1% per year, which would be included in the final prices. CADE concluded that it was satisfied with all the efficiencies resulting from the acquisition, and it understood that they should compensate the risks that this merger might bring to the market.

This case shows that, notwithstanding an increase of concentration, which created almost a monopoly in the submarket of paper filters, CADE is prepared to allow such merger when there are efficiencies that may offset its adverse effects. The analysis of the case demonstrates that there are two aspects to be criticised. In the first place, CADE considered as efficiencies any singular benefit resulting from the merger. Most of them seemed only as managerial strategies to be adopted in the

future, and not a direct consequence of the merger. By establishing an extensive range of efficiencies, it is not difficult to approve a merger. The second point is that the efficiencies found in this case, even if defined in a broad manner, do not seem to be enough to compensate the loss of competition, especially if we take into account the fact that the post-merger market share of Melitta increased to almost 90%. It is thus only possible to conclude that efficiencies may be used just as an excuse for approving anticompetitive mergers.

However, to present an efficiency defence does not necessarily mean that the probability of the merger being approved is greater. The *Brasilit* case[441] is an example. As seen in Chapter 6,[442] this was the case of a merger between the subsidiaries of two manufacturers of fibrocement products. The merging companies argued that the merger would achieve efficiencies resulting form the availability of their technology to each other, as well as would lead to lower prices for consumers.

In relation to the first efficiency, CADE held that the access of each company to the other was not a positive factor and therefore could not be the justification for a merger, because it is that ignorance of its competitors' behaviour that makes competition more dynamic, as competitors try to promote technological developments in order to have more chances in the market. By sharing their technology, the merging firms would not be achieving efficiencies, but contributing for reducing competition in the relevant market. The other efficiency - lower prices for consumers - was accordingly not considered feasible by CADE, because both merging companies incurred high costs and had high idle capacity. CADE concluded that there were no

efficiencies that justified the elimination of competition between the two companies. Moreover, CADE held that there were financial gains for the merging companies but no benefits for consumers.

2.2 Failing firm

The defence of failing firm has been first argued in the USA. According to this defence, an anticompetitive merger may be approved when one of the companies is in financial difficulties and will probably have to exit the market. The first time that the Supreme Court dealt with this defence was in *Citizens' Publishing Co. v. U.S.,*[443] where it ruled that this defence would be accepted only when the financial situation was really critical, without any chance of recovery, and the only perspective was liquidation. Moreover, it had to be proved that the failing company had attempted to find other buyers that not only the acquirer.

However, in a more recent case, the Court adopted a more lenient approach to this defence, and held that the weakness of a company, though it was not enough to make it a "failing company", was sufficient to establish that the company was unable to compete in that market, and therefore the acquisition would not cause anticompetitive effects. The failing firm defence is considered in the Merger Guidelines as well, which establish that the defence is accepted "if imminent failure (...) of one of the merging firms would cause the assets of that firm to exit the relevant market".[444] The Guidelines require that the companies must prove that the failing firm

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[441] AC 06/94, required by Brasilit S.A. and Eternit S.A. on 04.08.94, distributed to Commissioner Neide Teresinha Malard, and decided on 25.11.94.

[442] see subsection 4.1.

[443] 394 U.S. 131 (1969)

[444] 1992 Merger Guidelines, supra n. 434, subsection 5.0

cannot: a) meet its financial obligations in the near future; b) reorganise in bankruptcy; and, c) find another buyer that does not pose much danger to competition. One last requirement is that they must prove that, if it is not for the merger, the assets of the failing company will exit the relevant market.[445]

CADE also had to deal with a failing firm defence. However, to affirm that the defence was argued by the merging companies would not be in accordance with the truth. In reality, the companies argued in the *Carborundum* case[446] that one of the reasons for the acquisition by Norton of Carborundum's abrasive sector[447] was that Carborundum was not interested in investing in that sector because it was the only company in the economic group that still acted in the market of abrasive products, and this would make the sector obsolete. CADE then extended this argument to a kind of failing firm defence, since it concluded that, as Carborundum was a company that was suffering financial problems, had been suffering losses and had not been receiving financial support from the parent company, the acquisition would not eliminate from the market a company that was financially healthy and technologically advanced.

If compared to the approach developed by the American Supreme Court, CADE's application of the failing firm defence is too liberal. As a result, any merger where the acquiring company presents some kind of financial problem is likely to be approved without further investigation of the matter. CADE does not require prerequisites for establishing a failing firm defence, like the US Merger Guidelines. It follows that the number of mergers that will fall inside this defence will probably be

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[445] id., subsection 5.1

[446] AC 05/95, required by Carborundum do Brasil Ltda. and Norton S.A. Indústria e Comércio on 25.07.94, distributed to Commissioner Marcelo Monteiro Soares, and decided on 19.10.95.

[447] The other reason was that it would achieve efficiencies such as economy of scale.

considerable. However, it is necessary to bear in mind that the economic situation in Brazil has not been stable, therefore even small financial problems are likely to cause more serious effects in the companies. If CADE was to apply the Merger Guidelines test to the failing firm defence, few mergers would be approved.

2.3 Foreign competition

Another reason for CADE to approve an anticompetitive merger is when the relevant market is under the influence of foreign competition. In this case, it does not matter if the merger will result in a high concentrated market, as long as foreign products can be found in that market. Obviously the prices of these products must be very low, so that it will inhibit the domestic competitors from adopting higher prices.

This is what happened in the *Hoebras* case.[448] Hoebras and Rhodia, both manufacturers of chemical and pharmaceutical products, formed a joint venture called Fairway Filamentos with the view to producing nylon and polyester filaments. The main reason given by the companies for the creation of this joint venture was that it was necessary to combine efforts in the production and commercialisation of nylon and polyester filaments in order to create an efficient company, so that it was possible to compete with the foreign products, especially those manufactured by the Asian enterprises.

[448] AC 41/95, required by Hoechst do Brasil Química e Farmacêutica S.A. and Rhodia S.A. in July of 1995, distributed to Commissioner Neide Teresinha Malard, and decided on 06.03.96.

In its analysis of the merger, CADE found out that the market of polyester filaments was concentrated.[449] On one hand, Polienska had a market share of 23%; Hoebras, 20%; Rhodia, 19%; Fibra, 16%; and Cobafi, 4%. On the other, imports constituted 18% of that market. The imposition of import tariff for textiles was very unstable, with the government frequently augmenting or reducing its value.[450] CADE also found out that the market had been stable in the previous five years, when no competitors entered or exited the market. Moreover, CADE acknowledge the existence of barriers to entry, as high investments were necessary to install a plant.

These factors alone would be enough to prohibit the merger. However, CADE approved the merger. In the conclusion of the case, it was held that the joint venture was in accordance with article 54, because the proposed efficiencies were feasible and compatible with the investments, and the textile industry would benefit from the specialisation resulting from the transaction. Moreover, CADE held that the high level of concentration in the domestic market did not mean that a substantial part of the market was eliminated, since strong competitors remain in the market. Finally, CADE understood that the joint venture was within the limits necessary to meet the goals aimed at by the companies. It follows that, in its conclusion, CADE did not mention the fact that there was strong competition from foreign products.

However, this does not mean that CADE did not take this aspect into consideration. On the contrary, CADE acknowledged that the existence of foreign products in the market changed the scenario. CADE held that competition from

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[449] The market of nylon filaments was not analysed because concentration did not increase there, as Rhodia was the only manufacturer of the product.

foreign products can be a positive aspect, as the domestic producers are compelled to seek for efficiencies in order to be competitive. However, if this competition with foreign products ceases to exist - which can happen through the adoption of protective measures by the government -, competition in the domestic market is reduced, because the domestic producers, when faced with an increase in demand, are likely to raise production, but not to innovate and reduce costs in order to lower prices.[451] This theorisation on the existence of foreign products in the market in general, allied to the specific situation of the textile market in Brazil, which has been suffering a severe set-back because it has not been able to compete with the low prices offered by the Asian producers, presented great influence in the final decision.

One may argue that in this case CADE acted beyond its power, because the decision is clearly an attempt to protect the domestic industry against foreign competition, and the protection of the Brazilian industry is not under CADE's jurisdiction nor is it included in the purposes of competition law. Besides, it should have been given more weight to the existence of import tariffs for textiles, because these tariffs are directly related to the level of concentration in the market.

CADE conditioned the approval of the merger to a performance commitment, which included a clause where, if the tariffs were suspended, the company should submit to CADE information about the prices of its products, so that CADE could compare them with the prices of its competitors. However, concern should not be

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[450] For instance, in October of 1994 the import tariff for textiles was 16%, then it decreased to 2% and even 0%, to increase again in May of 1995 to 16%. See opinion of Commissioner Neide T. Malard, p. 24.

[451] opinion of Commissioner Neide T. Malard, page 39.

directed only towards the prices of the new company, but also towards the possibility of collusion between the few competitors in that market.

2.4 International market

Another possibility of having an anticompetitive merger approved occurs when the merger in question creates a company that is strong enough to compete in the international market. By allowing this kind of merger, the competition authorities are helping to create national champions, that is, companies that have the necessary power to compete with the biggest companies of the world and whose main goal is to produce for the external market. In a time where extreme importance is given to globalisation, there is a strong likelihood of the competition agencies giving much weight to this argument.

In the UK, some merging companies have argued that the merger was necessary to yield efficiencies that would allow the creation of a national or European champion, which would be able to compete especially with the Japanese and American companies. In the merger between British Airways and British Caledonian Group, the MMC was influenced by the fact that the merger would create a major British airline, the only one capable of competing with the other big foreign companies.

According to the MMC, "...the merger would also have important beneficial results. It would strengthen the competitive position of BA, which is the only British company competing with major foreign airlines world-wide, and in future may have to face increasing competition from American mega-carriers. Traffic should be

increased over the combined present traffic of BA and BCAL as the result of the greater number of connecting flights made possible by the enlarged network, increased interlining and intralining, and enhanced marketing opportunities".[452]

Finbow and Parr quote another MMC's report, this time of the acquisition of STC Limited by Alcatel Cable SA, where the MMC held that the merger was "likely to be a means of preserving STC's presence in the United Kingdom as a significant exporter and employer at the leading edge of telecommunications technology".[453]

This international competitiveness defence has also been argued in merger cases in Brazil. The *Ajinomoto* case[454] is an example of how CADE deals with the argument. In this case, Ajinomoto acquired 50% of the shares of Oriento, both companies being manufacturers of monosodium glutamate (MSG), a food seasoning.

The argument defended by the companies to justify the merger was that it was a strategy to face the international market, which would be very attractive after the import liberalisation in China, the biggest consumer of MSG. The companies held that Brazil was already one of the biggest producers of MSG, together with China, Indonesia and Korea, and the merger would increase its importance among the other producers, because it would be possible to explore the advantages found in the country, such as raw material and skilled labour. Moreover, the merger would

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[452] British Airways PLC/British Caledonian Group PLC, Cm. 247 (November 1987), para. 8.66, in Finbow , R.J. and Parr, A.N., *UK Merger Control: Law and Practice,* Sweet & Maxwell, London, 1995, p. 252.

[453] Alcatel Cable SA/STC Limited, Cm. 2466 (February 1994), para. 7.73, in Finbow, supra n. 452, p. 253.

[454] AC 19/94, required by Oriento Indústria e Comércio S. A. on 05.10.94, distributed to Commissioner Carlos Eduardo Vieira de Carvalho, and decided on 13.11.95.

transform Ajinomoto and Oriento in the main producers of MSG for the external market in the Ajinomoto group.

CADE did not define the market as that of food seasoning in general. Instead, it held that the relevant market was specifically that of MSG, which resulted in a smaller number of competitors, showing that the market was highly concentrated. CADE found out that, before the merger, there were only three producers of MSG in the market: Ajinomoto, with a share of 52%; Viten, with 28%; and Oriento, with 20%. However, there was evidence that only 10% of Oriento's and Ajinomoto's production of MSG stayed in the domestic market, as 90% of their production was directed to the external market. Moreover, during 1994 the exports of MSG brought to the country a revenue of foreign exchange credits of US$ 75 million.

CADE concluded that, though the transaction increased the economic concentration in the market of MSG, this relevant market involved a product not only of low consumption in the country but also manufactured mainly for the external market. Moreover, the relevant market was of little importance to Ajinomoto. CADE also held that, as Brazil presented advantages for the production of MSG, it would be possible for the company to adopt lower prices in the external market, thus putting the company among the most important producers of MSG in the world. This factor, together with the possibility of growth in the exports of MSG to China, would allow the merger to foster an increase in the performance of the Brazilian balance of trade.

Based on these conclusions, CADE decided for the approval of the merger, thus opting for permitting the existence of one strong company capable of competing

in the international market, which would result in the creation of new jobs and in benefits to the country, instead of supporting a more competitive but not so productive market.

2.5 Same economic group

There is one argument for the approval of mergers that CADE accepts without carrying out an extensive analysis of the case. This happens when the merger occurs between companies of the same economic group. The *Coplatex* case[455] illustrate this situation with perfection. This case dealt with the acquisition of Callas Têxtil S.A. by Coplatex Indústria e Comércio S.A. Both companies acted in the textile industry, producing mostly covers for seats, doors and roof of cars, as well as cloth and foam for the shoe and furniture industry. Also, the two companies belonged to the same economic group - the Coplatex group -, had the same partners and were controlled by the same persons.

The reason given by the companies for the acquisition was that the merger was just part of an administrative reorganisation that the group was promoting in order to be more efficient and competitive. With the acquisition, Coplatex obtained a share of 100% in the supply of the products to the car industry, 25% in the reposition segment, 25% in the shoe industry, and 16% in the foam market.

CADE held that it would not proceed to a thorough analysis of the market because it was not necessary. The rationale behind this reasoning was that companies

[455] AC 33/95, required by Coplatex Indústria e Comércio S.A. and Callas Têxtil S.A. on 06.03.95, distributed to Commissioner Edgard Lincoln de Proença Rosa, and decided on 16.02.96.

with common management and controlled by the same group of partners aim at co-ordinated goals established by the group. This means that they do not compete among themselves, because they belong to the same economic group and therefore have the same targets and adopt strategies that are in the interest of the group.

In the present case, CADE ruled that the acquisition did not alter the participation of the economic group in the market - it increased only the participation of one of the companies involved. The stock control of both companies were in the hands of the same persons - before and after the acquisition. Therefore, the participation of the group in the market as well as the level of economic concentration remained the same.

CADE decided that this acquisition was not to be subject to Law 8884/94, as it dealt only with internal organisation of an economic group and therefore did not affect competition. This same decision was taken in other cases where the merger occurred inside an economic group.[456]

This approach adopted by CADE can be seen as the application of the principle of the single unity, according to which the companies of a multinational enterprise should not be regarded as different and separate persons, but as one corporate personality. This principle is based on the fact that the multinational corporation controls all the activities within the group; the parent company, though may not direct the day-to-day activities of its subsidiaries, at least co-ordinates the

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[456] AC 04/94 - HLS do Brasil Serviços de Perfilagem Ltda., AC 07, 08, 09 and 10/94 - Tubos e Conexões Tigre Ltda., AC 20/94 - CBV Indústria Mecânica S.A.

organisation of the group. In the present case, CADE applied this principle to a Brazilian owned economic group with several units in the country.

One can argue whether this principle should not be applied to cases on competition, as companies on the same economic group may not compete among themselves, but nevertheless they stimulate and bring more competitiveness to the market in relation to the other companies of that same market. On the other hand, if we turn to other jurisdictions, no cases will be found where the question of mergers or acquisitions within the same economic group has been discussed.

3. Approach to non horizontal mergers

Mergers can occur through three different ways. One of them is horizontal merger, where the companies involved are competitors in the same product market and level of production. This kind of merger is the one that is more likely to affect the market in a negative manner, because it may lead to monopoly in a certain market.

A second kind of merger is the vertical merger, where one company mergers with another that is one level up or down the distribution chain. For instance, a vertical merger occurs when a manufacture of a certain product mergers with the producer of raw material which is used in that product. Vertical mergers are not considered as dangerous to the market as horizontal mergers, but they may bring anticompetitive results.

Finally, the third kind of merger is the conglomerate merger, where one company joins another that acts in a different market and is not a competitor nor is linked to its production cycle. A company may seek to enter this kind of merger in order to expand its business to other areas, and therefore the conglomerate merger is less likely to harm the market.

It has been argued that vertical mergers can only be attacked when they induce high prices and create barriers to entry of new competitors. On the other hand, "[i]f prices are reasonable and entry frequently occurs, then the decision to impose a vertical restraint or to integrate backwards or forwards should be treated as a valid exercise of commercial judgement by the producers concerned".[457]

During the period where the present research took place, the analysis of the Brazilian cases was restricted to horizontal mergers only, because non-horizontal cases have rarely been submitted to CADE. The reason for this lack of cases on non-horizontal mergers can be found that in the fact that CADE did not understand that vertical or conglomerate merger can cause damage to the market, since these mergers do not directly result in a change in the structure of the market.[458] It follows that CADE adopted a different treatment to non horizontal mergers. How this is done is what will be analysed in this section.

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[457] Kay, J., "Vertical integration: the regulatory issues", Lecture on Regulation 1991, Centre for Business Strategy, in Finbow , supra n. 4452, p. 236.

[458] However, this understanding has been gradually changing. In CADE's 1997 Annual Report, it was shown that during that year six cases of vertical integration were decided by CADE (AC 22/95, required by Bayer S.A. and Cia. Nitro Química do Brasil Ltda.; AC 55/95, required by Colgate-Palmolive Ltda. and Itap S.A.; AC 104/96, required by Montecitrus; AC 02/94, required by Ultrafértil and Fosfértil; AC 139/97, required by Worthington and Metalplus; and AC 59/95, required Honda and Motogear). It has been stressed in the 1997Report the necessity of a deeper analysis of the relevant markets in vertical integration, as well as of taking into consideration the transaction costs in such cases. (Conselho Administrativo de Defesa Econômica, *Relatório Anual 1997*, March 1998, published at http://www.mj.gov.br/cade).

3.1 Vertical mergers

Eight of the nine cases chosen to be analysed in this chapter involve horizontal mergers only. It was only in the *Rhodia* case[459] that CADE had to face both a horizontal and a vertical merger. The facts in this case are not simple. Two companies were involved in the merger, Rhodia S.A. and Sinasa S.A. (Figure 6). The former acted in the chemical, textile, pharmaceutical, veterinary, agrochemical and animal feeding sectors and controlled several companies. One of them was Rhodia Nordeste Ltda., producer of polyester fibre and owner of the company Rhodia Filmes Nordeste Ltda. This last company produced polyester films and owned the Rhodia Fibras Ltda., manufacturer of acrylic fibres. The other merging firm, Sinasa S.A., owned companies that acted in the chemical, food and textile markets. Sinasa controlled Excel S.A., which in its turn controlled Celbras S.A. Celbras produced polyester fibres, acrylic fibres, resin and PET containers, and controlled Braspet, which also manufactured PET containers.

The transaction submitted to CADE was the acquisition of Excel by Rhodia. The name of the company changed to Rhodia-Ster S.A., and its controlled company Celbras was then called Rhodia-Ster Fipack S.A. Rhodia transferred to Rhodia-Ster financial resources as well as goods and rights it owned, which included the enterprise Rhodia Nordeste and consequently Rhodia Filmes and Rhodia Fibras. Rhodia also transferred to the new company its participation in the enterprise Rhodiaco Indústrias Químicas Ltda., producer of polyester raw material, which is used in the manufacture of polyester fibres, films and resins (Figure 7).

Figure 6 - THE RHODIA CASE: RHODIA AND SINASA BEFORE THE MERGER

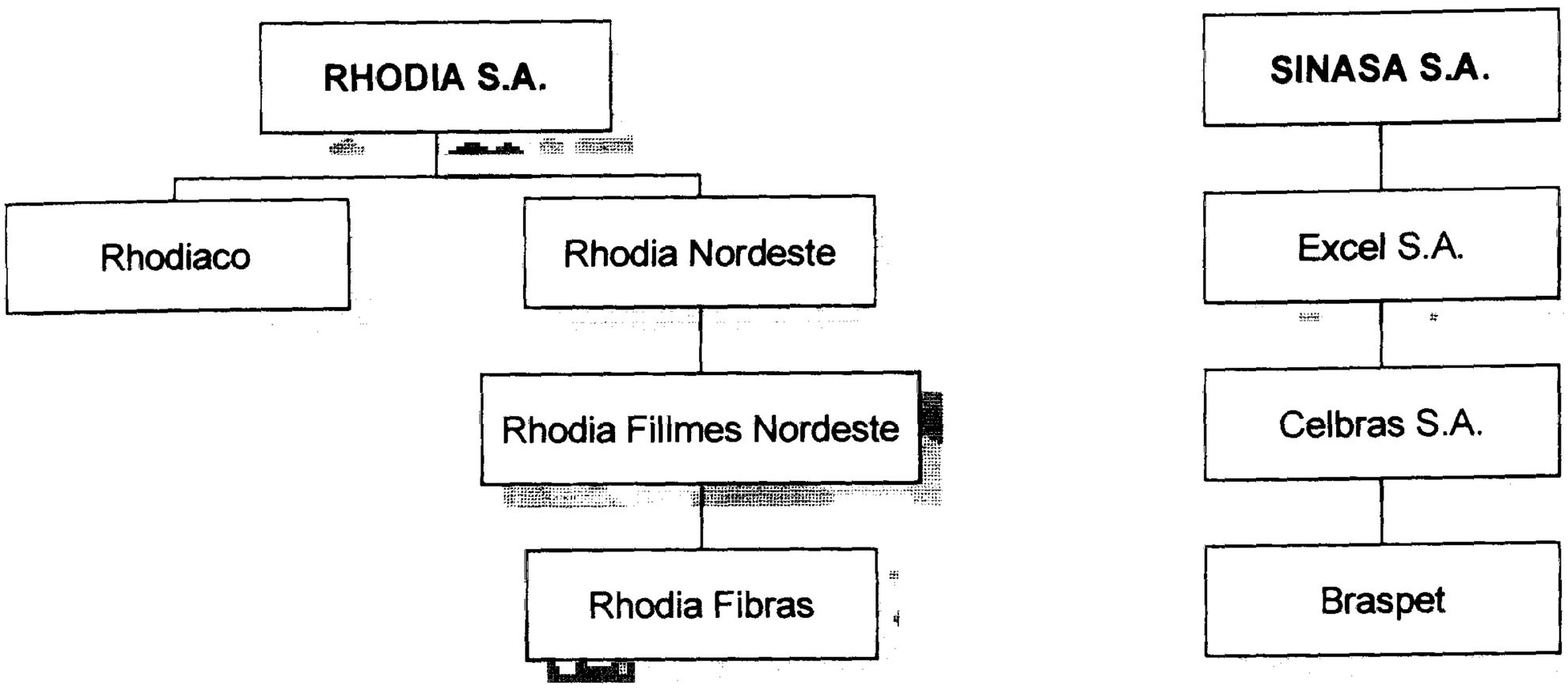
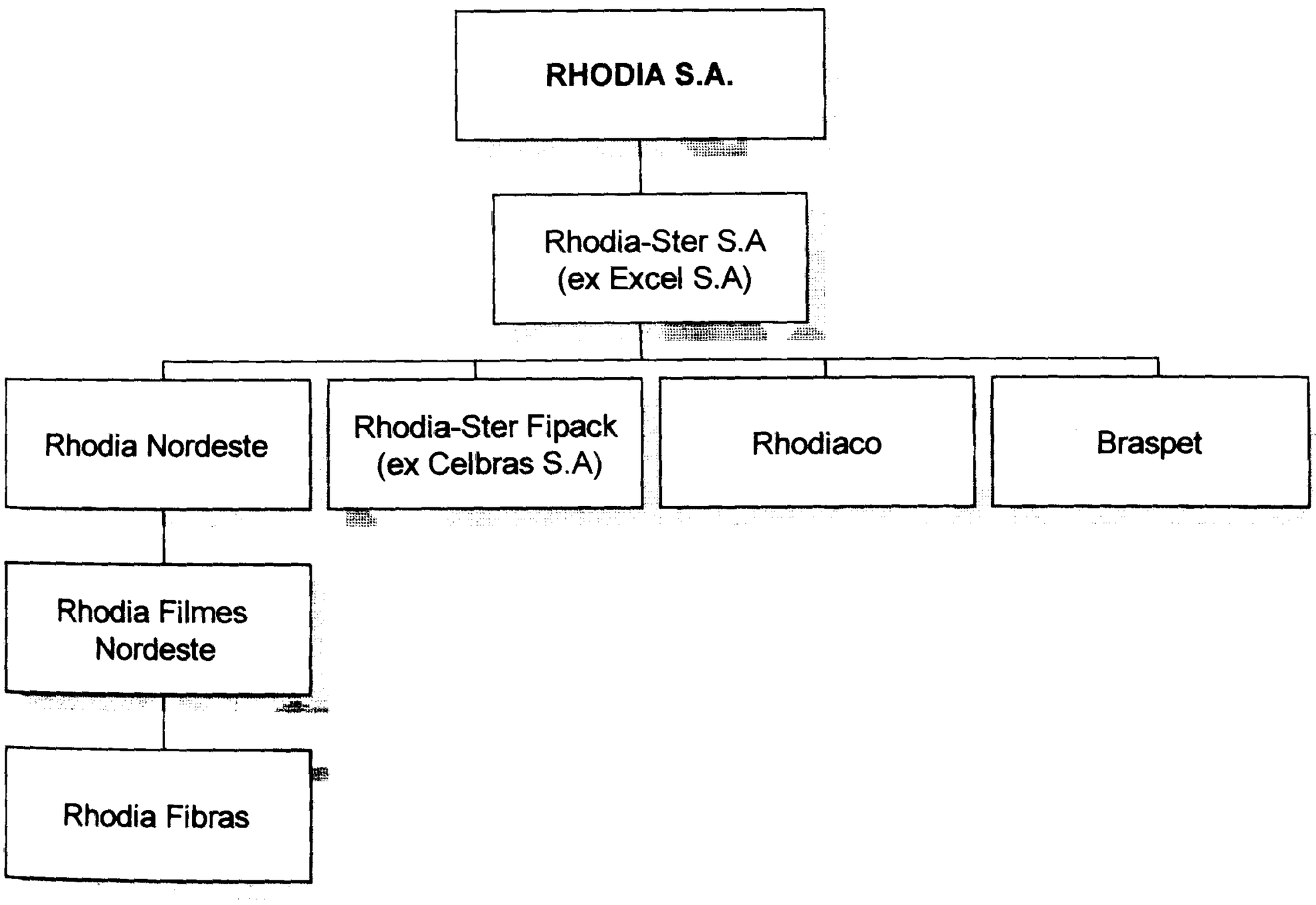


Figure 7 - THE RHODIA CASE: RHODIA AFTER THE MERGER



[459] AC 12/94, required by Rhodia S.A. and Sinasa S.A. Administração, Participações e Comércio in May of 1994, distributed to Commissioner José Matias Pereira, and decided on 30.09.94.

The transaction submitted to CADE was the acquisition of Excel by Rhodia. The name of the company changed to Rhodia-Ster S.A., and its controlled company Celbras was then called Rhodia-Ster Fipack S.A. Rhodia transferred to Rhodia-Ster financial resources as well as goods and rights it owned, which included the enterprise Rhodia Nordeste and consequently Rhodia Filmes and Rhodia Fibras. Rhodia also transferred to the new company its participation in the enterprise Rhodiaco Indústrias Químicas Ltda., producer of polyester raw material, which is used in the manufacture of polyester fibres, films and resins (Figure 7).

In its analysis of the case, CADE pointed out that the merger involved both horizontal and vertical integration because the companies were at the same time competitors and clients or suppliers of each other. According to CADE, the horizontal integration, which occurred in the production of acrylic and polyester synthetic fibres, was more likely to cause concern, because it included two companies that competed with each other at the same level of production. The vertical integration, in its turn, took place in the section of production of PET resin and containers, and did not change the structure of the market. It follows that CADE put much more weight in the horizontal aspect of that merger, which was properly analysed, including definition of the relevant market, analysis of the product, definition of barriers to entry, and assessment of efficiencies.

In relation to the vertical merger, CADE acknowledged the existence of a vertical integration, but held that it would not increase the concentration of the market, because it did not involve competitors acting in the same market. Consequently, the economic analysis of the vertical merger was quite superficial.

CADE did not define the relevant market with accuracy, nor made a detailed analysis of the market, as it uses to do in cases of horizontal merger. Moreover, an important aspect of the analysis of vertical mergers was left out, as CADE did not investigate whether this vertical merger would have any effect in the suppliers of the raw material or in other manufacturers of PET containers. It only recognised that there was a vertical merger, established that it happened in the sector of PET resin and containers, and ruled that it did not change the structure of the market because Rhodia already had the control in the supply of raw material for the final product.

One can therefore conclude that the treatment given by CADE to horizontal and vertical mergers is different. In fact, this would not be a problem, because obviously the two kinds of mergers may affect the market in different ways, as it was seen above. However, this difference of treatment does not mean that vertical mergers should be ignored.

If we take into account the approach adopted in the USA, we will find out that the 1984 Merger Guidelines do establish when non horizontal merger shall be challenged.[460] In the first place, the Guidelines hold that, "[a]lthough non-horizontal mergers are less likely than horizontal mergers to create competitive problems, they are not invariably innocuous".[461] Based on this assumption, the Guidelines define the anticompetitive effects that the merger must cause in order to be prohibited, which includes elimination of potential entrants, creation of barriers to entry and facilitating collusion. Consequently, a detailed economic analysis has to be conducted, though the

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[460] Reference in this specific case is made to the 1984 Merger Guidelines, since the 1992 Guidelines refer only to horizontal mergers.
[461] 1984 Merger Guidelines, supra n. 438, subsection 4.0

results of this analysis will be assessed in a different manner in the two kinds of mergers.

This was not the approach adopted by CADE, which opted for approving the vertical merger without further investigation. However, one can argue that it is necessary to bear in mind that the merger was inserted in the context of a developing country, which means that it may be more cost effective as well as beneficial for the country if the analysis is initially restricted only to horizontal mergers, due to their more imminent danger to competition. Once this analysis is firmed, then an approach to non horizontal mergers can be developed.

3.2 Conglomerate mergers

Though conglomerate mergers are not in principle likely to change the concentration of the market, they may cause some effects that can be anticompetitive. In this way, a conglomerate merger may eliminate from the market a potential competitor, that is, a company that could have entered that market if it was not for the merger.

This has been the main issue discussed in conglomerate mergers, and has been first developed by the US Supreme Court in *US v. Penn-Olin Chem. Co.*,[462] where it held that "if one of the firms probably would have entered with the other remaining 'at the edge of the market, continually threatening to enter,' the venture should be disapproved", and that "the possible elimination of a potential entrant, even if the evidence failed to show a reasonable probability of entry by the second firm, would

violate section 7".[463] In a later case, *US v. Falstaff Brewing Corp.*,[464] the Court went further and ruled that it was not important that the potential competitor actually intended to enter the market. The mere possibility of being able to do so was enough.

The approach to conglomerate mergers in Brazil has not yet reached the stage of discussing whether the elimination of a potential competitor may have anticompetitive effects or not. On the contrary, there is not much discussion on that issue. If vertical mergers are not given too much attention by CADE, the approach to conglomerate mergers is not better, especially if we take into account that the anticompetitive effects of conglomerate mergers are much more difficult to detect. In its first three years of existence, CADE has dealt with only one case of conglomerate merger. This is the *Yolat* case,[465] a privatisation of a producer of milk that belonged to the government of the state of Pernambuco.

In this case, after the privatisation had occurred, Yolat, the acquirer, submitted the transaction to CADE. Yolat was a producer of pasteurised and longlife milk, cream and other dairy stuffs for the Brazilian market, but it did not sell pasteurised milk in the state of Pernambuco. Cilpe, the privatised company, produced pasteurised skimmed milk for the city of Recife (the capital city of the state of Pernambuco). When analysing the case, CADE did not take into account the fact that Yolat was a potential competitor that could have entered the market at any moment, nor that competition could have suffered less had Cilpe been sold to another company. CADE held that, by acquiring Cilpe, Yolat would be a new competitor in the market.

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[462] 378 U.S. 158, 84 S.Ct. 1710, 12 L.Ed.2d 775 (1964).
[463] Gellhorn, supra n. 436, p. 390.
[464] 410 U.S. 526, 93 S.Ct. 1096, 35 L.Ed. 2d 475 (1973)

Moreover, as it was entering the market by taking the place of Cilpe, there would be no change in the level of concentration in that market. CADE then opted for ignoring that this was a conglomerate merger and fixed its reasoning in the concentration of the relevant market, that is, the market of pasteurised skimmed milk in the city of Recife. Yolat would then take over a market share of 62%, which was evidence of the existence of a highly concentrated market. However, CADE approved the merger, because it considered that the efficiencies resulting from the merger would counterbalance its anticompetitive effects.

Once again CADE lost the chance of developing a case law on conglomerate mergers. However, the same observation that was made in relation to vertical mergers applies here: it may be better for CADE to first develop its approach to horizontal mergers and then give more attention to vertical and conglomerate mergers. Besides, we have to take into account that the Yolat case dealt with the privatisation of a public company, which is a very delicate matter.

4. The special case of privatisation

Privatisation in Brazil only started to occur in practice at the beginning of the 1990s, but the law regulating this issue did not provide for any kind of control of the anticompetitive effects that may result from the privatisation of the public companies. It was only in 1993 that a decree was enacted establishing that one of the purposes of

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[465] AC 11/94, required by Yolat Indústria e Comércio de Laticínios Ltda. on 11.03.94, distributed to Commissioner Marcelo Monteiro Soares, and decided on 23.11.94.

the programme of privatisation was the protection of competition. However, the decree was silent about how this should be achieved.

In practice, only one case of privatisation was decided by CADE during the period of this research: the *Yolat* case.[466] As it was seen above, the case dealt with the privatisation of a milk producer of the state of Pernambuco which, through an auction, was sold to Yolat, a producer of pasteurised and longlife milk, cream and other dairy stuffs.[467] The treatment given by CADE to this case was the same given to any merger submitted to it. It follows that CADE proceeded to define the relevant market, determine the concentration of that market, and examine the efficiencies that it would bring to the market.

The only reference to privatisation can be found when CADE stated that the acquisition would give Yolat 62% of a relevant market that once belonged to a public enterprise. Thus, though CADE acknowledged that the privatisation would transform a public oligopoly into a private one, it did not take any measure to change it. On the contrary, it held that this transference of market dominance to a private company would not harm the market because it would result in efficiencies.

However, there was a dissenting opinion in this case. Commissioner José Matias Pereira understood that there was only a shift in the control of Cilpe, from the government of Pernambuco to a private enterprise, and that was something to be concerned about, because, according to him, previous privatisations carried out by the

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[466] AC 11/94, supra n. 465.

[467] Yolat is a subsidiary of Parmalat Brasil, which also produces dairy products, which includes longlife milk, sold in the state of Pernambuco as well as in the whole country.

federal government caused negative effects to competition. Moreover, the market power that Yolat would have would be a barrier to entry of new competitors.

The law gives CADE the power to break up a merger if it does not comply with the requirements therein.[468] This could have happened in the *Yolat* case. However, this was a very delicate case. Until that moment CADE had never examined a privatisation case, and there were no guidelines to follow. CADE thus preferred to deal with it as if it was a normal case of merger, so it would be able to avoid challenging a privatisation allowed by the government. As a matter of fact, at that time CADE did not have the power to do so. Besides, CADE was still trying to establish its position as the authority responsible for enforcement of competition law in the country. By challenging a measure taken by the government, CADE could jeopardise its own role.

However, this situation is now changing. During the process of privatisation of Companhia Vale do Rio Doce, one of the biggest public enterprises, acting in the sectors of paper and cellulose, gold, iron, electric energy, kaolin, bauxite and aluminium, which occurred in May of 1997, the Commission for Economic issues of the Senate requested a technical opinion from CADE related to the effects that the privatisation would cause to competition. CADE concluded that the privatisation would only result in economic concentration in the markets of aluminium and cellulose, and suggested that some measures should be taken by the acquirer to prevent any harm to competition. The privatisation was concluded in May of 1997 and then submitted to CADE, which is still examining it. Taking advantage of the

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[468] Article 54, paragraph 9, Law 8884/94. See Chapter 6, subsection 2.1.

discussion about privatisation that the *Vale* case arose, CADE issued a resolution that establishes that privatisation cases have priority over the analysis of the other types of mergers.[469]

5. Conclusion

In relation to efficiencies, there are three points to be established. In the first place, efficiencies are not seen as a defence to be argued, but as part of the analysis to be carried out in a merger case. It follows that CADE always investigates the efficiencies resulting from a merger, even if it is not necessary. Secondly, these efficiencies do not comprise only the economic or social aspects of the merger, but also the managerial strategies adopted by the companies, which are inherent to the administration of any business and do not constitute any benefit. Finally, the existence of efficiencies has been enough to approve the majority of the mergers submitted to CADE. The merger may result in a highly concentrated market, create serious barriers to entry, and eliminate a strong competitor, but it is very likely to be approved if it presents any kind of efficiencies. It seems that CADE has been using efficiencies indiscriminately, not assessing how necessary or feasible they are.

CADE's interpretation of the failing firm defence is too liberal, as any company that presents some kind of financial problem may fall into this category. However, one has to take into account that the unstable situation of the economy in Brazil does not allow for a strict application of the failing firm defence. In relation to

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[469] CADE Resolution n. 7, of 09.04.1997.

the foreign competition and the international market defences, one may argue that they can be used to approve anticompetitive mergers that do not present any real efficiency, or to strengthen and protect the domestic firms, which, in this last case, may go beyond the role of a competition authority. The law does not give CADE the power to create national champions to compete in the international market, nor to take the development of infant industries. CADE should restrain its action to the powers that the law has bestowed to it and leave to the other authorities the implementation of other governmental policies.

In relation to the difference in treatment to horizontal and non horizontal mergers, it is possible to conclude that CADE does not see non horizontal mergers as a threat to competition. However, this does not seem to be a deliberate approach adopted by CADE, but just a lack of understanding of how these non horizontal mergers can affect the market. Based on the analysis of the cases carried throughout the chapter, one can argue that CADE will challenge only those mergers that are likely to change the structure of the market. CADE does not take into account, for instance, the effect that the merger may have on potential competitors, though this is starting to change now, as in two very recent cases CADE did not approve joint ventures of Brazilian companies with foreign enterprises because the latter were potential competitors that could have entered the market without having to merger with the former.[470]

The analysis of privatisation cases by CADE is a very delicate matter that is still starting to develop at CADE, which means that it is not possible to predict what

will be the approach adopted. In the case examined here, which was the only one related to this issue that CADE has decided, CADE was able to avoid discussing this question at all. However, CADE seems now to be eager to have jurisdiction over this kind of case, and has already enacted regulations establishing that the analysis of privatisation cases will have preference over any other kind of case.

When analysing mergers, it should be important that CADE take into consideration the hypothesis on the adoption and enforcement of competition law on which this thesis is based.[471] Thus, CADE could not copy the tools used in antitrust analysis by foreign legislations without evaluating its relevance to Brazilian competition law. Moreover, CADE should be coherent in its approach to the different aspects of merger analysis as well as in its decisions, which would only bring certainty to the economic agents and thus facilitate the enforcement of the law. As part of an economic policy framework, CADE should not attempt to achieve certain results that are beyond the goals of competition law and that should be pursued by other policies. By doing so, CADE would be an efficient administrative body, thus making feasible the existence of a well structured and effective institutional framework.

From the overall discussion of the merger cases, the most crucial conclusion to be drawn is that CADE is still not sure about how to deal with mergers. Though it is in the right path, CADE has not found the right approach to be adopted. However, it is not possible to forget that merger control is a very recent phenomenon in Brazil, thus

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[470] This happened in the Antarctica case (AC 83/96 - Cia. Antarctica Paulista Ind. Bras. de Bebida e Conexos e Anheuser Busch International Inc.) and the Brahma case (AC 58/95 - Cia. Cervejaria Brahma, Miller Brewing Co. e Miller Brewing M 1855 Inc.).

[471] See Introduction, section 3.

it is only natural that CADE finds itself in that position. Now it is on CADE's hands to develop what it has already achieved in order to establish itself as an expert in merger analysis.

CONCLUSION

The regulation of competition is a necessary step for an emerging economy if the State wants to achieve a competitive market. The "laissez-faire" approach to regulation may be too risky to be adopted, since the time taken to correct the distortions of the market may be longer than the afforded. The State then has to decide on the goals of the law, the approach to competition, the practices to be considered anticompetitive, the treatment to mergers, the procedure to be adopted, the institutional framework to be created, among other issues that have to be included in any legislation regarding competition.

In order to do so, several options are open for the State: it can create its own law, it can copy the pre-existent laws of other countries, it can seek help in the work developed by UNCTAD. One option does not exclude the other, but it was argued here that, when enacting a competition law, the legislative authorities should not copy wholeheartedly any other law, not even UNCTAD's model law, since they do not reflect the country's reality and necessities.

The present Brazilian competition law has not totally followed that argument. Law 8884/94 was based on existing legislation; for instance, its article 54, paragraph 1 is almost identical to article 85(3) of the EEC Treaty. Moreover, CADE has been copying the methods of antitrust analysis adopted by competition authorities in other

countries. The positive aspect is that CADE has been trying to develop its own case law, and has used foreign decisions only as reference in cases where there are controversial issues involved.

Another argument is that the goals of the law have to be clearly defined and, based on that, the provisions of the law must be developed. Law 8884/94 does not necessarily conform to this argument. This law has the merit of being able to put some order in the chaotic situation in which competition law found itself due to the concomitant existence of two laws that were contradictory in some aspects. Accordingly, it was enacted as part of the *Plano Real,* the last economic plan adopted by the government, where competition law was included amongst the trade liberalisation measures, thus confirming the hypothesis that competition law should be part of a coherent economic policy framework.

However, the law presents some negative aspects that may hinder its enforcement. In the first place, the law does not define the approach to be adopted towards competition and its legislative history does not shed any light in relation to the goals of the law, which makes difficult to delineate the path to be followed by the enforcers of the law in its implementation. As proposed by UNCTAD's principles on the enactment of competition law, the law should define its goal as the enhancement and protection of competition. Thus, goals such as the protection of the domestic industry, protection of small and medium enterprises, control of prices, should be left for other policies to pursue.

Another negative aspect of the law is that it includes among the anticompetitive practices those that are not related to competition, such as "to abandon or cause abandonment or destruction of crops or harvest, without good cause". The consequence is that the enforcers of the law have to waste time on practices that do not affect the market nor impair competition. Moreover, the list of anticompetitive practices included in the law does not exhaust itself, that is, the practices are just examples of types of conduct that may be considered illegal. It follows that any conduct that causes or has the purpose of causing the effects established in the law (to limit, restrain or in any way injury free competition of free enterprise; to supervise a relevant market for a product or service; to increase profits in a discretionary basis; and, to abuse one's dominant position) may be considered anticompetitive and thus is subject to investigation by the competition authorities.

This broadness in definition has two results. On one hand, it includes in the jurisdiction of the law any type of conduct that may affect competition, which makes the law cover a greater number of practices that could have escaped from the scrutiny of the law had the anticompetitive practices been more narrowly defined. On the other hand, this broadness incurs in high costs, since a greater number of cases is likely to be submitted to the competition authorities, more time will be spent on the analysis of cases, and the volume of work will increase enormously.

If we take into account that there is not a "culture of competition" in Brazil, we may argue that it would have been better if the law had been more precise in its definition of anticompetitive practices, because this would allow the precise comprehension of what is considered as anticompetitive by the law, thus bringing more

certainty to the economic agents and facilitating the enforcement of the law. Accordingly, the development of a culture of competition would be improved if the law established the practices that are illegal per se, that is, those practices that do not require profound investigation due to their intrinsic anticompetitive nature. This would save time for the competition authorities and would provide a clearer guidance for the economic agents regarding the restrictive business practices.

The lack of definition of what constitutes a relevant market is another drawback of the law. It is crucial for a consistent enforcement of the law that it clearly states the elements involved in the concept of relevant market, because the relevant market will be the basis for the analysis of restrictive business practices as well as mergers. As Law 8884/94 is silent in relation to this issue, it has been left for the competition authorities to define the notion, which has been done in the majority of the cases, but it has not always been based on consistent economic grounds. An acceptable definition of relevant market should include not only the product or service in the line of commerce where competition has been affected but also its substitutes, the geographical market where the product or service is available and the other areas to which the consumers could turn to if prices were increased. The 1992 Merger Guidelines of the American Department of Justice provides a detailed test to be applied in order to define the relevant market.

On the other hand, certain developments can be found in Law 8884/94 if compared to the previous competition laws. One of them concerns the procedural rules. The present law has simplified the procedure for the implementation of the law by eliminating the unnecessary acts that were performed by the competition authorities

as well as by the parties, and by clearly establishing the steps that have to be followed in the two stages of case analysis, the preliminary investigation and the administrative proceeding. Moreover, the law decreased the time limits in relation both to the competition authorities and the parties. Thus, the procedure is now simpler and quicker.

The treatment to merger has also improved with the present law, as it defines more precisely when transactions that result in economic concentration are to be submitted to the competition authorities for approval, as well as the effects that the merger has to produce in order to be approved. The law has opted for establishing thresholds for qualifying mergers for investigation, which include a market share test (20% of the relevant market) that would involve especially horizontal mergers, and a gross turnover test (US$ 400 million gross turnover of one of the parties of the merger) that would catch vertical and conglomerate mergers as well. The establishment of thresholds is necessary for the limitation of the jurisdiction of the law, thus bringing more certainty to the economic agents.

Brazilian competition law thus does not fully consider the hypothesis that the legislation concerning competition must define with rigour the approach towards competition and the issues inherent to it. The legislation does not define at all the approach to be adopted regarding competition. In relation to the issues, the law is too broad and includes practices that are not related to competition. Moreover, CADE's development of the concepts does not help. A per se approach to certain practices would then be beneficial for the enforcement of the law. On the other hand, the provisions on merger control are more precise and thus more likely to be effective.

The institutional framework to implement the law created by Law 8884/94 is likely to be more effective, since it defines the role to be played by each of the three administrative agencies that are part of this framework. Though criticism may be applied to certain aspects of this institutional framework, it cannot be denied that the unambiguous distribution of power between the three agencies is an improvement in the enforcement of the law. Before Law 8884/94 was enacted, there was a conflict of jurisdiction between the agencies, which only impaired the enforcement of competition law in the country.

However, the institutional framework created by the law, which comprises SEAE, SDE and CADE, is far from being considered stable. There has been rivalry between SDE and CADE, attempts have occurred to merger the three agencies, the government has threatened to transfer some of CADE's powers to SDE. Moreover, the fact that CADE is composed by commissioners whose term of office lasts at most four years adds no stability to the system. In the first place, the commissioner does not have time enough to improve his/her knowledge of competition and acquire the necessary experience for a satisfactory performance in the post. By the time that the commissioner achieves it, the term of office has expired. Besides, this change of commissioners may hinder the development of CADE's work, since the approach to competition can vary from commissioner to commissioner and president to president.

An option that could solve this problem would be to adopt a system similar to that of the USA and create "administrative law judges" to deal with competition cases, who would not be subject to a fixed term in office but who could be dismissed at any time. To implement this solution, however, amendments in the Constitution would be

needed, and this involves a strong political commitment that is not easy to find. Moreover, the tendency now is to eliminate public bodies and posts in order to decrease expenditure of public money.

Other drawbacks of the framework include the bureaucracy that is inherent to the administration, as well as the lack of expertise of the some commissioners and personnel as a whole. Another problem is the lack of political will to implement the law as well as governmental support to CADE's powers. Moreover, there is the question of judicial review of CADE's decisions, which may also impair the enforcement of the law and consequently CADE's role as a competition authority.

Notwithstanding all the problems found in the institutional framework created by the law, it can be argued that the hypothesis that competition policy and law need a well structured and effective institutional framework to enforce them can be found in Brazilian competition law. It presents well structured framework, division of power, integration between the agencies. The problem, however, is that the system is still unstable, since it depends on political will to work reasonably well. It is not guaranteed that this will always exist. Thus, CADE's power may be curtailed at any time, or the agency may be used to other purposes than that established in the law, or even the system may be modified by the government.

The inclusion of the framework in the administrative system, though, is a much better option than attributing the jurisdiction on competition matters to the judiciary. The analysis of the cases would then be lengthier, the lack of expertise of personnel and judges would be greater, and the enforcement of the law would not be effective.

Besides, as part of the economic policies adopted by the government, its implementation has to be done through the administration, otherwise it would not produce the expected effects. Though the administrative system presents several problems, it has more flexibility to develop and enforce competition law.

The analysis of the cases decided by CADE, which was never done before and thus is a new contribution of this thesis to the study of competition law in Brazil, has allowed us to better understand the rationale behind CADE's decisions, so that more decisive conclusions can be drawn regarding the enforcement of the law to support the assessment of Brazilian competition law.

In relation to restrictive business practices, the analysis of the cases has shown that CADE always develops a legal analysis of the practice through the investigation of the intention of the parties when adopting the conduct as well as the effects that the practice has caused, as required by the law. This investigation confirms the rule of reason approach to antitrust analysis indicated in the law. However, there have been cases where this thorough analysis is not necessary, as it becomes obvious from a first and more superficial analysis that there is no way of the practice causing any harm to the market and to consumers. This was the situation in the *Valer* case, where the market share of the company was so small that, whatever the conduct, the effects it produced would be irrelevant. By doing this thorough analysis in every case CADE is wasting a time that can be given to the investigation of practices that are more likely to be anticompetitive and thus require more attention from the authorities.

A more serious problem can be found in CADE's treatment to the concepts of anticompetitive practices. In certain cases CADE shows evidence that it does not have a fully comprehension of the elements involved in the concepts, which obviously impairs the enforcement of the law. This problem is the result of the lack of knowledge of competition matters. However, it can be easily remedied through personnel training and indication of commissioners with expertise in the area. Another result of this lack of knowledge is the fact that the analysis of the cases has shown that CADE has not yet decided for an approach to competition: it is unclear whether CADE favours efficiencies at all costs, social goals or competition. The definition of this approach is essential for the effectiveness of competition law because it will establish what it is sought to achieve through the enforcement of the law, and thus the economic agents will have a clearer idea of what it is expected from them, being able to behave accordingly.

The analysis of merger cases decided by CADE is also a new contribution to the study of competition law in Brazil. In its examination of mergers CADE also develops an extensive investigation of the issues involved in the merger, which include the definition of the relevant market, the level of concentration of the market, the previous behaviour of the merging companies, the existence of barriers to entry, and the efficiencies resulting from the merger.

However, CADE has not always been able to draw conclusions from the investigation of such aspects of the transaction. By this I mean that the investigation is restrained to its fact-finding nature and some of the evidence it provides is not taken into account in the final decision. For instance, CADE has ignored in some cases the

high concentration of the market or the existence of barriers to entry. Another factor that impairs the enforcement of the law is the lack of method in the definition of the relevant market, which is the basis for the whole analysis of the merger. The outcome of the case depends on the definition of relevant market. As argued above, the adoption of the method proposed in the 1992 Merger Regulation of the American Department of Justice would provide a satisfactory solution to the problem.

Regarding the defences accepted by CADE in merger cases, deficiencies can also be found. CADE's acceptance of efficiencies as defence involves a too broad definition of the concept. The analysis of the cases has demonstrated that CADE is prepared to accept any singular benefit arising from the merger as efficiency. The result is that only in exceptional cases the merger will not generate efficiencies. By adopting this approach towards efficiencies, the majority of the mergers is likely to be approved. It is in this situation that the existence of a clear definition of the approach to, and the goals of, competition reveals essential. If this had been provided by the law, it would have been easier for CADE to figure out what efficiencies would be necessary to achieve the result intended by the law.

CADE's treatment to the failing firm defence is also too liberal, but if we take into consideration the reality of the country, with an unstable economy, this approach is necessary, since even the smallest financial problems may cause disastrous effects to the company.

In its treatment to the foreign competition and international market defences, CADE goes beyond its role of competition authority and approves mergers in order to

protect the domestic industry from international competition as well as to create national champions to compete in the international market. Here CADE is extrapolating its power and dealing with the subject-matter of other trade policies. What is interesting to note is that, at the same time that CADE does it, it has been having its power curtailed through government intervention, such as in the cases of restrictive practices concerning price control.

This is an evidence of the instability of the administrative system created for the implementation of competition law and policy, where it is difficult to predict to what extent the competition authorities will - or are allowed to - exert their power. CADE finds itself in a position of uncertainty where contradictory signs have been sent by the government in relation to its power. It is thus more complicated for CADE to figure out the exact limits of this power. By going beyond its role of competition authority, CADE may be testing what it is allowed to do.

The analysis of the merger cases has also demonstrated that CADE failed to see the effects that non horizontal mergers may cause in the market. CADE seems to consider only how the structure of the market is affected by the merger, ignoring that potential competitors may be affected as well. However, recently CADE has not allowed two joint ventures because the foreign enterprises were potential competitors that could have entered the market by themselves. This signs a development in CADE's approach to non horizontal mergers.

CADE's analysis of the only case involving privatisation decided during the period of this research does not allow any definitive conclusion on this issue, since

CADE opted for ignoring that the case dealt with a company that was privatised, thus avoiding any discussion on that matter. However, this approach has already changed, since lately CADE has been analysing privatisation cases as such.

The lack of power and governmental support that CADE has suffered since it was created has affected the development of competition law in the country. During 30 years CADE did not have freedom of action and thus was not able to develop its work. This situation is now reversing due to the power that CADE has been given, which means that CADE has to learn how to deal with it. Moreover, the limited resources provided by the administrative system, as well as the drawbacks of the competition framework, do not allow CADE to use all of its freedom to develop its work. Thus, CADE has been compelled to focus its attention on the issues that have more urgency to be dealt with, since their effects on the market are more harmful than the effects caused by other aspects of competition. This explains the fact that CADE has ignored the effects of non horizontal mergers, for instance. CADE may have considered that it was necessary to first give more attention to horizontal mergers due to the more imminent anticompetitive effects they cause, and then later discuss vertical and conglomerate mergers.

A final aspect to be alluded to is related to the development of CADE's case law. Though CADE has been copying in some aspects methods of antitrust analysis from other countries, CADE has not been adopting wholeheartedly the reasoning of the decisions on cases on competition. Reference has been made to American and European decisions, but just to clarify some aspect discussed in the case; they were not used as the grounds of the decision. Thus, CADE has been trying to develop its own

case law. The problem, though, is in the instability of the system. The lack of political will to support CADE, the uncertainty in relation to CADE's power, as well as the short term of office of the commissioners may contribute to hinder the development of CADE's own case law.

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