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ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN BRAZIL

-- 1999 - October 2000 --

The attached report is submitted by Brazil to the Committee on Competition Law and Policy FOR CONSIDERATION at its forthcoming meeting on 24-25 October 2000.

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ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN BRAZIL

(1999 – October 2000)

Ministry of Finance
Secretariat for Economic Monitoring

Ministry of Justice
Secretariat of Economic Law

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I. Introduction

1. The Secretariat for Economic Monitoring (SEAE) of the Ministry of Finance, the Secretariat for Economic Law (SDE) of the Ministry of Justice and the Administrative Council for Economic Defence (CADE), an independent body administratively linked to the Ministry of Justice, constitute the *Sistema Brasileiro de Defesa da Concorrência (SBDC)*. SEAE and SDE have analytical and investigative functions while CADE is an administrative tribunal. CADE's decisions can only be reviewed by the Courts.

2. For many years, the role of competition policy was diminished by government intervention and high inflation rates. In 1994, a new competition law was enacted and a strong emphasis was given to merger control, to capacity building and to the diffusion of competition values throughout the society. Last February, Ambev's trial was nationally broadcasted during more than six hours by the Senate's Channel.

3. However, repression to anti-competitive conducts, and anti-cartel enforcement in particular, was relatively neglected. Since 1999, important initiatives taken by antitrust authorities were related to anti-cartel enforcement. Efforts were also made to increase efficiency and to improve transparency of economic analysis. Measures to reduce budgetary limits were also introduced.

II. Changes to Competition Law and Policy Proposed or Adopted

II.1. SEAE

4. Directive n° 39 establishes SEAE's Merger Guidelines. The Guidelines summarise the main procedures adopted by SEAE, during the last five years, in preparing its technical reports on mergers judged by CADE. The Guidelines define a set of principles to guide economic analysis of mergers and detail its steps in order to enhance the consistency between merger control and economic principles. The Guidelines follow international standards, are adapted to the particularities of the Brazilian economy and are focused on the most common cases, being flexible enough to incorporate further developments.

5. Directive n° 45 establishes pecuniary sanctions for those firms that refuse to provide, omit or postpone, without reasonable justification, the provision of information or documents requested during antitrust investigations. The Directive is legally supported by article 26 of Law n° 8.884/94.

6. Directive n° 305 of the Ministry of Finance regulates the investigative powers of SEAE during the instruction of anti-competitive practices and merger cases.

II.2. SDE

7. The Provisional Measure n° 2.055/00, signed by the Brazilian President last August, extended even further the investigative powers of SEAE and SDE and, most importantly, gave SDE the authority to establish a leniency program for those firms that co-operate with cartel investigations. Because cartel is also a criminal offence in Brazil (conspirators are subject to 2 to 5 years in prison), a separate proceeding still has to be carried out for a full amnesty.

8. The Provisional Measure also increases the process fee on notification of concentration from R\$ 15000 (established by Law n° 9.781/99) to R\$45000. The new fee is due to the year 2001.

II.3. CADE

9. CADE's Resolution n° 20/99, in accordance to art. 51 of Law n° 8.884/94, requires that "the reporting council member [on a case in CADE] must verify [in no more than sixty days] whether the proceeding was duly supported with the elements necessary to form his opinion". The resolution is important because Law n° 8.884/94 does not set deadlines for the trials of conduct cases.

10. Law n° 9.781/99 establishes a process fee on notification of concentration, in accordance to art. 54 of Law n° 8.884/94, and consultation, in accordance to art. 7, part XVII.

II.4. Institutional Changes

11. Last May, the terms of the president of CADE and one of the other six commissioners expired. In June, the terms of other two commissioners expired. In June, the replacements for the four were announced. The recently appointed Commissioners are scholars from prestigious Brazilian Universities, one of them being from the law field and the other two of from the economics field. The new president is a former federal judge, with a strong background in international law.

12. SEAE and SDE established informal procedures in order to improve co-ordination among both agencies and enhance effectiveness of anti-cartel enforcement. Several cases have been investigated jointly. This was necessary to combine the investigative capacity that SEAE has (and SDE lacked) with SDE's prosecutory power (which SEAE does not have).

13. SEAE also undertook an institutional restructuring in order to create three new units entirely devoted to anti-cartel investigation in the cities of São Paulo, Rio de Janeiro and Brasilia. The group amounts to ten highly skilled officials, trained in economics and law.

II.5. International Affairs

14. In 1999, the Brazilian Ministry of Justice and the US Attorney General signed an agreement that facilitates technical and informal exchange of information among antitrust authorities in both countries. The agreement is a first generation type one and still has to be approved by the Brazilian Congress.

15. In 2000, Brazil associated itself with the OCDE Recommendation Concerning Effective Action Against Hard Core Cartels adopted by the Council in 1998.

II.6. Future Changes

16. SDE and SEAE are also enhancing procedures for co-operation between them in the investigation stage of merger control. SDE is considering the adoption of SEAE's merger guidelines and both agencies are considering the definition of a common initial notification form, aside the one required by CADE, to generate sufficient information to complete the analysis without the need of a supplemental request.

17. In August 11th, the President signed a Decree creating a interministerial working group to review the institutionality of the SBDC. According to the Decree, the main task of the working group is to prepare a law integrating in one agency, SEAE, SDE and CADE. It also establishes that this new body will be in charge of consumer affairs.

18. The working group is formed by the three members of SBDC and officials from the Ministry of Planning, Budget and Administration; the Ministry of Industry, Foreign Trade and Development and the Civil Cabinet of the Presidency. The Decree sets October 12th as the deadline for the presentation of the proposal. The proposed Law will be subject to public discussion and then it will be sent to the Parliament.

III. Enforcement of Competition Law and Policy

III.1. Merger cases

19. In 1999, CADE reviewed 226 merger cases, from which 95% were approved without further requirements. According to CADE's statistics, comportamental remedies were applied to 1% of cases. Merger analysis will certainly increase in 2000: until September, SEAE had reported to SDE almost 500 cases, roughly 50% from manufacturing industry.

20. Last year, 79% of the concentration cases were acquisitions, and 12% were joint-venture agreements. It is not likely that joint-venture agreements will increase in 2000.

III.1.1. The AmBev case

21. AmBev (standing for American Beverage Company) is the result of Brahma acquisition of Antarctica. Brahma and Antarctica were the leading brewers in Brazil. Their national market share in beer industry amounts to 75%. Considering specific regional markets (due to transportation costs) this figures increased up to 90% (as in the north region). Both firms owned several brands including the top three in terms of national preferences: Brahma, Antarctica and Skol brands. This brands were positioned at the "high end" of the brand spectrum. Kaiser, the next largest brand in Brazil and whose market share was about 12%, was positioned somewhat in a "lower" position.

22. Entry into beer production on a large scale, at the national level, is also difficult. Because Brazil is a very large country entry requires the establishment of several production facilities to serve different regions of the country. It is expensive to establish nationally a successful brand. Efficient distributors were scarce and it would be difficult to persuade small retailers to carry a relatively unknown brand of beer.

23. After extensive inquiries, SEAE and SDE concluded that the transaction was on balance competitively harmful and both recommended that it be approved only if AmBev were required to divest one of the three leading brands that it would control – Brahma, Antarctica or Skol – and the production facilities associated with that brand. CADE decided to condition its approval on a set of remedies, such as:

- i) AmBev must divest the "Bavaria" brand, a lesser brand owned by Antarctica. It must offer for sale to the purchaser of the brand five breweries located in different regions of the country. It must also provide the purchaser with access to the Brahma distribution system for a period of four years, with an option for an additional two years;
- ii) AmBev is prohibited from imposing exclusivity requirements on retail;
- iii) AmBev may not close any of its production facilities for a period of four years without first offering them for sale; and
- iv) AmBev must provide a program of retraining to workers who are displaced by the closing of its production facilities for a period of four years.

III.1.2. Other Cases

24. In *White Martins and Unigases Comercial* case, CADE concluded that even though the operation offered efficiencies, it gave White Martins substantial market power in the Southeast region. Having acknowledged that the lack of raw material was the reason for this market power, becoming a strong barrier to entry, CADE conditioned the approval of the operation to comportamental conditions of which the most important was that the petitioners should abjure, over the next six years, of any bidding process for whatever new source there may be of carbonic gas' sub-products in the Southeast region and Paraná.

25. In *Coca-Cola Company and Cadbury Schweppes* case, it was considered that the joint operation did not reinforce a dominant position in the markets at hand, especially because of the reduced horizontal concentration effects. In this manner, CADE approved the concentration with no restrictions.

26. In *Cervejarias Skol-Caracu and Carlsberg* case, a joint venture for the selling of Carlsberg in Brazil, CADE made restrictions to the contractual clauses that fixed the prices of the Carlsberg beer based on the price of Skol beer, in national territory, and decided to approve the operation, under the condition that, in 30 days after the publication of the sentence, these contractual clauses were to be eliminated.

27. In *Terminal de Vila Velha (TVV) and Companhia Docas do Espirito Santo* case, the leasing of the cribs 203, 204 and 205 of the *Cais de Capuaba* at the *Porto de Vitoria* and of the machinery installed for moving containers, CADE considered that the acquisition sought the accomplishment of synergy and the improvement of services but decided that the restriction imposed upon the clients prohibiting the use of its own or other transportation was not technically reasonable. In this manner, the approval was conditioned to the elimination of the exclusivity requirements.

III.2. Abuse of Dominance

28. In 1999, CADE reviewed 78 conducts related to the matter of abuse of dominance. In 33% of the cases, Cade decide that the conduct was unlawful. Unlawful conduct were mainly of exclusive dealing type (twelve cases). This tendency is likely to continue in 2000.

29. In *Philip Morris vs. British America Tobacco (BAT) Company*, a exclusive dealing case involving BAT and several points of sale, SDE and SEAE concluded that retail establishments in airports and shopping centers were separate markets, in which BAT had a monopoly and that the exclusive dealing with these retailers should be banned completely. SEAE and SDE also recommended CADE the imposition of a "significant monetary sanction" against BAT. CADE followed that recommendation regarding the elimination of the exclusive dealing but decided not to impose any fines.

30. A recent conduct case that could be classified as a "collective" boycott case involves an alleged agreement among 21 of the largest pharmaceutical firms in Brazil, most of them multinational manufacturers of branded drugs, to prevent distributors dealing with their products from selling generics to pharmacies. There was also written evidence of a verbal agreement reached in a meeting of the national sales managers of those companies. SDE initiated a preliminary investigation that confirmed the existence of such meeting and an administrative proceeding was then opened. SDE also issued a preliminary injunction under Article 52 of Law nº 8.884/94 ordering the respondents to cease their boycott, under the sanction of a daily fine of R\$100,000 for violations of the order. As of September, 2000, the administrative proceeding was continuing in SDE.

III.3. *Cartel cases*

31. Last year, CADE condemned the three Brazilian main steel producers, *CSN, Usiminas and Cosipa*, to pay R\$ 51 million (roughly 1% of their revenues in 1996) in fines due to the adoption of a co-ordinated price increase in 1997. Still concerned with price controls attributions of the Ministry of Finance during previous years, representatives from companies and the steel association went to SEAE's office to inform that they would increase their prices by a specific amount in a specific day. This peculiar case was the first cartel-type condemnation by CADE ever.

32. At the present, SEAE and SDE are working on approximately 10 hard-core cartel cases, almost all of them initiated by SEAE. SDE has opened formal accusations against firms in different sectors among which are the steel industry; civil aviation; orange juice; lysine; vitamins; maritime transportation; aluminium and gasoline stations. Most of the cases are related to co-ordinated price increase and two of them are international cartels.

33. In one case, the co-operation between SEAE and members of the District Attorney's office lead to important results. After listening to a report of SEAE, a District Attorney managed to obtain authorisation from Courts to wire tap price fixing discussions among gasoline station owners and conversations about threatening aggressive competitors.

III.3.1. *Collusion for price increase in the air transportation sector*

34. On August 4th, 1999, four major national newspapers informed about the occurrence of a private meeting, in a hotel in the city of São Paulo, between the presidents of the four largest Brazilian airlines. Five days later, the prices of the air tickets in the central airports of Rio de Janeiro (*Santos Dumont*) and São Paulo (*Congonhas*), commercialised by these four companies were 10% higher.

35. Since the four companies have 100% of the market for regular air transportation services at the *Santos Dumont-Congonhas* route, and no alternative explanation for the simultaneous price increase was found, SEAE concluded that this was not a case of parallelism of prices or external signalling and decided to request SDE to prosecute the four companies for collusive behaviour. As of September, 2000, the administrative proceeding was continuing in SDE.

III.3.2. *Collusion in the maritime transportation sector*

36. After being presented, during the months of February and March, 1999, with letters from export companies and associations situated in different parts of Brazil about being charged a specific fee, named Equipment Imbalance Surcharge – EIS, for the transportation of containers along Brazil, Central America and North America, SEAE decided to solicit information from the undertakers about the matter, making use of the competencies established in Law n° 9.021/95.

37. The responses presented made it clear that the undertakers had previously determined a certain date for the charging of the EIS. At the present, the high concentration of the supply in the maritime transportation services – more than 85% is concentrated among 4 groups – creates the necessary conditions for price agreements between the main suppliers. Therefore, the implementation of the EIS by every undertaker, in an uniform and previously established manner, with identical values for the same routes, was considered a strong evidence of collusion. These conclusions were submitted to SDE, along with an official request for the opening of an administrative process. As of September, 2000, the administrative proceeding was continuing in SDE.

III.3.3 International Cartels

38. SEAE started investigations regarding the effects of the international lysine cartel in the domestic market in October, 1999. With the collaboration of the Antitrust Division of the U.S. DOJ, it was possible to obtain transcripts of meetings showing that Latin America and Brazil were, in an explicit way, included in the world market division undertaken by the international cartel. Once the national industry did not produce lysine, Brazilian consumers became subjugated to the exporters' decisions, considering that there were no available choices, what made them pay artificially higher prices.

39. These conclusions were submitted to SDE, along with an official request for charging ADM and Ajinomoto for colluding. As of September, 2000, the administrative proceeding was continuing in SDE.

40. In 2000, SEAE and SDE also announced their administrative lawsuit against the Brazilian subsidiaries of Roche, Basf and Aventis Animal Nutrition (company formed by the merger of Rhône-Poulenc and Hoescht), its respective head offices and eleven executives and former executives of those companies, for their conspiracies to fix the prices and allocate market shares of bulk vitamins in Brazil, as an extension of their participation in the international vitamins cartel. As of September, 2000, the administrative proceeding was continuing in SDE.

41. The administrative lawsuit was preceded by extensive investigative procedures that lasted approximately a year. During that time, SEAE and SDE heard seven of the main executives in the vitamin industry in Latin America, totalling nearly 30 hours of oral statements, in three different Brazilian states. Both agencies also searched the premises of the Latin American headquarters of Roche and Basf for more than ten hours and requested copies of several documents. The investigations made by SEAE and SDE found strong evidence that the Brazilian subsidiaries of the investigated companies undertook co-ordinated efforts to avoid price reduction and to limit the supply of the vitamins A, E and beta carotene in Brazil.

42. Between 1995 and 1998, for example, executives from Roche, Basf and Rhône-Poulenc in charge of the Latin American vitamins market had quarterly meetings, in a deluxe hotel at the city of São Paulo, with the purpose of exchanging information on the current prices and total sales of vitamins A, E and beta carotene. The global head offices of the conspiring companies instructed their regional managers to have such meetings, which probably served as an enforcement mechanism to the international cartel in the Brazilian and Latin American markets. Also as instructed by their head offices, the executives of those companies undertook co-ordinated efforts to limit the increase of vitamin supply in Brazil and to avoid price reductions, with the purpose of achieving the goals that had been established by the international conspiracy.

IV. The Role of Competition Authorities in the Formulation of Other Policies.

43. The SBDC works in co-operation with federal Regulatory Agencies already established –the Agência Nacional de Energia Elétrica (Aneel), the Agência Nacional de Telecomunicações (Anatel), the Agência Nacional de Petróleo (ANP), the Agência Nacional de Saúde Suplementar (ANS) and the Agência Nacional de Vigilância Sanitária (ANVS) - and with governmental bodies that represent the conceding power in non competitive industries.

44. The goal of these actions is to review and eliminate excessive regulations, in order to promote competition. Each of the three agencies has signed a formal agreement with Aneel regarding exchange of information and technical standards for antitrust analysis. SEAE and SDE have advised the regulators in electricity, petroleum, civil aviation and ports, on specific occasions. SEAE has been more active in competition advocacy, which is to be expected, given its position as part of the Ministry of Finance.

45. SEAE has strongly supported the deregulation of the civil air transportation in meetings with the *Departamento de Aviação Civil*. SEAE has pressured the Brazilian Congress for the inclusion of competition clauses in new laws for services that will be soon privatised (such as water and postal services) and for an active role for SBDC in antitrust cases from these industries. SDE has also participated in competition advocacy in the natural gas sector.