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CONSEIL DU COMMERCE ET DU DÉVELOPPEMENT

Groupe intergouvernemental d'experts du droit et de la politique de la concurrence

MANUEL SUR LE DROIT DE LA CONCURRENCE

Note du secrétariat de la CNUCED

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INTRODUCTION

L'Ensemble de principes et de règles équitables convenus au niveau multilatéral pour le contrôle des pratiques commerciales restrictives (aussi dénommé Ensemble de principes et de règles des Nations Unies sur la concurrence) prévoit, à la section F.6 c), l'établissement d'un *Manuel des législations appliquées en matière de pratiques commerciales restrictives*.

La cinquième Conférence des Nations Unies chargée de revoir tous les aspects de l'Ensemble, qui s'est tenue à Antalya (Turquie) du 14 au 18 novembre 2005, a prié le secrétariat de la CNUCED de continuer à publier de nouvelles livraisons du *Manuel sur le droit de la concurrence*, y compris le texte d'instruments bilatéraux, régionaux et internationaux, complété par un résumé des principales dispositions des lois sur la concurrence ou desdits instruments, établi à partir de communications soumises par les États membres parties à ces instruments (voir la résolution adoptée par la Conférence (TD/RBP/CONF.6/14)).

Le secrétariat a donc établi la présente note, qui contient les textes législatifs sur la concurrence de l'Algérie, du Brésil, du Portugal et de la Suisse, ainsi que les commentaires de ces quatre pays[1].

À ce jour, le secrétariat de la CNUCED a publié dans son *Manuel* le texte des lois sur la concurrence de 52 pays: Afrique du Sud, Algérie, Allemagne, Belgique, Brésil, Bulgarie, Burkina Faso, Canada, Chili, Colombie, Côte d'Ivoire, Croatie, Danemark, Espagne, États-Unis d'Amérique, Finlande, France, Géorgie, Hongrie, Indonésie, Italie, Jamaïque, Japon, Kenya, Lituanie, Malawi, Maroc, Mexique, Monténégro, Norvège, Nouvelle-Zélande, Pakistan, Pologne, Portugal, République de Corée, République tchèque, République-Unie de Tanzanie, Roumanie, Royaume-Uni de Grande-Bretagne et d'Irlande du Nord, Sénégal, Serbie, Slovaquie, Sri Lanka, Suède, Suisse, Thaïlande, Tunisie, Turquie, Ukraine, Venezuela (République bolivarienne du), Zambie et Zimbabwe.

Le Secrétaire général de la CNUCED, dans une note du 8 mars 1996, a prié les États membres qui ne l'avaient pas encore fait ainsi que ceux qui avaient modifié leur législation sur la concurrence ou adopté des dispositions nouvelles depuis leur dernière communication au secrétariat de la CNUCED de fournir à celui-ci le texte de leurs lois et décisions judiciaires, accompagné de commentaires, selon le mode de présentation prescrit (voir la section ci-après). Pour faciliter la publication des textes législatifs dans plusieurs langues officielles de l'ONU, les États ont été invités à fournir si possible des traductions dans au moins une autre de ces langues.

Le secrétariat remercie les États qui lui ont envoyé les renseignements demandés pour l'établissement de la présente livraison du *Manuel*, et invite de nouveau ceux qui ne l'ont pas encore fait à répondre à la demande du Secrétaire général de la CNUCED.

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[1] Les commentaires et les textes législatifs sont reproduits sous la forme et dans la langue dans lesquelles ils ont été reçus.

MODE DE PRÉSENTATION DES RENSEIGNEMENTS À FOURNIR POUR LE MANUEL

A. Exposé des raisons qui ont motivé l'adoption de la législation.

B. Description des objectifs de la législation et de leur évolution depuis l'adoption de la législation initiale.

C. Description des pratiques, actes ou comportements soumis à un contrôle, en indiquant pour chacun:

1) Le type de contrôle − par exemple interdiction pure et simple, interdiction de principe, ou examen au cas par cas;

2) La mesure dans laquelle les pratiques, actes ou comportements visés aux paragraphes 3 et 4 de la section D de l'Ensemble de principes et de règles sont soumis à ce contrôle, ainsi que les autres pratiques, actes ou comportements susceptibles d'y être assujettis et ceux qui font l'objet de mesures expressément liées à la protection du consommateur, comme la lutte contre la publicité mensongère.

D. Description du champ d'application de la législation, en indiquant:

1) Si elle est applicable à toutes les transactions portant sur des biens et des services et, dans la négative, quelles transactions sont exclues;

2) Si elle s'applique à la totalité des pratiques, actes ou comportements ayant des effets sur le pays, quelle qu'en soit l'origine géographique;

3) Si elle dépend de l'existence ou de l'entrée en vigueur d'un accord.

E. Description du mécanisme (administratif ou judiciaire) d'application, en indiquant les éventuels accords de notification et d'enregistrement et les principaux pouvoirs de l'organe ou des organes compétents.

F. Description de toute législation parallèle ou supplémentaire, y compris des traités ou conventions avec d'autres pays, prévoyant une coopération ou des procédures pour régler les différends dans le domaine des pratiques commerciales restrictives.

G. Description des principales décisions prises par des organes administratifs ou judiciaires, et des questions qui en font expressément l'objet.

H. Bibliographie succincte indiquant la référence des textes législatifs et des principales décisions, ainsi que les documents explicatifs publiés par les pouvoirs publics, ou les textes législatifs ou certains passages de ces textes.

Annex

[English/French]

COMPETITION LEGISLATION

I. ALGERIA

Commentary by the Government of Algeria on Algerian competition legislation

A. INTRODUCTION:

Dans le cadre des exigences induites par les actions de mise à niveau de notre économie et d'harmonisation de notre législation et à la faveur de la conclusion de l'Accord d'Association avec l'Union Européenne, l'Algérie a procédé à la refonte globale du dispositif législatif relatif à la concurrence.

Cette action s'est traduite par la promulgation de la nouvelle ordonnance n° 03-03 du 19 juillet 2003 relative à la concurrence en remplacement de l'ordonnance n° 95-06 du 25 janvier 1995, qui a été abrogée par le nouveau texte.

A cet effet, il convient de préciser les principales raisons ayant motivé la refonte de l'ordonnance n° 95-06 du 25 janvier 1995**,** à savoir:

1. la **première** raison a trait à la séparation des règles relatives à la concurrence (ententes et accords illicites, abus de position dominante et concentrations) de celles se rapportant aux pratiques commerciales;

2. la **deuxième** raison est liée à la nécessité de rompre avec le caractère répressif de notre législation et de mettre en place des mécanismes de concertation favorisant la concertation et la coopération entre l'Administration du Commerce, le Conseil de la Concurrence et les entreprises, en vue de familiariser ces dernières au fonctionnement concurrentiel du marché et de créer ainsi une culture de la concurrence;

3. la **troisième** raison concerne la nécessaire reconfiguration du Conseil de la Concurrence à l'effet de lui conférer un rôle plus dynamique de régulation du marché et de promotion de la concurrence;

4. la **quatrième** raison se rapporte aux exigences découlant de l'intégration de notre pays à l'économie régionale (Union Européenne) et mondiale (OMC), qui impliquent la modernisation et l'adaptation de notre législation nationale en matière de concurrence.

5. C'est sur la base de ces principales considérations que le nouveau dispositif législatif présenté ci-après, a été élaboré.

B. PRESENTATION DU NOUVEAU DISPOSITIF LEGISLATIF:

a. Objet et champ d'application de l'ordonnance:

L'ordonnance n° 03.03 du 19 juillet 2003 relative à la concurrence a pour objectifs:

- de fixer les conditions d'exercice de la concurrence sur le marché;
- de prévenir toute pratique restrictive de concurrence;
- et de contrôler les concentrations économiques afin de stimuler l'efficience économique et d'améliorer le bien-être des consommateurs.

Ce cadre législatif couvre l'ensemble des activités de production, de distribution et de services. Son champ d'application concerne également les activités des personnes publiques lorsque celles-ci n'interviennent pas dans le cadre de l'exercice de prérogatives de puissance publique ou dans l'accomplissement de missions de service public.

b. Contenu de l'ordonnance:

1°) Pratiques restrictives de concurrence:

En plus des pratiques d'ententes illicites et d'abus de position dominante déjà consacrées dans l'ancien dispositif (ordonnance n° 95-06 du 25 janvier 1995 relative à la concurrence), la nouvelle ordonnance intègre **d'autres pratiques restrictives de la concurrence** qui sont désormais interdites et sanctionnées, à savoir :

- l'abus de l'état de dépendance économique (**art. 11**);
- la constitution de monopoles par le biais de contrats d'achats exclusifs (**art. 10**);
- et la pratique de vente à des prix abusivement bas (**art. 12**).

Cette ordonnance prévoit cependant des **exceptions** à ces interdictions lorsque les pratiques et accords restrictifs résultent d'un texte législatif ou d'un texte réglementaire pris pour son application. Ces exceptions couvrent également les accords et pratiques qui permettent notamment aux petites et moyennes entreprises de renforcer leur position concurrentielle sur le marché ou qui favorisent l'emploi.

Par ailleurs, l'ordonnance en vigueur intègre une nouvelle disposition qui consacre une mesure **préventive et pédagogique en matière d'ententes et d'abus de position dominante, à travers l'instauration de l'attestation négative**. En effet, en vertu de cette nouvelle procédure, les entreprises dont les comportements sont susceptibles d'être non conformes aux règles de la concurrence, peuvent demander au Conseil de la Concurrence de vérifier si les pratiques ou accords qu'elles souhaitent mettre en œuvre peuvent être considérés comme compatibles avec cette loi et bénéficier ainsi d'une attestation négative.

Le nouveau dispositif institue également des **mesures de clémence**. Il s'agit d'une procédure par laquelle le Conseil de la Concurrence peut décider de réduire le montant de l'amende ou de ne pas prononcer du tout d'amende lorsque les entreprises concernées:

- reconnaissent les griefs qui leur sont imputés;

- contribuent à accélérer la procédure d'instruction de l'affaire;

- s'engagent à ne plus commettre d'infractions liées aux pratiques restrictives de concurrence.

Toutefois et en cas de récidive, les mesures de clémence ne sont pas accordées. La consécration de ces deux (02) dernières dispositions vise à amoindrir l'aspect répressif de l'ancienne ordonnance et à rendre ce nouveau dispositif plus attractif afin de favoriser ainsi son développement au niveau de la sphère commerciale et sa réelle application sur le terrain par les agents économiques.

2°) Concentrations économiques:

S'agissant des **concentrations économiques**, la nouvelle ordonnance reconduit la compétence du Conseil de la Concurrence en la matière. En effet, les agents économiques doivent notifier au Conseil leurs opérations de concentration lorsqu'elles sont de nature à porter atteinte à la concurrence et qu'elles atteignent **un seuil de plus de 40%** des ventes ou achats à effectuer sur un marché. Le Conseil de la Concurrence prend sa décision dans un délai de trois (03) mois.

Cependant, elle consacre une exception à ce principe en accordant la faculté au Gouvernement d'autoriser, lorsque l'intérêt général le justifie, les concentrations économiques rejetées par le Conseil de la Concurrence à chaque fois que des conditions économiques objectives le justifient (notamment pour développer et assurer la compétitivité des entreprises nationales face à la concurrence internationale, créer de l'emploi et développer des technologies nouvelles).

3°) Conseil de la Concurrence:

Le nouveau dispositif apporte, par ailleurs, des enrichissements en ce qui concerne les attributions, l'organisation et le fonctionnement du **Conseil de la Concurrence**. La révision et l'amélioration du cadre organisationnel et juridique du Conseil sont motivées par la faiblesse du bilan de l'activité de cette institution au cours des années passées et par l'inadéquation de son organisation et de son fonctionnement par rapport à l'importance du rôle que doit jouer une telle autorité en matière de régulation économique et de mise en œuvre des règles de la concurrence.

Les enrichissements apportés aux attributions du Conseil de la Concurrence ont trait notamment:

- à la définition du Conseil en tant qu'autorité administrative autonome, jouissant de la personnalité juridique et de l'autonomie financière;

- au renforcement de ses prérogatives en matière de contentieux;

- et à l'élargissement de son champ d'intervention sur le plan consultatif, par l'intégration de nouvelles mesures lui permettant dorénavant de coopérer et d'échanger des informations avec les autorités de régulation sectorielles ainsi qu'avec les autorités étrangères homologues.

Les modifications apportées au plan de l'organisation et du fonctionnement du Conseil de la Concurrence ont pour but de renforcer ses capacités et ses compétences en tant que principal régulateur du marché.

Dans cette optique, le nombre des membres du Conseil est ramené à **neuf (09) membres permanents au lieu de douze (12) membres dont sept (07) non permanents prévus dans l'ancien texte.**

Sur les neuf (09) membres, deux (02) sont des magistrats et les sept (07) autres membres sont choisis parmi des personnalités connues pour leur compétence juridique, économique ou en matière de concurrence, de distribution et de consommation.

4°) Procédures d'instruction et de recours:

L'ordonnance sus-citée consacre deux (02) chapitres aux procédures d'instruction et de recours contre les décisions du Conseil de la Concurrence.

L'objectif visé est de renforcer la transparence et l'efficience des procédures afin de sauvegarder et de garantir les droits des parties, de préserver et de faire respecter le principe du contradictoire.

Cette ordonnance instaure également un cadre de collaboration entre les différentes institutions chargées de la concurrence. C'est ainsi qu'il est prévu que la Cour d'Alger recueille l'avis du Ministre du Commerce et du Conseil de la Concurrence à l'occasion du traitement des contentieux qui lui sont soumis.

Compte tenu de la spécificité de la procédure, l'ordonnance précise les règles de recours en appel devant la Cour d'Alger.

S'agissant de la contestation des décisions de rejet des opérations de concentration, les recours en annulation sont désormais formulés devant le Conseil d'Etat, compte tenu de la nature juridique de la décision contestée (administrative) et ce, conformément à l'article 9 du code de procédure civile.

En outre, la nouvelle ordonnance a instauré un cadre de transparence dans le traitement des contentieux à travers:

- son **chapitre III** qui fixe les attributions du rapporteur ainsi que les différentes étapes de la procédure d'instruction;

- et son **chapitre V** relatif à la procédure de recours contre les décisions du Conseil de la Concurrence.

La révision et la mise à niveau du dispositif législatif relatif à la concurrence, s'inscrivent notamment dans le cadre de la concrétisation du train des réformes économiques initié par les pouvoirs publics en vue de la consolidation des règles de l'économie de marché, d'intégration de l'Algérie dans les espaces économiques mondiaux et régionaux (Accord d'Association avec l'Union Européenne et Organisation

Mondiale du Commerce) et de renforcement du dispositif d'encadrement et de régulation du marché dans le domaine de la concurrence.

Il permettra ainsi à notre pays de disposer d'un outil efficient et adapté dans le domaine de la régulation et de la concurrence à même de permettre la maîtrise du marché et la détection ainsi que la sanction des pratiques restrictives de concurrence.

C. HARMONISATION PAR RAPPORT A L'ACCORD D'ASSOCIATION AVEC L'UNION EUROPEENNE:

La présentation du nouveau dispositif relatif à la concurrence permet de faire ressortir que notre législation en matière de concurrence est en harmonie avec les règles européennes de concurrence, dans la mesure où elle prohibe à travers ses **articles 6 et 7** (cf. article 41, 1er point, a et b)**:**

1. les pratiques et actions concertées, conventions et ententes expresses ou tacites (point a);

2. ainsi que les abus de position dominante ou monopolistique sur un marché ou un segment de marché (point b).

Ces deux (02) pratiques sont interdites lorsqu'elles ont pour objet ou pour effet d'empêcher, de restreindre ou de fausser le libre jeu de la concurrence dans un même marché ou dans une partie substantielle de celui-ci (à savoir, en la matière, l'ensemble du territoire de la Communauté ou une partie substantielle de celui-ci ou l'ensemble du territoire algérien ou une partie substantielle de celui-ci).

Elle instaure, en outre, à travers ses **articles 41 à 43**, un cadre de coopération entre le Conseil de la Concurrence et les autorités étrangères de concurrence, en vue d'assurer la mise en œuvre adéquate des législations nationale et étrangère et de développer entre ces institutions des relations de concertation et d'échange d'information et ce, dans le respect des règles liées à la souveraineté nationale, à l'ordre public et au secret professionnel.

Ce cadre de coopération qui a une portée générale, est en totale conformité avec les règles de mise en œuvre de **l'article 41** de l'Accord d'Association avec l'Union Européenne, contenues dans **l'annexe n° 5** relative aux modalités d'application dudit article. En effet, les conditions d'application de **l'article 41** portent sur les actions de coopération et de coordination qui seront concrétisées à travers les procédures de notification, d'échange d'information et de consultation.

Par ailleurs, l'accord d'association prévoit que les deux parties s'engagent à prendre les mesures nécessaires pour la levée de toutes les discriminations pouvant affecter les échanges économiques et commerciaux entre la Communauté et l'Algérie, à travers:

- l'ajustement progressif des monopoles d'Etat à caractère commercial d'ici à la fin de la cinquième d'entrée en vigueur de l'accord (2010);

- la suppression de toutes les mesures contraires aux intérêts des parties notamment en ce qui concerne les entreprises publiques et celles auxquelles des droits spéciaux ou exclusifs ont été accordés.

D. TEXTES D'APPLICATION DE L'ORDONNANCE:

Dans le cadre de la formalisation des textes d'application de l'ordonnance, **deux (02) décrets exécutifs** ont été publiés, à savoir:

- le décret exécutif n° 05-175 du 12 mai 2005 fixant les modalités d'obtention de **l'attestation négative** relative aux ententes et à la position dominante;

- le décret exécutif n° 05-219 du 22 juin 2005 relatif aux autorisations des opérations de **concentration;**

Le **premier texte**, qui découle de **l'article 08** de l'ordonnance, définit les modalités d'introduction de **l'attestation négative** par les agents économiques auprès du Conseil de la Concurrence et comporte en **annexe,** l'imprimé de demande d'obtention de l'attestation négative (identités du demandeur et des autres parties concernées ainsi que l'objet de la demande) et la fiche de renseignements à joindre à la demande (données relatives à l'entreprise, au marché concerné et aux motifs de la demande).

Le **second texte**, pris en application de **l'article 22** de l'ordonnance, fixe les conditions et procédures d'introduction de la demande d'autorisation de l'opération de **concentration** au niveau du Conseil de la Concurrence et intègre en **annexe**, le formulaire de la demande (identités du demandeur et des autres parties concernées ainsi que l'objet de la demande) et la fiche de renseignements devant accompagner la demande (informations relatives aux entreprises concernées par la concentration et aux données ayant trait à l'opération de concentration).

Ordonnance No.03-03 du 19 Joumada El Oula 1424 correspondant au 19 juillet 2003 relative à la concurrence.

(Parue au journal officiel No. 43 du 20 juillet 2003)

Le Président de la République,

Vu la Constitution, notamment ses articles 122 et 124;

Vu l'ordonnance n65-278 du 16 novembre 1965, modifiée et complétée, portant organisation judiciaire;

Vu l'ordonnance n66-154 du 8 juin 1966, modifiée et complétée, portant code de procédure civile;

Vu l'ordonnance n66-155 du 8 juin 1966, modifiée et complétée, portant code de procédure pénale;

Vu l'ordonnance n66-156 du 8 juin 1966, modifiée et complétée, portant code pénal;

Vu l'ordonnance n75-58 du 26 septembre 1975, modifiée et complétée, portant code civil;

Vu l'ordonnance n75-59 du 26 septembre 1975, modifiée et complétée, portant code de commerce;

Vu la loi n83-17 du 16 juillet 1983, modifiée et complétée, portant code des eaux;

Vu la loi n89-02 du 7 février 1989 relative aux règles générales de protection du consommateur;

Vu la loi n90-10 du 14 avril 1990, modifiée et complétée, relative à la monnaie et au crédit;

Vu la loi n90-22 du 18 août 1990, modifiée et complétée, relative au registre de commerce;

Vu l'ordonnance n95-06 du 23 Châabane 1415 correspondant au 25 janvier 1995 relative à la concurrence;

Vu la loi organique n98-01 du 4 Safar 1419 correspondant au 30 mai 1998 relative aux compétences, à l'organisation et au fonctionnement du Conseil d'Etat;

Vu la loi n2000-03 du 5 Joumada El Oula 1421 correspondant au 5 août 2000 fixant les règles générales relatives à la poste et aux télécommunications;

Vu la loi n2000-06 du 27 Ramadhan 1421 correspondant au 23 décembre 2000 portant loi de finances pour 2001, notamment ses articles 32 et 33;

Vu la loi n01-10 du 11 Rabie Ethani1422 correspondant au 3 juillet 2001 portant loi minière;

Vu l'ordonnance n01-04 du Aouel Joumada Ethania 1422 correspondant au 20 août 2001 relative à l'organisation, la gestion et la privatisation des entreprises publiques économiques;

Vu la loi n01 -18 du 27 Ramadhan 1422 correspondant au 12 décembre 2001 portant loi d'orientation sur la promotion de la petite et moyenne entreprise;

Vu la loi n02-01 du 2 Dhou El Kaada 1422 correspondant au 5 février 2002 relative à l'électricité et à la distribution du gaz par canalisation;

Vu la loi n02-11 du 20 Chaoual 1423 correspondant au 24 décembre 2002 portant loi de finances pour 2003 notamment son article 102;

Le Conseil des ministres entendu;

Promulgue l'ordonnance dont la teneur suit:

TITRE I

DISPOSITIONS GENERALES

Article. 1 er. — La présente ordonnance a pour objet de fixer les conditions d'exercice de la concurrence sur le marché, de prévenir toute pratique restrictive de concurrence et de contrôler les concentrations économiques afin de stimuler l'efficience économique et d'améliorer le bien-être des consommateurs.

Art. 2. — La présente ordonnance s'applique aux activités de production, de distribution et de services y compris celles qui sont le fait de personnes publiques, dans la mesure où elles n'interviennent pas dans le cadre de l'exercice de prérogatives de puissance publique ou dans l'accomplissement de missions de service public.

Art. 3. — Il est entendu au sens de la présente ordonnance par:

a) **entreprise:** toute personne physique ou morale quelle que soit sa nature, exerçant d'une manière durable des activités de production, de distribution ou de services;

b) **marché:** tout marché des biens ou services concernés par une pratique restrictive, ainsi que ceux que le consommateur considère comme identiques ou substituables en raison notamment de leurs caractéristiques, de leurs prix et de l'usage auquel ils sont destinés, et la zone géographique dans laquelle sont engagées les entreprises dans l'offre des biens ou services en cause;

c) **position dominante:** la position permettant à une entreprise de détenir, sur le marché en cause, une position de puissance économique qui lui donne le pouvoir de faire obstacle au maintien d'une concurrence effective, en lui fournissant la possibilité de comportements indépendants dans une mesure appréciable vis-à-vis de ses concurrents, de ses clients ou de ses fournisseurs;

d) **état de dépendance économique:** la relation commerciale dans laquelle l'une des entreprises n'a pas de solution alternative comparable si elle souhaite refuser de contracter dans les conditions qui lui sont imposées par une autre entreprise, client ou fournisseur.

TITRE II

DES PRINCIPES DE LA CONCURRENCE

Chapitre I

De la liberté des prix

Art. 4 . — Les prix des biens et services sont librement déterminés par le jeu de la concurrence.

Toutefois, l'Etat peut restreindre le principe général de la liberté des prix dans les conditions définies à l'article 5 ci-dessous.

Art. 5. — Les biens et services considérés stratégiques par l'Etat peuvent faire l'objet d'une réglementation des prix par décret, après avis du Conseil de la concurrence.

Peuvent être également prises, des mesures exceptionnelles de limitation de hausse des prix ou de fixation des prix en cas de hausses excessives des prix provoquées par une grave perturbation du marché, une calamité, des difficultés durables d'approvisionnement dans un secteur d'activité ou une zone géographique déterminée ou par des situations de monopoles naturels.

Ces mesures exceptionnelles sont prises par décret pour une durée maximum de six (6) mois, après avis du Conseil de la concurrence.

Chapitre II

Des pratiques restrictives de la concurrence

Art. 6. — Sont prohibées, lorsqu'elles ont pour objet ou peuvent avoir pour effet d'empêcher, de restreindre ou de fausser le jeu de la libre concurrence dans un même marché ou, dans une partie substantielle de celui-ci, les pratiques et actions concertées, conventions et ententes expresses ou tacites et notamment lorsqu'elles tendent à:

- limiter l'accès au marché ou l'exercice d'activités commerciales;

- limiter ou contrôler la production, les débouchés, les investissements ou le progrès technique;

- répartir les marchés ou lessources d'approvisionnement;

- faire obstacle à la fixation des prix par le libre jeu du marché en favorisant artificiellement leur hausse ou leur baisse;

- appliquer, à l'égard de partenaires commerciaux, des conditions inégales à des prestations équivalentes en leur infligeant de ce fait un désavantage dans la concurrence;

- subordonner la conclusion de contrats à l'acceptation, par les partenaires, de prestations supplémentaires qui, par leur nature ou selon les usages commerciaux, n'ont pas de lien avec l'objet de ces contrats.

Art. 7. — Est prohibé tout abus d'une position dominante ou monopolistique sur un marché ou un segment de marché tendant à:

- limiter l'accès au marché ou l'exercice d'activités commerciales;

- limiter ou contrôler la production,les débouchés, les investissements ou le progrès technique;

- répartir les marchés ou lessources d'approvisionnement;

- faire obstacle à la fixation des prix par le libre jeu du marché en favorisant artificiellement leur hausse ou leur baisse;

- appliquer, à l'égard de partenaires commerciaux, des conditions inégales à des prestations équivalentes en leur infligeant de ce fait un désavantage dans la concurrence;

- subordonner la conclusion de contrats à l'acceptation, par les partenaires, de prestations supplémentaires qui, par leur nature ou selon les usages commerciaux, n'ont pas de lien avec l'objet de ces contrats.

Art. 8. — Le Conseil de la concurrence peut constater, sur demande des entreprises intéressées, qu'il n'y a pas lieu pour lui, en fonction des éléments dont il a connaissance, d'intervenir à l'égard d'un accord, d'une action concertée, d'une convention ou d'une pratique tels que définis aux articles 6 et 7 ci-dessus.

Les modalités d'introduction de la demande de bénéficier des dispositions de l'alinéa précédent sont déterminées par décret.

Art. 9. — Ne sont pas soumis aux dispositions des articles 6 et 7, les accords et pratiques qui résultent de l'application d'un texte législatif ou d'un texte réglementaire pris pour son application.

Sont autorisés, les accords et pratiques dont les auteurs peuvent justifier qu'ils ont pour effet d'assurer un progrès économique ou technique, ou qu'ils contribuent à améliorer l'emploi, ou qui permettent aux petites et moyennes entreprises de consolider leur position concurrentielle sur le marché. Ne pourront bénéficier de cette disposition que les accords et pratiques qui ont fait l'objet d'une autorisation du Conseil de la concurrence.

Art. 10. — Est considéré comme pratique ayant pour effet d'empêcher, de restreindre ou de fausser le jeu de la libre concurrence, tout contrat d'achat exclusif conférant à son titulaire un monopole de distribution sur un marché.

Art. 11. — Est prohibée, dès lors qu'elle est susceptible d'affecter le libre jeu de la concurrence, l'exploitation abusive, par une entreprise, de l'état de dépendance dans lequel se trouve à son égard une entreprise, client ou fournisseur.

Ces abus peuvent notamment consister en: — un refus de vente sans motif légitime;

- la vente concomitante ou discriminatoire;

- la vente conditionnée par l'acquisition d'une quantité minimale;

- l'obligation de revente à un prix minimum;

- la rupture d'une relation commerciale au seul motif que le partenaire refuse de se soumettre à des conditions commerciales injustifiées;

- tout autre acte de nature à réduire ou à éliminer les avantages de la concurrence dans un marché.

Art. 12. — Sont prohibées les offres de prix ou pratiques de prix de vente aux consommateurs abusivement bas par rapport aux coûts de production, de transformation et de commercialisation, dès lors que ces offres ou pratiques ont pour objet ou peuvent avoir pour effet d'éliminer d'un marché ou d'empêcher d'accéder à un marché, une entreprise ou un de ses produits.

Art. 13. — Sans préjudice des dispositions des articles 8 et 9 de la présente ordonnance, est nul tout engagement, convention ou clause contractuelle se rapportant à l'une des pratiques prohibées par les articles 6, 7, 10, 11 et 12 ci-dessus.

Art. 14. — Les pratiques visées aux articles 6, 7, 10, 11 et 12 ci-dessus sont qualifiées de pratiques restrictives de concurrence.

Chapitre III

Des concentrations économiques

Art. 15. — Aux termes de la présente ordonnance, une concentration est réalisée lorsque:

1 — deux ou plusieurs entreprises antérieurement indépendantes fusionnent,

2 — une ou plusieurs personnes physiques détenant déjà le contrôle d'une entreprise au moins, ou bien, une ou plusieurs entreprises, acquièrent directement ou indirectement, que ce soit par prise de participations au capital ou achat d'éléments

d'actifs, contrat ou par tout autre moyen, le contrôle de l'ensemble ou de parties d'une ou de plusieurs autres entreprises.

3 — la création d'une entreprise commune accomplissant, d'une manière durable, toutes les fonctions d'une entité économique autonome.

Art. 16 . — Le contrôle visé au point 2 de l'article 15 ci-dessus, découle des droits des contrats ou autres moyens qui confèrent seuls ou conjointement, et compte tenu des circonstances de fait ou de droit, la possibilité d'exercer une influence déterminante et durable sur l'activité d'une entreprise et notamment:

1— des droits de propriété ou de jouissance sur tout ou partie des biens d'une entreprise;

2— des droits ou des contrats qui confèrent une influence déterminante sur la composition, les délibérations ou les décisions des organes d'une entreprise.

Art. 17 . — Les concentrations qui sont de nature à porter atteinte à la concurrence en renforçant notamment la position dominante d'une entreprise dans un marché, doivent être soumises par leurs auteurs au Conseil de la concurrence qui prend une décision dans un délai de trois (3) mois.

Art. 18. — Les dispositions de l'article 17 ci-dessus s'appliquent à chaque fois que la concentration vise à réaliser un seuil de plus de 40 % des ventes ou achats effectués sur un marché.

Art. 19. — Le Conseil de la concurrence peut, après avis du ministre chargé du commerce, autoriser ou rejeter, par décision motivée, la concentration.

L'autorisation du Conseil de la concurrence peut être assortie de prescriptions de nature à atténuer les effets de la concentration sur la concurrence. Les entreprises parties à la concentration peuvent d'elles-mêmes souscrire des engagements destinés à atténuer les effets de la concentration sur la concurrence.

La décision de rejet de la concentration peut faire l'objet d'un recours devant le Conseil d'Etat.

Art. 20. — Pendant la durée requise pour la décision du Conseil de la concurrence, les auteurs de l'opération de concentration ne peuvent prendre aucune mesure rendant la concentration irréversible.

Art. 21. — Lorsque l'intérêt général le justifie, le Gouvernement peut, sur le rapport du ministre chargé du commerce et du ministre dont relève le secteur concerné par la concentration, autoriser d'office ou à la demande des parties concernées, la réalisation d'une concentration rejetée par le Conseil de la concurrence.

Art. 22. — Les conditions et modalités de demande d'autorisation des opérations de concentration sont déterminées par décret.

TITRE III

DU CONSEIL DE LA CONCURRENCE

Art. 23. — Il est créé auprès du Chef du Gouvernement une autorité administrative ci-après dénommée " Conseil de la concurrence", jouissant de la personnalité juridique et de l'autonomie financière.

Le siège du Conseil de la concurrence est fixé à Alger.

Art. 24. — Le Conseil de la concurrence est composé de neuf (9) membres relevant des catégories ci-après:

1 — deux (2) membres exerçant ou ayant exercé au Conseil d'Etat, à la Cour suprême ou à la Cour des comptes en qualité de magistrat ou de conseiller;

2 — sept (7) membres choisis parmi les personnalités connues pour leur compétence juridique, économique ou en matière de concurrence, de distribution et de consommation, dont un choisi sur proposition du ministre chargé de l'intérieur.

Ils exercent leurs fonctions à plein temps.

Art. 25. — Le président, le vice-président et les autres membres du Conseil de la concurrence sont nommés par décret présidentiel, pour une durée de cinq (5) années, renouvelable.

Il est mis fin à leurs fonctions dans les mêmes formes.

Art. 26. — Il est désigné auprès du Conseil de la concurrence un secrétaire général et des rapporteurs, nommés par décret présidentiel.

Le ministre chargé du commerce désigne par arrêté son représentant et un suppléant auprès du Conseil de la concurrence.

Ils assistent aux travaux du Conseil de la concurrence sans voix délibérative.

Chapitre I

Du fonctionnement du Conseil de la concurrence

Art. 27. — Le Conseil de la concurrence adresse un rapport annuel d'activité à l'instance législative, au Chef du Gouvernement et au ministre chargé du commerce.

Le rapport est rendu public un mois après sa transmission aux autorités visées ci-dessus. Il est publié au *Journal officiel* de la République algérienne démocratique et populaire. Il peut également être publié en totalité ou par extraits sur tout autre support d'information.

Art. 28. — Les travaux du Conseil de la concurrence sont dirigés par le président ou le vice-président qui le remplace en cas d'absence ou d'empêchement.

Le Conseil de la concurrence ne peut siéger valablement qu'en présence de six (6) de ses membres au moins.

Les séances du Conseil de la concurrence ne sont pas publiques.

Les décisions du Conseil de la concurrence sont prises à la majorité simple; en cas de partage égal des voix, celle du président est prépondérante.

Art. 29. — Aucun membre du Conseil de la concurrence ne peut délibérer dans une affaire dans laquelle il a un intérêt ou s'il a un lien de parenté jusqu'au quatrième degré avec l'une des parties ou, s'il représente ou a représenté une des parties intéressées.

Les membres du Conseil de la concurrence sont tenus au secret professionnel.

La fonction de membre du Conseil de la concurrence est incompatible avec toute autre activité professionnelle.

Art. 30. — Pour les affaires dont il est saisi, le Conseil de la concurrence entend contradictoirement les parties intéressées qui doivent présenter un mémoire. Les parties peuvent se faire représenter ou se faire assister par leurs avocats ou par toute personne de leur choix.

Les parties intéressées et le représentant du ministre chargé du commerce ont droit à l'accès au dossier et à en obtenir copie.

Toutefois, le président peut refuser, à son initiative ou à la demande des parties intéressées, la communication de pièces ou documents mettant en jeu le secret des affaires. Dans ce cas, ces pièces ou documents sont retirés du dossier. La décision du Conseil de la concurrence ne peut être fondée sur les pièces ou documents retirés du dossier.

Art. 31. — L'organisation et le fonctionnement du Conseil de la concurrence sont fixés par décret.

Art. 32. — Le statut et le système de rémunération des membres du Conseil de la concurrence sont fixés par décret.

Art. 33. — Le budget du Conseil de la concurrence est inscrit à l'indicatif des services du Chef du Gouvernement.

Le président du Conseil de la concurrence est ordonnateur principal.

Le budget du Conseil de la concurrence est soumis aux règles générales de fonctionnement applicables au budget de l'Etat.

Chapitre II
Des attributions du Conseil de la concurrence

Art. 34. — Le Conseil de la concurrence a compétence de décision, de proposition et d'avis qu'il exerce de son initiative ou à la demande, sur toute question ou toute action ou mesure de nature à assurer le bon fonctionnement de la concurrence et à favoriser la concurrence dans les zones géographiques ou les secteurs d'activité où la concurrence n'existe pas ou est insuffisamment développée.

Le Conseil de la concurrence peut faire appel à tout expert ou entendre toute personne susceptible de l'informer.

Il peut également saisir les services chargés des enquêtes économiques pour effectuer tout contrôle, enquête ou expertise portant sur des questions relatives aux affaires relevant de sa compétence.

Art. 35. — Le Conseil de la concurrence donne son avis sur toute question concernant la concurrence à la demande du Gouvernement et formule toute proposition sur les aspects de concurrence.

Il peut également être consulté sur les mêmes questions par les collectivités locales, les institutions économiques et financières, les entreprises, les associations professionnelles et syndicales, ainsi que les associations de consommateurs.

Art. 36. — Le Conseil de la concurrence est consulté sur tout projet de texte réglementaire ayant un lien avec la concurrence ou introduisant des mesures ayant pour effet notamment:

— de soumettre l'exercice d'une profession ou d'une activité, ou l'accès à un marché à des restrictions quantitatives;

- d'établir des droits exclusifs dans certaines zones ou activités;

- d'instaurer des conditions particulières pour l'exercice d'activités de production, de distribution et de services;

- de fixer des pratiques uniformes en matière de conditions de vente.

Art. 37. — Le Conseil de la concurrence peut effectuer des enquêtes sur les conditions d'application des textes législatifs et réglementaires ayant un lien avec la concurrence. Dans le cas où ces enquêtes révèlent que l'application de ces textes donne

lieu à des restrictions à la concurrence, le Conseil de la concurrence engage toutes les actions pour mettre fin à ces restrictions.

Art. 38. — Pour le traitement des affaires liées aux pratiques restrictives, telles que définies par la présente ordonnance, les juridictions peuvent saisir le Conseil de la concurrence pour avis. L'avis n'est donné qu'après une procédure contradictoire, sauf si le Conseil a déjà examiné l'affaire concernée.

Les juridictions communiquent au Conseil de la concurrence, sur sa demande, les procès-verbaux ou les rapports d'enquête ayant un lien avec des faits dont le Conseil est saisi.

Art. 39. — Lorsque le Conseil de la concurrence est saisi d'une pratique relevant d'un secteur d'activité placé sous le contrôle d'une autorité de régulation, il transmet une copie du dossier, pour avis, à l'autorité concernée.

Dans le cadre de ses missions, le Conseil de la concurrence développe des relations de coopération, de concertation et d'échange d'informations avec les autorités de régulation.

Art. 40. — Sous réserve de réciprocité, le Conseil de la concurrence peut, dans les limites de ses compétences, et en relation avec les autorités compétentes, communiquer des informations ou des documents en sa possession ou qu'il peut recueillir, à leur demande, aux autorités étrangères de concurrence, dotées des mêmes compétences, à condition d'assurer le secret professionnel.

Art. 41. — Sous les mêmes conditions que celles prévues à l'article 40 ci-dessus, le Conseil de la concurrence peut, à la demande d'autorités étrangères de concurrence, conduire ou faire conduire des enquêtes liées à des pratiques restrictives de concurrence.

L'enquête est menée sous les mêmes conditions et procédures que celles prévues dans les attributions du Conseil de la concurrence.

Art. 42. — Les dispositions des articles 40 et 41 ci-dessus ne sont pas applicables dans le cas où les informations, les documents ou enquêtes demandés portent atteinte à la souveraineté nationale, aux intérêts économiques de l'Algérie ou à l'ordre public intérieur.

Art. 43. — Le Conseil de la concurrence peut, pour la mise en œuvre des articles 40 et 41 ci-dessus, conclure des conventions organisant ses relations avec les autorités étrangères de concurrence ayant les mêmes compétences.

Art. 44. — Le Conseil de la concurrence peut être saisi par le ministre chargé du commerce. Il peut se saisir d'office ou être saisi par toute entreprise ou, pour toute affaire dans laquelle ils sont intéressés, par les institutions et organismes visés à l'alinéa 2 de l'article 35 de la présente ordonnance.

Le Conseil de la concurrence examine si les pratiques et actions dont il est saisi entrent dans le champ d'application des articles 6,7,10,11 et 12 ci-dessus ou se trouvent justifiées par application de l'article 9 ci-dessus.

Il peut déclarer, par décision motivée, la saisine irrecevable s'il estime que les faits invoqués n'entrent pas dans le champ de sa compétence, ou ne sont pas appuyés d'éléments suffisamment probants.

Le Conseil de la concurrence ne peut être saisi d'affaires remontant à plus de trois (3) ans, s'il n'a été fait aucun acte tendant à leur recherche, leur constatation et leur sanction.

Art. 45. — Dans le cas où les requêtes et les dossiers dont il est saisi ou dont il se saisit relèvent de sa compétence, le Conseil de la concurrence fait des injonctions motivées visant à mettre fin aux pratiques restrictives de concurrence constatées.

Il peut prononcer des sanctions pécuniaires applicables soit immédiatement, soit en cas d'inexécution des injonctions dans les délais qu'il aura fixés.

Il peut également ordonner la publication, la diffusion ou l'affichage de sa décision ou d'un extrait de celle-ci.

Art. 46 . — Le Conseil de la concurrence peut, sur demande du plaignant ou du ministre chargé du commerce, prendre des mesures provisoires destinées à suspendre les pratiques présumées restrictives faisant l'objet d'instruction, s'il est urgent d'éviter une situation susceptible de provoquer un préjudice imminent et irréparable aux entreprises dont les intérêts sont affectés par ces pratiques ou de nuire à l'intérêt économique général.

Art. 47. — Les décisions rendues par le Conseil de la concurrence sont notifiées pour exécution aux parties concernées par envoi recommandé avec accusé de réception et au ministre chargé du commerce qui veille à leur exécution.

Sous peine de nullité, les décisions doivent indiquer le délai de recours. Elles doivent également indiquer les noms, qualités et adresses des parties auxquelles elles ont été notifiées.

Art. 48. — Toute personne physique ou morale qui s'estime lésée par une pratique restrictive telle que prévue par la présente ordonnance, peut saisir pour réparation la juridiction compétente conformément à la législation en vigueur.

Art. 49. — Les décisions rendues par le Conseil de la concurrence et la Cour d'Alger en matière de concurrence sont publiées par le ministre chargé du commerce au bulletin officiel de la concurrence. Des extraits des décisions peuvent être publiés par voie de presse ou sur tout autre support d'information.

Chapitre III

De la procédure d'instruction

Art. 50. — Le rapporteur instruit les demandes et les plaintes relatives aux pratiques restrictives que lui confie le président du Conseil de la concurrence.

S'il conclut à l'irrecevabilité, conformément aux dispositions de l'article 44 (alinéa 3) ci-dessus, il en informe par avis motivé le Conseil de la concurrence.

Les affaires relevant de secteurs d'activité placés sous le contrôle d'une autorité de régulation sont instruites en coordination avec les services de l'autorité concernée.

Art. 51. — Le rapporteur peut, sans se voir opposer le secret professionnel, consulter tout document nécessaire à l'instruction de l'affaire dont il a la charge.

Il peut exiger la communication en quelque main qu'ils se trouvent, et procéder à la saisie des documents de toute nature, propres à faciliter l'accomplissement de sa mission. Les documents saisis sont joints au rapport ou restitués à l'issue de l'enquête.

Le rapporteur peut recueillir tous les renseignements nécessaires à son enquête auprès des entreprises ou auprès de toute autre personne. Il fixe les délais dans lesquels les renseignements doivent lui parvenir.

Art. 52. — Le rapporteur établit un rapport préliminaire contenant l'exposé des faits ainsi que les griefs retenus. Le rapport est notifié par le président du Conseil aux parties concernées, au ministre chargé du commerce, ainsi qu'aux parties intéressées, qui peuvent formuler des observations écrites dans un délai n'excédant pas trois (3) mois.

Art. 53 . — Les auditions auxquelles procède, le cas échéant, le rapporteur, donnent lieu à l'établissement d'un procès-verbal signé par les personnes entendues. En cas de refus de signer, il en est fait mention par le rapporteur.

Les personnes entendues peuvent être assistées d'un conseil.

Art. 54. — Au terme de l'instruction, le rapporteur dépose auprès du Conseil de la concurrence un rapport motivé contenant les griefs retenus, la référence aux infractions commises et une proposition de décision ainsi que, le cas échéant, les propositions de mesures règlementaires conformément aux dispositions de l'article 37 ci-dessus.

Art. 55. — Le président du Conseil de la concurrence notifie le rapport aux parties et au ministre chargé du commerce qui peuvent présenter des observations écrites dans un délai de deux (2) mois. Il leur indique également la date de l'audience se rapportant à l'affaire.

Les observations écrites citées à l'alinéa 1 ci-dessus peuvent être consultées par les parties quinze (15) jours avant la date de l'audience.

Le rapporteur fait valoir ses observations sur les éventuelles observations écrites citées à l'alinéa 1 ci-dessus.

Chapitre IV

Des sanctions des pratiques restrictives et des concentrations

Art. 56. — Les pratiques restrictives, telles que visées à l'article 14 ci-dessus, sont sanctionnées par une amende ne dépassant pas 7% du montant du chiffre d'affaires hors taxes réalisé en Algérie au cours du dernier exercice clos. Si le contrevenant est une personne physique ou morale ou une organisation professionnelle n'ayant pas de chiffre d'affaires propre, le maximum de l'amende est de trois millions de dinars (3.000.000 DA).

Art. 57. — Est punie d'une amende de deux millions de dinars (2.000.000 DA), toute personne physique qui aura pris part personnellement et frauduleusement à l'organisation et la mise en œuvre de pratiques restrictives telles que définies par la présente ordonnance.

Art. 58. — Si les injonctions ou les mesures provisoires prévues aux articles 45 et 46 ci-dessus ne sont pas respectées dans les délais fixés, le Conseil de la concurrence peut prononcer des astreintes à raison d'un montant de cent mille dinars (100.000 DA) par jour de retard.

Art. 59. — Le Conseil de la concurrence peut décider, sur rapport du rapporteur, d'une amende d'un montant maximum de cinq cent mille dinars (500.000 DA) contre les entreprises qui, délibérément ou par négligence, fournis sent un renseignement inexact ou incomplet à une demande de renseignements conformément aux dispositions

de l'article 51 ci-dessus ou ne fournissent pas le renseignement demandé dans les délais fixés par le rapporteur.

Le Conseil peut en outre décider d'une astreinte de cinquante mille dinars (50.000 DA) par jour de retard.

Art. 60. — Le Conseil de la concurrence peut décider de réduire le montant de l'amende ou ne pas prononcer d'amende contre les entreprises qui, au cours de l'instruction de l'affaire les concernant, reconnaissent les infractions qui leur sont reprochées, collaborent à l'accélération de celle-ci et s'engagent à ne plus commettre d'infractions liées à l'application des dispositions de la présente ordonnance.

Les dispositions de l'alinéa 1 ci-dessus ne sont pas applicables en cas de récidive quelle que soit la nature de l'infraction commise.

Art. 61. — Les opérations de concentration soumises aux dispositions de l'article 17 ci-dessus et réalisées sans autorisation du Conseil de la concurrence, sont punies d'une sanction pécuniaire pouvant aller jusqu'à 7% du chiffre d'affaires hors taxes réalisé en Algérie, durant le dernier exercice clos, pour chaque entreprise partie à la concentration ou de l'entreprise résultant de la concentration.

Art. 62. — En cas de non respect des prescriptions ou engagements mentionnés à l'article 19 ci-dessus, le Conseil de la concurrence peut décider une sanction pécuniaire pouvant aller jusqu'à 5% du chiffre d'affaires hors taxes réalisé en Algérie durant le dernier exercice clos de chaque entreprise partie à la concentration, ou de l'entreprise résultant de la concentration.

Chapitre V

De la procédure de recours contre les décisions du Conseil de la concurrence

Art. 63. — Les décisions du Conseil de la concurrence peuvent faire l'objet d'un recours auprès de la Cour d'Alger, statuant en matière commerciale, par les parties concernées ou par le ministre chargé du commerce, dans un délai ne pouvant excéder un mois à compter de la date de réception de la décision. Le recours formulé contre les mesures provisoires visées à l'article 46 ci-dessus est introduit dans un délai de huit (8) jours.

Le recours auprès de la Cour d'Alger n'est pas suspensif des décisions du Conseil de la concurrence. Toutefois, le président de la Cour d'Alger peut décider, dans un délai n'excédant pas quinze (15) jours, de surseoir à l'exécution des mesures prévues aux articles 45 et 46 ci-dessus prononcées par le Conseil de la concurrence, lorsque des circonstances ou des faits graves l'exigent.

Art. 64 . — Le recours auprès de la Cour d'Alger contre les décisions du Conseil de la concurrence est formulé, par les parties à l'instance, conformément aux dispositions du code de procédure civile.

Art. 65 . — Dès le dépôt de la requête de recours, une copie est transmise au président du Conseil de la concurrence et au ministre chargé du commerce lorsque ce dernier n'est pas partie à l'instance.

Le président du Conseil de la concurrence transmet au président de la Cour d'Alger le dossier de l'affaire, objet du recours, dans les délais fixés par ce dernier.

Art. 66. — Le magistrat rapporteur transmet au ministre chargé du commerce et au président du Conseil de la concurrence pour observations éventuelles copie de toutes les pièces nouvelles échangées entre les parties à l'instance.

Art. 67. — Le ministre chargé du commerce et le président du Conseil de la concurrence peuvent présenter des observations écrites dans les délais fixés par le magistrat rapporteur.

Ces observations sont communiquées aux parties à l'instance.

Art. 68 . — Les parties en cause devant le Conseil de la concurrence et qui ne sont pas parties au recours, peuvent, se joindre à l'instance ou être mises en cause à tous les moments de la procédure en cours conformément aux dispositions du code de procédure civile.

Art. 69 . — La demande de sursis à exécution, prévue à l'alinéa 2 de l'article 63 ci-dessus, est formulée conformément aux dispositions du code de procédure civile.

La demande de sursis est introduite par le demandeur au recours principal ou par le ministre chargé du commerce. Elle n'est recevable qu'après formation du recours et doit être accompagnée de la décision du Conseil de la concurrence.

Le président de la Cour d'Alger requiert l'avis du ministre chargé du commerce sur la demande de sursis à exécution, lorsqu'il n'est pas partie à l'instance.

Art. 70 . — Les arrêts de la Cour d'Alger sont transmis au ministre chargé du commerce et au président du Conseil de la concurrence.

TITRE IV

DISPOSITIONS TRANSITOIRES ET FINALES

Art. 71. — Le recouvrement des montants des amendes et des astreintes décidées par le Conseil de la concurrence s'effectue comme étant des créances de l'Etat.

Art. 72. — Les affaires introduites devant le Conseil de la concurrence et la Cour d'Alger avant l'entrée en vigueur de la présente ordonnance continuent d'être instruites conformément aux dispositions de l'ordonnance 95-06 du 23 Chaâbane 1415 correspondant au 25 janvier 1995 relative à la concurrence et aux textes pris pour son application.

Art. 73. — Sont abrogées toutes dispositions contraires à celles de la présente ordonnance, notamment les dispositions de l'ordonnance n95-06 du 23 Chaâbane 1415 correspondant au 25 janvier 1995, susvisée.

A titre transitoire, demeurent en vigueur les dispositions relatives au titre IV, au titre V et au titre VI de l'ordonnance n 9 5 - 0 6 du 23 Chaâbane 1415 correspondant au 25 janvier 1995 susvisée ainsi que les textes pris pour son application, à l'exception:

- du décret exécutif n2000-314 du 16 Rajab 1421 correspondant au 14 octobre 2000 définissant les critères conférant à un agent économique la position dominante ainsi que ceux qualifiant les actes constituant des abus de position dominante;

- du décret exécutif n2000-315 du 16 Rajab 1421 correspondant au 14 octobre 2000 définissant les critères d'appréciation des projets de concentrations ou des concentrations, qui sont abrogés.

Art. 74. — La présente ordonnance sera publiée au *Journal oficiel* de la République algérienne démocratique et populaire.

Fait à Alger, le 19 Joumada El Oula 1424 correspondant au 19 juillet 2003.

Abdelaziz BOUTEFLIKA.

Décret exécutif No.05-175 du 3 Rabie Ethani 1426 correspondant au 12 mai 2005 fixant les modalités d'obtention de l'attestation négative relative aux ententes et à la position dominante sur le marché.

(Parue au journal officiel No. 35 du 18 mai 2005)

Le Chef du Gouvernement,

Sur le rapport du ministre du commerce,

Vu la Constitution, notamment ses articles 85-4et 125 (alinéa 2);

Vu l'ordonnance n03-03 du 19 Joumada El Oula 1424 correspondant au 19 juillet 2003 relative à la concurrence, notamment son article 8;

Vu le décret présidentiel n04-136 du 29 Safar 1425 correspondant au 19 avril 2004 portant nomination du Chef du Gouvernement;

Vu le décret présidentiel n05-161 du 22 Rabie El Aouel 1426 correspondant au 1er mai 2005 portant nomination des membres du Gouvernement;

Après avis du conseil de la concurrence;

Décrète :

Article 1er. — En application des dispositions de l'article 8 de l'ordonnance n03-03 du 19 Joumada El Oula 1424 correspondant au 19 juillet 2003, susvisée, le présent décret a pour objet de fixer les modalités d'introduction de la demande d'obtention de l'attestation négative relative aux ententes et à la position dominante sur le marché.

Art. 2. — L'attestation négative citée à l'article 1er ci-dessus est une attestation délivrée par le conseil de la concurrence, sur demande des entreprises intéressées, par laquelle le conseil constate qu'il n'y a pas lieu, pour lui, d'intervenir à l'égard des pratiques prévues aux articles 6 et 7 de l'ordonnance n03-03 du 19 Joumada El Oula 1424 correspondant au 19 juillet 2003, susvisée.

Art. 3. — La demande d'obtention de l'attestation négative est introduite par l'entreprise ou les entreprises concernées. Elle peut être introduite par les représentants de ces entreprises qui doivent présenter un mandat écrit attestant des pouvoirs de représentation qui leur sont conférés.

Les entreprises étrangères concernées ou leurs représentants mandatés doivent indiquer une adresse en Algérie.

Art. 4. — Le dossier relatif à la demande d'obtention de l'attestation négative est constitué des pièces suivantes :

— une demande datée et signée par les entreprises concernées ou leurs représentants dûment mandatés dont le modèle est annexé au présent décret;

— un formulaire de renseignements joint à la demande, intitulé "formulaire de renseignements pour obtention d'attestation négative" dont le modèle est annexé au présent décret;

- une justification des pouvoirs conférés à la personne ou aux personnes mandatée (s) qui introduisent la demande d'obtention de l'attestation négative;

- une copie certifiée conforme des statuts de l'entreprise ou des entreprises parties à la demande d'obtention de l'attestation négative;

- des copies des trois (3) derniers bilans, visées et certifiées par le commissaire aux comptes ou, dans le cas où l'entreprise ou les entreprises concernée (s) n'a ou n'ont pas trois (3) années d'existence, une copie du dernier bilan.

En cas de demande conjointe, un seul dossier peut être présenté.

Art. 5. — Le dossier visé à l'article 4 ci-dessus est transmis en cinq (5) exemplaires. Les documents joints à la demande sont des originaux ou, s'il s'agit de copies, ils doivent être certifiés conformes aux originaux.

Le dossier de demande d'obtention d'attestation négative est déposé contre accusé de réception au secrétariat général du conseil de la concurrence ou transmis par envoi recommandé.

La demande reçoit un numéro d'inscription porté sur l'accusé de réception.

Art. 6. — Le rapporteur désigné pour l'instruction de la demande peut demander aux entreprises concernées ou à leurs représentants mandatés, la communication de renseignements ou de documents complémentaires qu'il juge nécessaires.

Art. 7. — Les entreprises concernées ou les représentants mandatés peuvent demander à ce que certaines informations ou certains documents fournis soient couverts par le secret des affaires. Dans ce cas, les informations et les documents concernés sont transmis séparément et doivent porter la mention "secret d'affaires" sur chaque page.

Art. 8. — Le présent décret sera publié au *Journal oficiel* de la République algérienne démocratique et populaire.

Fait à Alger, le 3 Rabie Ethani 1426 correspondant au 12 mai 2005.

Ahmed OUYAHIA.

ANNEXE 1

Conseil de la concurrence

Secrétariat général

DEMANDE D'OBTENTION
D'UNE ATTESTATION NEGATIVE

(Conformément aux dispositions de l'article 8
de l'ordonnance n03-03 du 19 Joumada El Oula 1424 correspondant au 19 juillet 2003 relative à la concurrence)

La présente demande doit être accompagnée du formulaire contenant les renseignements demandés, les pièces exigées et les documents joints. Le dossier est transmis en cinq (5) exemplaires par dépôt, contre accusé de réception, au secrétariat général du conseil de la concurrence ou par envoi recommandé. La demande doit préciser:

1. L'identité du demandeur

1.1 Indiquer la dénomination ou la raison sociale complète , la forme juridique, et l'adresse complète de l'entreprise;

1.2 Si la demande est introduite par un représentant, indiquer le nom et le prénom, l'adresse et la qualité du représentant et joindre le mandat de représentation;

1.3 Indiquer une adresse en Algérie.

2. L'identité des autres participants à la demande

2.1 Indiquer la dénomination ou la raison sociale complète, la forme juridique et l'adresse complète de chaque participant;

2.2 Indiquer s'ils sont d'accord sur la totalité ou partie de l'objet de la demande.

3. **L'objet de la demande** Indiquer si la demande porte : 3.1 sur une entente;

3. 2 sur une position dominante.

La demande doit être accompagnée de la déclaration des soussignés libellée comme suit :

Déclaration des soussignés

Les soussignés déclarent que les renseignements fournis ci-dessus, ainsi que les renseignements fournis dans toutes les pièces et documents joints à la présente sont sincères et conformes aux faits et que les estimations, chiffres et appréciations sont indiqués et fournis de la façon la plus proche de la réalité. Ils ont pris connaissance des dispositions de l'article 59 de l'ordonnance n03-03 du 19 Joumada El Oula 1424 correspondant au 19 juillet 2003 relative à la concurrence.

Lieu et date.....

Signature et qualité

ANNEXE 2

Conseil de la concurrence
Secrétariat général

FORMULAIRE DE RENSEIGNEMENTS POUR L'OBTENTION D'UNE ATTESTATION NEGATIVE

(Conformément aux dispositions de l'article 8 de l'ordonnance n03-03 du 19 Joumada El Oula 1424 correspondant au 19 juillet 2003 relative à la concurrence)

1.Données relatives à l'entreprise ou aux entreprises parties à la demande

1.1 Position de l'entreprise ou des entreprises sur le marché;

- indiquer si l'entreprise a des liens, au sens de l'article 16 de l'ordonnance n03-03 du 19 Joumada El Oula 1424 correspondant au 19 juillet 2003 relative à la concurrence;

- dans l'affirmative, indiquer la dénomination complète ou la raison sociale de chaque entreprise et son dernier bilan.

1.2 Chiffre d'affaires

- indiquer le chiffre d'affaires réalisé au cours de l'exercice précédent de chaque entreprise partie à la demande, sur le marché algérien, et le cas échéant, sur les marchés extérieurs;

- indiquer pour chaque entreprise le chiffre d'affaires réalisé pour les biens et services concernés par la demande.

2. Marché concerné

2.1 Nature des biens ou des services concernés par la demande :

- indiquer les biens et services de substitution;
- indiquer si les biens et services sont soumis à une réglementation particulière;
- indiquer si les biens et services sont libres à l'importation;
- Les noms et adresses des entreprises placées dans le même marché
- indiquer les facilités ou contraintes liées à l'accès au marché;
- indiquer les noms et adresses des clients sur le même marché;
- indiquer la dimension géographique.

3. Motifs de la demande

3.1 indiquer l'objet précis de la demande au regard des dispositions des articles 6 et 7 de l'ordonnance n03-03 du 19 Joumada El Oula 1424 correspondant au 19 juillet 2003 relative à la concurrence;

3.2 indiquer les avantages que procure l'objet de la demande au profit des entreprises concernées;

3.3 indiquer la durée de la demande;

3.4 indiquer les raisons pour lesquelles l'objet de la demande pourrait affecter la concurrence;

3.5 indiquer les raisons pour lesquelles le comportement de l'entreprise ou des entreprises concernées n'a pas pour objet ou pour effet d'empêcher, de restreindre ou de fausser le libre jeu de la concurrence dans un même marché;

3.6 indiquer les avantages que la demande est susceptible de procurer à la concurrence, aux utilisateurs et aux consommateurs.

Décret exécutif n05-219 du 15 Joumada El Oula 1426 correspondant au 22 juin 2005 relatif aux autorisations des opérations de concentration.

(Parue au journal officiel No. 43 du 22 juin 2005)

Le Chef du Gouvernement,

Sur le rapport du ministre du commerce,

Vu la Constitution, notamment ses articles 85-4et 125 (alinéa 2);

Vu l'ordonnance n03-03 du 19 Joumada El Oula 1424 correspondant au 19 juillet 2003 relative à la concurrence, notamment son article 22;

Vu le décret présidentiel n04-136 du 29 Safar 1425 correspondant au 19 avril 2004 portant nomination du Chef du Gouvernement;

Vu le décret présidentiel n05-161 du 22 Rabie El Aouel 1426 correspondant au 1er mai 2005 portant nomination des membres du Gouvernement;

Après avis du conseil de la concurrence;

Décrète:

Article 1er. — En application des dispositions de l'article 22 de l'ordonnance n03-03 du 19 Joumada El Oula 1424 correspondant au 19 juillet 2003, susvisée, le présent décret a pour objet de fixer les conditions et les modalités de demande d'autorisation des opérations de concentration.

Art. 2. — Les dispositions du présent décret s'appliquent à toutes les opérations de concentration susceptibles de porter atteinte à la concurrence au sens des dispositions des articles 17 et 18 de l'ordonnance n03-03 du 19 Joumada El Oula 1424 correspondant au 19 juillet 2003, susvisée.

Art. 3. — Les opérations de concentration visées à l'article 2 ci-dessus doivent faire l'objet d'une demande d'autorisation par leurs auteurs auprès du conseil de la concurrence, conformément aux dispositions fixées par le présent décret.

Art. 4. — La demande d'autorisation d'une opération de concentration portant sur une fusion ou sur la création d'une entreprise commune, au sens des dispositions des alinéas 1 et 3 de l'article 15 de l'ordonnance n03-03 du 19 Joumada El Oula 1424 correspondant au 19 juillet 2003, susvisée, est formulée conjointement par les parties à la concentration.

Dans le cas où l'opération de concentration vise la prise de contrôle au sens des dispositions de l'alinéa 2 de l'article 15 de l'ordonnance n03-03 du 19 Joumada El Oula 1424 correspondant au 19 juillet 2003, susvisée, la demande d'autorisation est formulée par la ou les personne (s) qui réalise(nt) la concentration.

Art. 5. — La demande est introduite par les entreprises concernées par l'opération de concentration ou par leurs représentants qui doivent présenter leurs mandats écrits attestant les pouvoirs de représentation qui leur sont conférés.

Les entreprises concernées ou leurs représentants dûment mandatés doivent indiquer une adresse en Algérie.

Art. 6. — Le dossier relatif à la demande d'autorisation est composé des pièces suivantes:

- la demande dont le modèle est annexé au présent décret, datée et signée par les entreprises concernées ou leurs représentants dûment mandatés;

- le formulaire de renseignements dont le modèle est annexé au présent décret;

- la justification des pouvoirs conférés à la personne ou aux personnes qui introduisent la demande;

- une copie certifiée conforme des statuts de l'entreprise ou des entreprises parties à la demande;

- les copies des trois (3) derniers bilans visées et certifiées par le commissaire aux comptes ou, dans le cas où l'entreprise ou les entreprises concernées n'ont pas trois (3) années d'existence, une copie du dernier bilan;

- le cas échéant, une copie légalisée des statuts de l'entreprise résultant de l'opération de concentration.

En cas d'une demande conjointe, un seul dossier est présenté.

Art. 7. — La demande et les annexes qui l'accompagnent sont transmises en cinq (5) exemplaires. Les documents joints à la demande sont des originaux ou doivent être certifiés conformes aux originaux lorsqu'il s'agit de copies.

La demande et les documents sont déposés contre accusé de réception au secrétariat général du conseil de la concurrence ou transmis par envoi recommandé.

La demande reçoit un numéro d'inscription qui est porté sur l'accusé de réception.

Art. 8. — Le rapporteur chargé de l'instruction de la demande peut exiger des entreprises concernées ou de leurs représentants mandatés, la communication de renseignements et/ou de documents complémentaires qu'il juge nécessaires.

Art. 9. — Les entreprises concernées ou leurs représentants mandatés peuvent demander à ce que certaines informations ou certains documents fournis soient couverts par "le secret des affaires". Dans ce cas, les informations et les documents concernés sont transmis séparément et doivent porter la mention "secret d'affaires" sur chaque page.

Art. 10. — Le présent décret sera publié au *Journal oficiel* de la République algérienne démocratique et populaire.

Fait à Alger, le 15 Joumada El Oula 1426 correspondant au 22 juin 2005.

Ahmed OUYAHIA.

ANNEXE I

Conseil de la concurrence

Secrétariat général

Demande d'une autorisation d'une opération de concentration

La demande doit préciser les informations ci-après:

1. L'identité du ou des demandeur (s):

1.1 - dénomination ou raison sociale complète, forme juridique et adresse;

1.2 - si la demande est introduite par un représentant dûment mandaté, indiquer le nom et le prénom, l'adresse et la qualité du représentant et joindre le mandat de représentation;

1.3 - indiquer une adresse en Algérie.

2. L'identité des autres participants à la demande:

2.1 - indiquer la dénomination ou la raison sociale, la forme juridique et l'adresse complète;

2.2 - si la représentation est commune, indiquer le nom et le prénom, la qualité du représentant dûment mandaté et joindre le mandat de représentation.

3. L'objet de la demande:

3.1 - indiquer si la demande porte:

- sur une fusion;
- sur une création d'une entreprise commune;
- sur un contrôle;

3.2 - indiquer si la concentration porte sur l'ensemble ou sur des parties des entreprises concernées.

4. La déclaration des soussignés:

La demande doit être accompagnée de la déclaration des soussignés qui précise:

« Les soussignés déclarent que les renseignements fournis ci-dessus, ainsi que les renseignements fournis dans toutes les pièces et documents joints à la présente sont sincères et conformes aux faits et que les estimations, chiffres et appréciations sont indiqués et fournis de la façon la plus proche de la réalité. Ils ont pris connaissance des dispositions de l'article 59 de l'ordonnance n03-03 du 19 Joumada El Oula 1424 correspondant au 19 juillet 2003 relative à la concurrence".

Lieu et date

Signature et qualité

ANNEXE 2

Formulaire de renseignements relatif à une opération de concentration

1 - Données relatives aux entreprises parties à la concentration:

1.1 - Activité concernée:

- indiquer la nature précise de l'activité concernée par la demande;
- indiquer la nature des autres activités des entreprises;
- indiquer pour les trois (3) années précédentes le volume de production de l'activité concernée et le volume de production des autres activités.

1.2 - Chiffre d'affaires de l'activité concernée:

- indiquer pour les trois (3) années précédentes le chiffre d'affaires de l'activité concernée;
- indiquer pour les trois (3) années précédentes le chiffre d'affaires global des entreprises concernées;
- le cas échéant, indiquer pour les trois (3) années précédentes le chiffre d'affaires réalisé à l'étranger de l'activité concernée et le chiffre d'affaires global des activités concernées de chacune des entreprises.

1.3 - Structure du capital social de chaque entreprise:

- fournir la liste des dirigeants de chaque entreprise;
- indiquer s'il existe des liens personnels, financiers et économiques entre les entreprises concernées;
- indiquer si, durant les trois (3) dernières années, les entreprises concernées ont acquis des activités ou cédé des activités;
- indiquer les principaux fournisseurs et clients des entreprises concernées;
- indiquer s'il existe des liens personnels, économiques ou financiers entre les entreprises et leurs fournisseurs et clients.

2 - Données relatives à la concentration:

2.1 - Nature de la concentration:

- indiquer si la concentration porte sur l'ensemble ou sur des parties des entreprises en cause;
- indiquer la date de réalisation effective de la concentration.

2.2 - Structure économique et financière de la concentration:

- indiquer la structure de propriété et de contrôle proposée après la réalisation de la concentration;
- indiquer si la concentration bénéficie d'un apport financier ou d'un crédit.

2.3 - But de la concentration:

- indiquer les secteurs économiques concernés par la concentration.

3 - Données relatives au marché.

3.1 - Marchés des produits ou services en cause:

- indiquer les marchés des produits ou services de substitution;

- indiquer la zone géographique sur laquelle les entreprises concernées offrent leurs produits ou services.

3.2 - Incidence de la concentration sur le marché des produits ou services en cause:

- indiquer les marchés sur lesquels la concentration aurait une incidence;

- indiquer la structure du marché des produits ou services en cause;

- indiquer s'il existe des barrières à l'accès au marché concerné;

- indiquer dans quelle mesure la concentration pourrait affecter la concurrence;

- indiquer les mesures à prendre pour atténuer les effets de la concentration sur la concurrence.

II. BRAZIL

Commentary by the Government of Brazil on the main provisions of Law 8.884/94.

The BCPS consists of three bodies:
(1) CADE, the Administrative Council for Economic Defence, an autonomous agency which has dispositive adjudicative authority in BCPS cases; (2) SDE, the Secretariat of Economic Law in the Ministry of Justice, which has the principal investigative role; and (3) SEAE, the Secretariat for Economic Monitoring in the Ministry of Finance, which also has investigative authority but is primarily responsible for providing economic analysis in BCPS proceedings.

The substantive provisions of Brazil's competition law appear in Articles 20, 21, and 54 of Law 8.884/94. Articles 20 and 21 deal with all types of anticompetitive conduct, other than mergers, while mergers, acquisitions, and similar transactions are addressed in Article 54.

Article 20 contains general language providing that any act in any way intended or otherwise able to produce the effects listed therein, even if any such effects are not achieved, shall be deemed a violation of the economic order. The specified effects are (1) to limit, restrain or in any way injure open competition or free enterprise; (2) to control a relevant market of a certain product or service; (3) to increase profits on a discretionary basis; and (4) to abuse one's market control. The article specifies that the "market control" violation described in item (2) does not include control achieved by means of "competitive efficiency." Market control is "presumed" when a company or group of companies possesses a 20 per cent share, and vests CADE with authority to change the 20 per cent presumption with respect to specific sectors of the economy.

Article 21 contains a lengthy but non-exclusive list of acts that are considered unlawful if they produce the effects enumerated in Article 20. The listed practices include various kinds of horizontal and vertical agreements and unilateral abuses of market power. With respect to horizontal agreements, the list covers collusion among competitors, including agreements to fix prices or terms of sale, divide markets, rig bids, and limit research and development. The listed vertical agreements include resale price restraints and other restrictions affecting sales to third parties (including limits on sales volumes and profit margins), as well as price discrimination and tying.

As to unilateral conduct, the list specifies various actions to exclude or disadvantage new entrants or existing rivals, including refusals to deal and limitations on access to inputs or distribution channels. Other unilateral practices cited in Article 21 are actions to impose unreasonable contractual terms or conditions, bar the use of industrial or intellectual property, unreasonably sell products below cost, discontinue production or other business activities without good cause, affect third-party prices by deceitful means, hoard or destroy raw materials and intermediate or finished goods (including agricultural products), require or grant exclusivity in mass media advertisements, impair the operation of manufacturing or distribution equipment, impose abusive prices, or unreasonably increase the price of a product or service.

Enforcement guidelines for Articles 20 and 21 were issued in 1999 as attachments to CADE Resolution 20. This resolution establishes procedures applicable to the presentation of a proposed case to the Council by the assigned Reporting Commissioner, and requires that the commissioner verify whether the proceeding is duly supported in accordance with the guidelines. The Attachments to the resolution establish a standard analytic scheme for restrictive practices. According to Attachment I, a finding of illegality for either horizontal or vertical restrictions entails establishing the existence of market power in the relevant market of origin, as well as an effect on a substantial share of the market that is the target of such practices. Annex II elaborates on these themes by outlining the basic criteria for the analysis of restrictive trade practices, and describing the specific steps to be followed. They include:

(1) Identifying the precise practice at issue and assuring that there is an adequate evidentiary basis to conclude that the practice was implemented;

(2) Determining the existence of a dominant position, which involves (a) defining the relevant market in both product and geographic dimensions, by considering actual or potential product or service substitution by buyers; (b) determining market shares and measures of concentration, using either or both of the additive market share (CRx) or the Herfindahl-Hirschman (HHI) indices; (c) analysing barriers to entry; and

(3) Weighing the economic efficiencies likely to result from the practice against the actual or prospective competitive harm.

In making market power determinations, CADE always undertakes a case specific analysis, and has neither invoked the 20 per cent market control presumption in Article 20 nor exercised the power to alter that percentage for a specific market. As a practical matter, a market share below 20 per cent is presumed to reflect the absence of market power. With respect to cartels, although the guidelines do not establish a "per se rule," they imply that cartels will be strictly scrutinised by noting that non-cartel agreements entail fewer anticompetitive effects and more pro-competitive benefits and therefore require "a more judicious application" of the rule of reason. In fact, in cartel cases, CADE assumes that anticompetitive effects exist once the existence of market power is demonstrated.

Law 8,884/94 vests SDE with primary responsibility for monitoring markets and identifying possible violations (Art. 14). The SDE Secretary may initiate a "preliminary investigation" either *ex officio* or upon a complaint or request of an interested party (including CADE, SEAE and regulatory agencies), where the available evidence does not warrant immediate commencement of more formal "administrative proceeding" (Art. 30). Within 60 days thereafter (a period which may be extended by requests for information), the Secretary must decide whether to close the preliminary investigation or initiate an administrative proceeding (Art. 31). A determination to close the investigation requires approval by CADE.

The "administrative proceeding," which is essentially a process for developing a formal evidentiary record, must be instituted within eight days of closing the preliminary investigation or of receipt of a sufficiently well founded complaint (Art. 32). SEAE is notified when such a proceeding is initiated and may then elect to provide an opinion to SDE on the matter (Art. 38). The defendant party is formally advised of the nature of the alleged violation and is summoned to submit a defence within fifteen days (Art. 33).

After submission of the defence, a forty-five day period commences, during which the defendant may submit additional information and also request a hearing before SDE of up to three witnesses (Art. 37). Within five days after close of the investigative phase, the defendant presents its final arguments, and the SDE Secretary thereafter issues a written report containing findings and a recommendation that the Plenary either dismiss the case or find a violation of law (Art. 39). The case file, including any recommendation prepared by SEAE, is then forwarded to CADE for judgement.

All of SDE's information gathering powers may be invoked during both preliminary investigations and formal administrative proceedings (Art. 35 §1), which include the possibility to issue search warrants with 24 hours advance notice (Art. 35 §2), and the request by SDE and SEAE to the Federal Attorney to obtain a judicial warrant to execute unannounced search warrants ("dawn raids") (Art. 35-A), Further, Article 35-B authorises SDE to enter into leniency agreements under which individuals and corporations, in return for their cooperation in prosecuting a case, are excused from some or all of the penalties for unlawful conduct under Law 8884. The leniency provision is supplemented by new Article 35-C, which provides that successful fulfilment of a leniency agreement will also protect cooperating parties from criminal prosecution under Brazil's economic crimes law (Law 8137/90).

A leniency agreement may be executed if all of the following conditions are met: (1) the company or individual is the first to report with respect to the anti-competitive practice under investigation, (2) the company or individual ceases all involvement in the anti-competitive practice as of the date on which the agreement is proposed, (3) SDE does not already possess sufficient evidence to convict the company or the individual at the time the agreement is proposed, and (4) the company or individual confesses to having participated in the unlawful practice and effectively cooperates with the government's investigations (Art. 35-B, §2). Leniency is not available to the companies or individuals that instigated the illegal conduct (Art. 35-B, §1).

The degree of leniency accorded to a cooperating party depends on whether SDE was previously aware of the illegal conduct at issue. If SDE was unaware, the party is entitled to freedom from any penalty in the ensuing CADE proceeding. If SDE was previously aware, CADE is authorised to reduce the applicable penalty by one to two-thirds, depending on the effectiveness of the cooperation and the "good faith" of the party in complying with the leniency agreement (Art. 35-B, §4). In the latter instance, the penalty imposed cannot in any event be more severe than the mildest penalty imposed on any of the other participants in the illegal conduct (Art. 35-B, §5). A leniency agreement shelters the directors and managers of the cooperating firm if those individuals sign the agreement and fulfil the requisite obligations (Art. 35-B, §6).

Interim relief during the SDE proceedings is available under Law 8884. The SDE Secretary, either *ex officio* or upon the request of the CADE Attorney General, may issue a preventive order during an administrative proceeding if the Secretariat finds sound reason to believe that the defendant's conduct either caused or may cause irreparable or substantial damages to the market or may render the final outcome of the proceedings ineffective (Art. 52). The order is immediately effective, but may be appealed to CADE and thereafter to the courts. Once a case is before CADE, Article 52 also permits the Reporting Commissioner to issue a preventive order, again subject to review by the Council.

Consent settlements in conduct cases may be arranged under Article 53 of the law, which provides that either SDE (subject to approval by CADE) or CADE itself may enter into an agreement with a defendant to resolve an administrative proceeding. Under such a settlement, the case is suspended if the defendant agrees to cease and desist from the conduct at issue and to provide periodic compliance reports. The agreement does not constitute an admission of liability or guilt by the defendant, the case will be reopened and fines assessed if the settlement's terms are subsequently violated, as well as a fine will be applicable if, at the end of the process, the party is found guilty on economic infraction. The agreement applies for a specified period of time, at the end of which the underlying administrative case is dismissed if the agreement has been honoured. The SDE ordinance also requires that settlement agreements be posted for 15 days of public comment before acceptance by SDE and transmittal to CADE for review (Art. 41).

Nonetheless, such settlements may not be accepted with respect to horizontal violations involving price fixing, bid-rigging, market division, and similar conduct (Art. 53 §5). SDE regulations provide that an Article 53 settlement is not available if, at the time it is proposed, SDE already has sufficient evidence to convict the respondent of the violation under investigation.

When CADE receives the SDE report-recommending disposition of a matter, the case is assigned on a random basis to one of the six commissioners, who is designated as the Reporting Commissioner. The CADE Attorney General is required to provide an opinion on the case within 20 days (Art. 42). The Attorney General's opinion generally focuses on the legal aspects of the matter. Under CADE Resolution 20, which establishes certain features of the Plenary's deliberative procedures, the Reporting Commissioner must decide whether to institute a supplementary investigation within 60 days of receiving the case. If a supplementary inquiry is undertaken, CADE may employ the investigative powers of Article 35 to obtain the necessary information (Art. 43). As noted above, the Reporting Official, like the SDE Secretary during SDE's administrative proceeding, may invoke Article 52 to issue a preventive cease and desist order during the CADE proceeding. Such an order, issued to prevent irreparable harm or otherwise to ensure that the proceeding will not be rendered moot, is effective immediately but may be appealed to the CADE Plenary and thereafter to the courts.

Upon completion of the 60 day period or the supplemental investigation, the Reporting Commissioner places the matter on CADE's trial docket to be judged as soon as possible. The Reporting Commissioner must prepare a written report and a recommended resolution of the case and must provide that report to the other commissioners and the parties not less than five days before the judgment session.

The decision of the Council is rendered at a public meeting, during which the CADE Attorney General and the defendant (but not SDE or SEAE) are accorded an opportunity to speak (Art. 45). The minimum quorum is five members and a decision is taken by a majority of those participating (Art. 49). The President is one of the seven voting members and, in the event of a tie, may cast an additional vote (Art. 8 II). At the judgment session, any of the commissioners may request the opportunity to review the case file in detail, and may also propose that additional investigation be undertaken. Such additional investigation must be approved by the Plenary and, if approved, is undertaken by the Reporting Commissioner.

CADE is not in bound by the recommendations of SEAE or SDE and is responsible for impartial adjudication of contested cases. A Council judgment finding a violation must be issued as a written decision, containing a detailed report of the defendant's conduct, an analysis of the basis for determining illegality, a discussion of the remedial order imposed, the amount of the monetary penalty assessed, and a specification of the daily fine to be assessed if the unlawful conduct continues (Art. 46). Under Article 24, CADE has broad remedial authority to order any necessary alteration in the defendant's structure or conduct, including asset divestiture, transfer of corporate control, and discontinuance of specified business activities. The order may also declare the defendant ineligible to bid on public contracts for up to five years, require the defendant to publish a newspaper notice summarising CADE's decision, and mandate entry of the defendant's name on Brazil's list of consumer protection violators.

The provisions of Law 8884/94 applicable to mergers appear in Article 54, according to which 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.

This notification requirement applies to any "acts," and thus covers not merely mergers but all agreements. In August 2001, SDE and SEAE jointly issued Horizontal Mergers Guidelines that confirm the applicability of Article 54 to any transactions that may limit or otherwise harm free competition, or result in the domination of relevant goods and services markets, such as horizontal agreements among competitors. Article 54 paragraph 4 requires that notification must be made no later than fifteen business days after the occurrence of the transaction, while paragraph 5 empowers CADE to penalise a failure to comply with the filing requirement by imposing a fine in an amount ranging from 60,000 to 6 million tax reference units ("UFIR")(USD $24,900 to USD $2.49 million)[2]. A fee of BRL 45,000 (USD 17,550) is imposed for notifications filed under Article 54.

Article 54 paragraph 3 establishes special notification thresholds for acts that constitute mergers, stating that notification is mandatory for any form of economic concentration where the resulting entity accounts for twenty per cent of a relevant market or where any of the transaction participants had total turnover in Brazil in the previous year of BRL 400 million (USD 156 million).

Paragraph 1 of Article 54 provides that a transaction submitted for review may be approved if it meets all four of the following conditions: (1) It is intended to increase productivity; improve product or service quality; or cause an increased efficiency, or foster technological or economical development. (2) It generates benefits that are equitably allocated between the merging parties and consumers. (3) It does not eliminate a substantial portion of the relevant market for a product or service. (4) Its provisions are no more restrictive than necessary to obtain the beneficial effects.

Paragraph 2 of Article 54 contains a special provision that permits mergers to be approved that satisfy only three of the four attributes enumerated in Paragraph 1, provided that the transaction is in the public interest or otherwise required to the benefit of the Brazilian economy, and provided no damages are caused to end consumers.

[2] All references to USD in this text were calculated at the exchange rate of USD 0.39 for BRL $1.

The August 2001 Horizontal Merger Guidelines, issued jointly by SEAE and SDE, describe a five-step analytical process employing concepts found in similar guidelines published by other countries. The elements of the process include (1) defining the relevant product and geographic markets; (2) determining whether the market share of the merged entity is sufficiently large to permit the exercise of market power; (3) assessing the probability that market power will be exercised post-merger; (4) examining the efficiencies generated by the transaction; and (5) evaluating the net effect of the transaction on economic welfare.

Transactions notified to CADE under Article 54 may be resolved in three possible ways: unconditioned approval, approval with conditions, or denial. If a transaction is rejected outright, Article 54 paragraph 9 empowers CADE to take any action necessary to undo such damage as may have been caused to the economic order, including the issuance of orders requiring dissolution, spin off or sale of assets, and partial cessation of activities.

When transactions are approved conditionally, the conditions imposed fall into one of two categories, depending on the statutory provision invoked. Conditions requiring one-time acts (such as the divestiture of assets or the deletion of a noncompete clause from the acquisition contract) are imposed as an exercise of CADE's intrinsic authority to review transactions under Article 54. Conditions that mandate continuing but time-limited acts (such as the temporary obligation of an acquiring company to license a trademark or maintain a relocation program for terminated employees) are, in many cases, imposed under Article 58. That Article empowers CADE to require that one or more parties to a transaction comply with temporary conduct restrictions or requirements, termed "performance commitments" by the statute.

The statute provides that CADE may revoke a transaction approval in the event of default on obligations assumed by the parties, or if the intended benefits have not been attained (Art. 55). Revocation is also authorised, whether or not conditions or performance commitments are imposed, if the approval was based on false or misleading information submitted by the applicants.

As noted previously, Article 54 paragraph 3 requires notification for mergers that either produce an entity with twenty per cent of a relevant market, or involve a participant with total annual turnover of BRL 400 million (USD 156 million). Until recently, the BRL 400 million turnover threshold was applied to worldwide turnover. In an important decision rendered in January 2005, CADE determined that annual turnover would henceforth be measured with reference to Brazilian rather than worldwide sales.

An important feature of the merger notification scheme in Brazil is that notification, while mandatory, need not be filed in advance of consummation. Article 54 paragraph 4 requires only that notification must be made no later than fifteen business days after the occurrence of the transaction. According to Brazilian regulation, the period begins to run when (1) the first binding document is signed by the parties or (2) when there occurs a modification in the competition relations between the requesting parties or between at least one of them and a third agent.

The difficulties associated with undoing consummated mergers have led CADE to purse other means for preventing the complete integration of business entities pending review. Although no provision in Law 8884 addresses this issue,

Article 83 applies Brazil's Code of Civil Procedure and certain related procedural statutes to BCPS proceedings and CADE may therefore impose an injunction according to the standards applicable to temporary relief under Brazilian law.

To formalise the mechanisms by which the consummation of merger transactions can be suspended pending review on the merits, CADE issued Resolution 28 in August 2002. Under Article 2 of the Resolution, a *precautionary order* may be granted under civil law principles either by the Council, or by the Reporting Commissioner with subsequent ratification by the Council (Art. 7). The order can be issued either *ex officio* or in response to a petition by SEAE, SDE, the CADE Attorney General, or any third party interested in the concentration act under review. The Resolution establishes a procedure whereby the merging parties are given five day's notice of an impending preventive order and provided with an opportunity to present opposing arguments to CADE (Art. 4). Such orders, if granted, are subject to review in the courts. Resolution 28 also creates (in Article 8) a second mechanism, termed an Agreement to Preserve Reversibility of Transaction ("Acordo de Preservação de Reversibilidade da Operação" or APRO).

As its name suggests, an APRO reflects a consensual agreement between CADE and the merging parties designed to accomplish the same result as a precautionary order. Typically, preventive orders and APROs impose restrictions or conditions on the acquiring company's freedom to integrate activities; close stores or plants; dismiss workers; terminate brands or product lines; alter marketing, investment, or research plans; or liquidate assets. Both preventive orders and APROs include provisions that specify daily fines for failure to comply with the restrictions imposed.

The procedures established under the present law for reviewing notified transactions appear in Article 54. The notification is filed with SDE, which supplies copies immediately to SEAE and CADE (paragraph 4). Unlike conduct cases processed under Article 38, SEAE does not have the option to determine whether it will opine on merger transactions. Rather, Article 54 requires that SEAE provide to SDE, within 30 days, a technical report on the transaction. SDE, in turn, must provide a recommendation to CADE within 30 days of receipt of the SEAE report.

At that point, the case files are transferred to CADE, which must render a decision within 60 days (paragraph 6). CADE is not in any way bound by the recommendations of SEAE or SDE and is responsible for impartial adjudication of contested cases. If SEAE or SDE fail to meet their respective deadlines, no legal consequences result. If CADE does not issue a decision within its 60 day period, however, the merger is deemed to be approved (paragraph 7). Assuming deadline compliance by all three agencies, the maximum statutory period for merger review under Article 54 is 120 days. Each of the three agencies, however, also has the power to issue one or more requests for additional information, and in such circumstances the running of the statutory periods is suspended from the time of the request until the information is supplied (paragraph 8).

Although neither Article 54 nor CADE regulations establish any formal mechanism for settlement of merger cases by consent, conditional merger approvals may arise from negotiations between the parties and the BCPS. CADE Resolution 15, the implementing merger regulation, was adopted in 1998 as part of an effort to streamline the merger review process within CADE. The Resolution introduced a "two stage" process involving an initial notification form (attached as Exhibit I to the Resolution) that was a simplified and shortened

version of the form previously used. A second form (Exhibit II), requiring substantially more information, was designed for issuance to the merging parties if the Reporting Commissioner determined that supplementary investigation was required.

In February 2003, SDE and SEAE issued the Joint Ordinance No. 1, which establishes a "Fast Track Procedure" under which SEAE would prepare a short form report within 15 days of receiving the notification and SDE would likewise prepares a short form report within 15 days of receiving the SEAE report. This procedure is applicable to transactions involving (1) the purchase of franchisees by their franchisors, (2) cooperative joint ventures created to enter a new market, (3) corporate restructuring within a single business group that entails no change in control, (4) acquisition of a Brazilian firm by a foreign firm that has no (or insignificant) business interests in Brazil, (4) acquisition of a foreign firm that no (or insignificant) business interests in Brazil by a Brazilian firm, (6) replacement of an economic agent where the acquiring firm did not previously participate substantially in the target market or in vertically–related markets, and (7) acquisition of a firm with a market share small enough to be unquestionably irrelevant with respect to competition.

In January 2004, SEAE and SDE instituted a "Joint Procedure for Merger Review and Anticompetitive Conduct Analysis", which was formalised by the issuance of the Joint Ordinance No. 33/2006, and that has further expedited merger analysis. Under this procedure, both Secretariats begin reviewing a notification immediately upon its receipt and send a joint recommendation to CADE, thus avoiding the delay inherent in referring a case to SEAE and awaiting its analysis before SDE commences work..

CADE has also developed some procedures to help expedite cases. Mergers processed under the "Fast Track" procedure precede all others on CADE's decision docket, and CADE has also continued the practice of adopting as its own the report issued by SDE and SEAE, rather than preparing a separate decision.

Article 50 of law 8884 provides expressly that CADE decisions, once issued, are not subject to review elsewhere in the Executive Branch, and that such decisions shall be promptly executed. CADE decisions are, however, fully subject to review by the Judicial Branch at the instance of the affected parties, as discussed further below. The CADE Attorney General is responsible for taking appropriate legal action to assure implementation of the Plenary's decision. CADE's orders, as required by law, impose a fine for the violation found, and also specify a daily fine to accumulate in the event that the defendant does not comply with any conduct prohibitions or requirements established by the decision.

For cases involving conduct in violation of Article 20 (that is, for unlawful conduct not involving mergers), the statutory minimum fine is 1 per cent of gross pre-tax revenues for the previous year, provided that the amount assessed may not be less than the gain realised from the violation (Art. 23 I). The statute does not specify whether gross revenues are to be determined by reference to worldwide revenues of the defendant or only to revenues generated by sales in the Brazilian market affected by the violation. The maximum fine for Article 20 violations is 30 per cent of gross pre-tax revenue for the previous year (Art. 23 I). Individual managers responsible for unlawful corporate conduct may be fined an amount ranging from 10 to 50 per cent of the corporate fine (Art. 23 II).

Associations and other entities that do not engage in commercial activities, or for which gross revenue is not relevant, may be fined from 6 thousand to 6

million tax reference units (USD $2,460 to USD $2.46 million) (Art. 23 III). Fines for recurring violations are doubled (Art. 23, sole paragraph).

For failure to comply with a CADE remedial order, preventive measure, cease and desist commitment, or merger performance commitment, CADE may impose a daily fine ranging from 5,000 to 100,000 UFIR (USD 2,050 to 41,000) (Art. 25), accumulating for up to ninety days. As noted in the discussion of merger notification filings, Article 54 paragraph 5 empowers CADE to assess a fine ranging from 60,000 and 6,000,000 UFIR (USD 22,800 to USD 2.28 million) for failure to comply with the merger notification filing deadline.

Aside from such fines as may arise from untimely filing, no fine or other penalty is assessed for proposing a merger that CADE disapproves or approves conditionally, unless the defendant subsequently violates CADE's remedial order.

A daily fine ranging from 5,000 to 100,000 UFIR (USD 2,050 to 41,000), accumulating for up to ninety days, may be imposed for failing to produce (or for tampering wit documents demanded in an investigation (Art. 26). A person who does not appear for oral examination may be fined from BRL 500 to 10,700 (USD 195 to 4175) (Art. 26 §5). These fines may be assessed by SDE, SEAE, or CADE, depending on which entity issues the investigative demand. Similarly, Article 26-A authorises imposition of a fine ranging from BRL 21,200 to 425,700 (USD 8270 to 166,000) for impeding an examination conducted at a firm's place of business under Article 35 §2.

Law 8884/94 provides that, in imposing fines, CADE must consider various factors, including the impact of the violation on the market and the amount of damage caused, the benefit to the violator, the violator's good faith, and the violator's economic resources (Art. 27). Article 84 requires that all fines collected be remitted to the Fund for the Defence of Diffused Rights ("Fundo Gestor de Defesa dos Direitos Difusos" or "CFDD"). The CFDD is administered by a Council, comprised of representatives from the government and the public. It disburses funds to support educational or scientific projects relating to protection of the environment, consumers, economic order, open competition, and the artistic, aesthetic, historical, tourism, and landscape heritage.

LAW # 8884 OF JUNE 11, 1994
(OFFICIAL GAZETTE OF THE FEDERAL EXECUTIVE, JUNE 13, 1994)

Changes the Administrative Council for Economic Defense — CADE into an independent agency, regulates antitrust measures, and makes other provisions.

THE PRESIDENT OF THE REPUBLIC:

I hereby make known that the Congress decrees and I sanction the following Law:

TITLE I
GENERAL PROVISIONS

CHAPTER I
OBJECT

Article 1. This Law sets out antitrust measures in keeping with such constitutional principles as free enterprise and open competition, the social role of property, consumer protection, and restraint of abuses of economic power.

Sole Paragraph. Society at large is entrusted with the legal rights protected herein.

CHAPTER II
TERRITORY

Article 2. Without prejudice to any agreements and treaties to which Brazil is a party, this Law applies to acts wholly or partially performed within the Brazilian territory, or the effects of which are or may be suffered therein.

Sole Paragraph. Foreign companies that operate or have a branch, agency, subsidiary, office, establishment, agent or representative in Brazil shall be deemed situated in the Brazilian territory.

TITLE II
THE ADMINISTRATIVE COUNCIL FOR ECONOMIC DEFENSE — CADE

CHAPTER I
INDEPENDENT AGENCY

Article 3. The Administrative Council for Economic Defense — CADE, an agency with authority throughout the Brazilian territory and created by Law # 4137 of September 10, 1962, shall henceforth become a federal independent agency *(autarquia federal)* reporting to the

Ministry of Justice, with headquarters and jurisdiction in the Federal District, and duly commissioned for performance of the duties set forth herein.

CHAPTER II
THE CADE BOARD

Article 4. The CADE Board shall be composed of a President and six Board Members chosen from among citizens older than thirty years of age reputed for their legal or economic knowledge and unblemished reputation, duly appointed by the President of the Republic after their approval by the Senate.

Paragraph 1. The term of office of the President and Board Members shall be two years, one reelection being hereby permitted.

Paragraph 2. The President and Board Member duties shall be discharged on an exclusive basis; accordingly, no overlapping of positions will be permitted, unless otherwise provided for in the Constitution.

Paragraph 3. In the event of resignation, death or termination of a CADE President, the senior or eldest Board Member (in this order) will take office as President until further appointment thereof, without prejudice to his/her corresponding duties as Board Member.

Paragraph 4. In the event of resignation, death or termination of a CADE Board Member, a new Board Member shall be appointed for the remaining term of office of the replaced member.

Paragraph 5. In the events set forth in the preceding paragraph or upon expiration of the terms of office of the councilmembers, the Council shall be reduced to less than the number established in article 49, the time frames set out in articles 28, 31, 32, 33, 35, 37, 39, 42, 45, 46, sole paragraph, 52, paragraph 2, 54, paragraphs 4, 6, 7 and 10, and 59, paragraph 1 of this law shall be considered automatically interrupted, and the case development shall be suspended, and the new terms shall begin immediately after restructuring of the quorum. (Provisory Measure # 1465-7/96, Article 1).

Article 5. The CADE President or Board Members may only be ousted by a decision of the Senate, a request of the President of the Republic, as a result of unappealable criminal sentencing of any such member for malicious crime, or in light of disciplinary action as set forth in Law # 8112 of December 11, 1990 and Law # 8429 of June 2, 1992, as well as owing to violation of any of the limitations dealt with in article 6 hereof.

Sole Paragraph. Any CADE Member's absence at three consecutive ordinary meetings, or twenty intermittent ordinary meetings, shall cause automatic termination of his/her term of office, except for leaves of absence duly approved by the CADE Board.

Article 6. The President and Board Members shall not:

I - receive fees, percentages or other compensation in any way or on any pretext;

II - act as a self-employed workers;

III - participate--as controlling parties, officers, managers, agents or attorneys in fact--in any civil, commercial or like companies;

IV - render opinions on matters of their specialty, even if on a theoretical basis, or act as advisors to companies of any kind;

V - avail themselves of the media to render opinion on cases pending decision, or otherwise disparage orders, votes or sentences handed down by the courts, except for critique in case records, technical works or in the exercise of court duties; and

VI - carry out politics- or party-oriented activities.

CHAPTER III
AUTHORITY OF THE CADE BOARD

Article 7. The CADE Board shall:

I - ensure compliance with this Law and its regulations, as well as with the Board in-house rules;

II - resolve on purported violations of the economic order, and apply the penalties provided for by law;

III - resolve on proceedings instituted by the Economic Law Office - SDE of the Ministry of Justice;

IV - resolve on *ex oficio* appeals from the SDE Secretary;

V - order that action be taken in restraint of violations of the economic order within the term scheduled therefor;

VI - approve both the cease-and-desist commitment *(compromisso de cessação de prática)* and the performance commitment, as well as order SDE to monitor compliance therewith;

VII - judge appeals against preventive action adopted by SDE or by the Board reporting official;

VIII - make its decisions known to interested parties;

IX - request information from individuals, agencies, authorities and other public or private entities, with due regard for the confidentiality ensured such information pursuant to law, if any, as well as determine the investigations required for performance of its duties;

X - request from the Federal Executive Branch agencies and from state, municipal, the Federal District and territorial authorities the taking of all acts required for compliance with this Law;

XI - retain the performance of examinations, inspections and studies, approving the respective professional fees and other expenditures on a case-by-case basis, all of which shall be borne by the company if it is eventually punished under this Law;

XII - analyze acts or conducts under any circumstance, subject to approval thereof pursuant to article 54 below, and establish a performance commitment as the case may be;

XIII - request court execution of its decisions pursuant to this Law;

XIV - request services and staff from any federal public agencies or entities;

XV - determine the adoption of administrative and court action by the CADE Attorney General Office;

XVI - sign contracts and agreements with Brazilian agencies or entities, and advance to the Minister of Justice for approval any such documents that are to be signed with foreign or international organisms;

XVII - answer consultations on matters within its sphere of authority;

XVIII - make the forms of violation of the economic order known to the public;

XIX - draft and approve its in-house rules on operations, criteria for resolutions, and organization of in-house services, including for the purpose of establishing the recess of the Board and the Attorney General Office on account of vacation; during such period, the statute of limitations as well as the term set forth in article 54, paragraph 6 hereof shall be suspended;

XX - draft the structure applying to the CADE staff, with due regard for article 37, II of the Constitution;

XXI - draft budgetary proposals pursuant to this Law; and

XXII - appoint the possible substitute of the Attorney General in the event of absences, dismissal or impairment.

CHAPTER IV
AUTHORITY OF THE CADE PRESIDENT

Article 8. The CADE President shall:

I - act as the CADE legal representative in and out of court;

II - preside over the CADE Board meetings, with the right to vote thereat, plus a casting vote;

III - distribute processes by lot at the Board meetings;

IV - call meetings and organize the corresponding agenda;

V - comply and cause compliance with the CADE decisions;

VI - determine that the CADE Attorney General Office take all court action required for execution of the CADE decisions and sentences;

VII - sign the cease-and-desist commitments, as well as performance commitments;

VIII - submit to the CADE Board for approval the budgetary proposal, as well as the intended assignment of the staff that is to render services to CADE; and

IX - guide, coordinate and supervise the CADE administrative activities.

CHAPTER V
AUTHORITY OF THE CADE BOARD MEMBERS

Article 9 - The CADE Board Members shall:

I - vote on cases and matters submitted to the CADE Board;

II. - issue orders and decisions on the cases for which they act as reporting members;

III. - submit to the CADE Board any requirements as to data and documents from individuals, agencies, authorities and other public or private entities, which data and documents are to be kept confidential pursuant to law, as the case may be, as well as order all investigations deemed required for performance of their duties;

IV - adopt preventive action, and establish a daily fine for noncompliance therewith; and

V - discharge all further duties ascribed thereto under the applicable rules.

CHAPTER VI
THE CADE ATTORNEY GENERAL OFFICE

Article 10. An Attorney General Office shall be commissioned with CADE to:

I - render legal assistance to CADE, and provide for defense thereof in court;

II - arrange for judicial execution of CADE decisions and sentences;

III - subject to the CADE Board preliminary approval, request court measures with a view to curbing violations of the economic order;

IV - arrive at court settlements for cases involving violations of the economic order, subject to the CADE Board preliminary approval after hearing a representative of the Attorney General of the Republic;

V - render opinion on cases under the CADE authority;

VI - ensure compliance with this Law; and

VII - perform all further action incumbent thereon under the in-house rules.

Article 11. The Attorney General--appointed by the Minister of Justice, and duly commissioned by the President of the Republic after consultation and approval of the Senate--shall be a Brazilian citizen with unblemished reputation and renowned legal expertise.

Paragraph 1. The Attorney General shall attend the CADE meetings, with no right to vote thereat.

Paragraph 2. The Attorney General shall be subject to the same rules on term of office, reelection, disqualification, termination and replacement as those applying to the CADE Board Members.

Paragraph 3. In the event of absences, temporary separation or impairment of the Attorney General, the plenary body will indicate and the CADE President will appoint a possible substitute to act for a period not exceeding ninety (90) days, with no need for Federal Senate approval; such substitute shall be entitled to compensation for the position held during such substitution.

TITLE III
THE ATTORNEY GENERAL OF THE REPUBLIC AND CADE

Article 12. The Attorney General of the Republic, after hearing the Higher Council, shall appoint a member of the Attorney General Office of the Republic to handle the cases submitted to CADE for review.

Sole Paragraph. CADE may request that the Attorney General Office of the Republic cause enforcement of the CADE decisions or of the cease-and-desist commitments, as well as that it adopt all court action provided for in article 6, XIV (b) of Supplementary Law No. 75 of May 20, 1993.

TITLE IV
THE ECONOMIC LAW OFFICE

Article 13. The Economic Law Office of the Ministry of Justice — SDE, as structured pursuant to law, will be headed by a Secretary appointed by the Minister of Justice from among Brazilian citizens of renowned legal or economic expertise and unblemished reputation, duly commissioned by the President of the Republic.

Article 14. SDE shall:

I - ensure compliance with this Law by monitoring and following up on market practices;

II - provide for ongoing follow-up on business activities and practices from individuals

or legal entities with overriding control over a relevant market for a certain product or service, in order to prevent violations of the economic order; for such purposes, all pertinent data and documents may be required, with due regard for the confidential status thereof pursuant to law, if any;

III - carry out preliminary investigations on purported violations of the economic order, for further instatement of administrative proceedings;

IV - acknowledge the lack of grounds or evidence, and shelve the preliminary investigation records;

V - request data from individuals, agencies, authorities and other public or private entities, with due regard for the confidential status thereof under the law, if any, as well as determine the action required for exercise of its duties;

VI - commence administrative proceedings intended to investigate and restrain violations of the economic order;

VII - appeal *ex oficio* to CADE for shelving of preliminary investigations or administrative proceedings;

VIII - send on to CADE, for review, any cases commenced by SDE, if a violation of the economic order has been duly evidenced;

IX - sign a cease-and-desist commitment on the agreed conditions and submit it to CADE, as well as monitor compliance therewith;

X - advise CADE of certain conditions for signing of a performance commitment, and monitor compliance therewith;

XI - adopt preventive measures intended to cease the act characterized as a violation of the economic order, and establish the deadline for compliance therewith as well as a daily fine applying to default thereon;

XII - receive and substantiate cases to be judged by CADE, including consultations, and monitor compliance with the CADE decisions;

XIII - advise the public authorities as to the adoption of any action required for compliance herewith;

XIV - carry out studies and researches with a view to improving antitrust policies;

XV - advise the public of the various forms of violation of the economic order, as well as the means to curb such violations; and

XVI - perform other duties as provided for by law.

TITLE V
VIOLATIONS OF THE ECONOMIC ORDER

CHAPTER I
GENERAL PROVISIONS

Article 15 - This Law applies to individuals, public or private companies, as well as to any individual or corporate associations, established *de facto* and *de jure* — even on a provisional basis — irrespective of a separate legal nature, and notwithstanding the exercise of activities regarded as a legal monopoly.

Article 16. The company and each of its managers or officers shall be jointly liable to the various forms of violation of the economic order.

Article 17. The companies or entities within a same economic group *de facto* and *de jure* shall be jointly liable to violations of the economic order.

Article 18. The legal nature of any party charged with violation of the economic order may be disregarded whenever any such violation entails abuse of power and rights, violation of the law, illicit facts or acts, or any breach of bylaws or articles of association. This legal nature shall also be disregarded in the event of bankruptcy, insolvency, discontinuance or suspended operations of the underlying company owing to poor management thereof.

Article 19. The antitrust measures set forth herein do not exclude any punishment inflicted on other legal acts pursuant to law.

CHAPTER II
VIOLATIONS

Article20. Notwithstanding malicious intent, any act in any way intended or otherwise able to produce the effects listed below, even if any such effects are not achieved, shall be deemed a violation of the economic order:

I - to limit, restrain or in any way injure open competition or free enterprise;

II - to control a relevant market of a certain product or service;

III - to increase profits on a discretionary basis; and

IV - to abuse one's market control.

Paragraph 1. Achievement of market control as a result of competitive efficiency does not entail an occurrence of the illicit act provided for in item II above.

Paragraph 2. Market control occurs when a company or group of companies controls a substantial share of a relevant market as supplier, agent, purchaser or financier of a product, service or related technology.

Paragraph 3. The *dominant position* mentioned in the preceding paragraph is presumed when a company or group of companies controls twenty percent (20%) of the relevant market; this percentage is subject to change by CADE for specific sectors of the economy.

Article 21. The acts spelled out below, among others, will be deemed a violation of the economic order, to the extent applicable under article 20 and items thereof:

I - to set or offer in any way--in collusion with competitors--prices and conditions for the sale of a certain product or 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 prices, 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;

XIII - 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 bar the use of industrial or intellectual property rights or technology;

XVII - to abandon of cause abandonment or destruction of crops or harvests, without provenly good cause;

XVIII - to unreasonably 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 provenly good cause;

XXI - to partially or fully discontinue the company's activities, without provenly 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.

Sole Paragraph. For the purpose of characterizing an imposition of abusive prices or unreasonable increase of prices, the following items shall be considered, with due regard for other relevant economic or market circumstances:

I - the price of a product or service, or any increase therein, vis-à-vis any changes in the cost of their respective input or with quality improvements;

II - the price of a product previously manufactured, as compared to its market replacement without substantial changes;

III - the price for a similiar product or service, or any improvement thereof, on like competitive markets; and

IV - the existence of agreements or arrangements in any way, which cause an increase in the prices of a product or service, or in their respective costs.

Article 22. (VETOED)

Sole Paragraph. (VETOED)

CHAPTER III
PENALTIES

Article 23. The following antitrust penalties shall apply:

I - for companies: a fine from one to thirty percent of the gross pretax revenue thereof as of the latest financial year, which fine shall by no means be lower than the advantage obtained from the underlying violation, if assessable;

II - for managers directly or indirectly liable to their company's violation: a fine from ten to fifty percent of the fine imposed on said company, which shall be personally and exclusively imposed on the manager; and

III - in the case of other individuals and other public or private legal entities, as well as any *de facto* or *de jure* associations of entities or persons, even temporary ones, with or without legal identity, that do not engage in business activities, when it is not feasible to use the gross sales value, the fine will be 6,000 (six thousand) to 6,000,000 (six million) UFIR or any other index replacing it.

Sole Paragraph. Fines imposed on recurring violations shall be doubled.

Article 24. Without prejudice to the provisions of the preceding article, the fines listed below may be individually or cumulatively imposed on violations, whenever the severity of the facts or the public interest so requires:

I - at the violator's expense, half-page publication of the summary sentence in a court-appointed newspaper for two consecutive days, from one to three consecutive weeks;

II. - ineligibility for official financing or participation in bidding processes involving purchases, sales, works, services or utility concessions with the federal, state, municipal and the Federal District authorities and related entities, for a period equal to or exceeding five years;

III. - annotation of the violator on the Brazilian Consumer Protection List;

IV - recommendation that the proper public agencies:

(a) grant compulsory licenses for patents held by the violator; and

(b) deny the violator installment payment of federal overdue debts, or order total or partial cancellation of tax incentives or public subsidies;

V - the company's spin-off, transfer of corporate control, sale of assets, partial discontinuance of activities, or any other antitrust measure required for such purposes.

Article 25. If any acts or situations detrimental to the economic order are not discontinued after a CADE Board decision to this effect, or in the event preventive measures or any cease-and-desist commitment set forth herein are not complied with, a daily fine equal

to or higher than 5,000 (five thousand) Fiscal Reference Units — UFIR or replacing index shall apply, which fine may be increased as many as twenty times in accordance with the severity of the violation and the violator's economic status.

Article 26. In the event any data or documents requested by CADE, SDE, SEAE or other public entity acting under this Law are unreasonably denied, concealed, tampered with or delayed, this shall constitute a violation subject to a daily fine of 5,000 (five thousand) UFIR, which fine may be increased up to twentyfold in keeping with the violator's economic status.

Article 27. The penalties provided for in this Law shall apply with due regard for:

I - the severity of the violation;

II - the violator's good faith;

III - the advantages obtained or envisaged by the violator;

IV - actual or threatened occurrence of the violation;

V - the extent of damages or threatened damages to open competition, the Brazilian economy, consumers, or third parties;

VI - the adverse economic effects on the market;

VII - the violator's economic status; and

VIII - recurrences.

CHAPTER IV
STATUTE OF LIMITATIONS

Article 28. Violations of the economic order become time-barred five years after the date of the corresponding violation or, in the event of repeated or ongoing violations, after the date in which any such act has ceased.

Paragraph 1. Any administrative or court action intended to investigate purported violations of the economic order stays the statute of limitations set forth herein.

Paragraph 2. This statute of limitations is stayed during the effectiveness of a ceaseand-desist commitment or performance commitment.

CHAPTER V
CAUSE OF ACTION

Article 29. Injured parties may — for themselves or for the privies under article 82 of Law #. 8078 of September 11, 1990 — defend their individual or diffuse interests in court by way of antitrust measures and the awarding of losses and damages suffered in connection therewith, irrespective of the corresponding administrative proceeding which shall not be stayed in view of the court action.

TITLE VI
ADMINISTRATIVE PROCEEDINGS

CHAPTER I
PRELIMINARY INVESTIGATIONS

Article 30. SDE may carry out preliminary investigations *ex oficio* or at the written and reasonable request of interested parties; no disclosure as to any such investigations shall be made whenever the evidence as to purported violation of the economic order does not suffice to immediate commencement of administrative proceedings.

Paragraph 1. During preliminary investigations, the SDE Secretary may adopt any of the steps set forth in article 35 hereof, including requests for clarification addressed to the defendant.

Paragraph 2. Commencement of administrative proceedings out of formal complaints addressed by the Senate or the House of Representatives is not conditioned to preliminary investigations.

Article 31. After conclusion of preliminary investigations within sixty days, the SDE Secretary shall order commencement of a corresponding administrative proceeding or the shelving thereof, subject to *ex oficio* appeal to CADE in this latter case.

CHAPTER II
COMMENCEMENT AND DISCOVERY OF ADMINISTRATIVE PROCEEDINGS

Article 32. Administrative proceedings shall be instituted no later than eight days after cognizance of the underlying fact, formal complaint or closing of the preliminary

investigations, as per order issued by the SDE Secretary providing for the facts to be verified thereunder.

Article 33. The defendant shall be summoned to file a defense within fifteen days.

Paragraph 1. The initial summons shall bear the entire tenor of the order providing for institution of the administrative proceeding and the corresponding formal complaint, as the case may be.

Paragraph 2. The defendant shall be first personally summoned by mail against receipt or, in case of failure thereof, by notice published in the Official Gazette of the Federal Executive and in a newspaper widely circulated in the state in which the defendant is resident or headquartered, with due regard for the periods required for attachment of the receipt notice or publication, as the case may be.

Paragraph 3. Any summons under subsequent proceedings shall be made by publication in the Official Gazette of the Federal Executive, in which the name of the defendant and respective attorney shall be mentioned.

Paragraph 4. The defendant's holders, officers or managers, or duly appointed attorney,

may follow up on administrative proceedings, with full access to the case records at SDE and CADE.

Article 34. Failure to file a defense in due course after duly notified to that effect will entail the defendant's judgment by default and acknowledgment of the charges against it/him, subject to all further terms irrespective of prior notice in that respect. The *in absentia* defendant may take part in any phase of the proceeding without recourse of preceding acts.

Article 35. Upon lapse of time for filing a defense, SDE will order investigations and the production of evidence required thereby; SDE may order that the defendant, any individuals or companies, public entities or agencies provide data, clarifications or documents within fifteen days, with due regard for the confidentiality applying thereto under the law, as the case may be.

Sole Paragraph. The investigations and evidence required by the SDE Secretary, including hearing of witnesses, shall be concluded within forty-five days, extendable for a like period with good cause.

Article 36. Federal authorities, as well as officers of independent agencies, federal government-owned companies and mixed-capital companies, shall render all assistance and collaboration required by CADE or SDE, including as regards preparation of technical reports on the matters under the authority thereof, under penalty of liability.

Article 37. The defendant shall produce any evidence within forty-five days after submission of defense, as well as put forth new documents at any time before the discovery phase lapses.

Sole Paragraph. The defendant may ask the SDE Secretary to set out a date, time and place for hearing of a maximum of three witnesses.

Article 38. The Economic Policy Secretariat of the Ministry of Finance (SEAE) shall be informed by official letter of the institution of any administrative proceedings, and the Secretariat may elect to render an opinion on the matters within its sphere of authority, before the discovery phase lapses.

Article 39. Upon conclusion of the discovery phase, the defendant will be summoned to put forth his/its final arguments within five days, after which the SDE Secretary will issue a substantiated report resolving on forwarding of the case records to CADE for review or shelving thereof, subject to an *ex oficio* appeal to CADE in this latter case.

Article 40. The SDE Secretary, the CADE members, and their civil servants and officials shall exert their best efforts to develop and conclude preliminary investigations and administrative proceedings in the interest of proper expedition as required for clarification of the facts, under penalty of liability.

Article 41. The SDE Secretary decisions cannot be appealed to higher ranks.

CHAPTER III
CADE JUDGMENT ON ADMINISTRATIVE PROCEEDINGS

Article 42. Once the proceedings have been found admissible, the CADE President will randomly distribute such proceedings to the Reporting Official, who will be afforded a twenty-day term to render an opinion thereon.

Article 43. The reporting official may order supplementary investigations or request further information pursuant to article 35 hereof, as well as allow for the production of new evidence to the case whenever he/she considers the existing data insufficient for a final determination on the case.

Article 44. Upon invitation of the CADE President in response to an indication of the reporting official, any person may provide CADE with clarifications on relevant matters.

Article 45. Upon board judgments--the date of which will be made known to the parties at least five days in advance--the Attorney General and the defendant, or his/its attorney, will be respectively offered the floor for fifteen minutes each.

Article 46. The CADE decision--which in any event shall be duly substantiated against violations of the economic order--shall contain:

I - a detailed report on the violating acts, and an indication as to the antitrust action to be taken by the proper authorities;

II - the terms for commencement and conclusion of the action referred to in the preceding item;

III - the applicable fine; and

IV - a daily fine to apply while the violation is in effect.

Sole Paragraph. The CADE decision shall be published within five days in the Official Gazette of the Federal Executive.

Article 47. CADE shall monitor compliance with its decisions.

Article 48. Total or partial noncompliance with the CADE decision shall be reported to the CADE President, who will ask the Attorney General to provide for execution thereof via court channels.

Article 49. The CADE decisions shall be taken by majority vote, with the attendance of a minimum of five members.

Article 50. The CADE decisions do not qualify for Executive Branch review; accordingly, any such decisions shall be promptly executed, the Attorney General Office being then advised in this respect for the purpose of taking all legal action within its sphere of authority.

Article 51. The CADE regulations and in-house rules shall further regulate administrative proceedings.

CHAPTER IV
PREVENT IVE MEASURES AND CEASE-AND-DESIST ORDERS

Article 52. The SDE Secretary or reporting official may--upon his/her own initiative or at the request of the CADE Attorney General--adopt preventive measures in any instance of administrative proceedings, whenever there are signs or sound reasons to believe that the defendant directly or indirectly caused or may cause irreparable or substantial damages to the market, or that he/it may render the final outcome of the proceedings ineffective.

Paragraph 1. The preventive measures issued by the SDE Secretary or reporting official shall order prompt cessation of damaging acts and the resumption of the preceding situation, if reasonably feasible, as well as impose a daily fine pursuant to article 25 hereof.

Paragraph 2. The SDE Secretary or CADE reporting official decision on adoption of preventive measures may be voluntarily appealed to the CADE Board within five days, without suspensive effects.

CHAPTER V
CEASE-AND-DESIST COMMITMENTS

Article 53. CADE or SDE — *ad referendum* CADE — may agree on a commitment to cease acts under investigation in any instance of administrative proceedings, which commitment shall by no means entail a confession as to the matter under analysis nor acknowledgment of guilt for the acts thereunder.

Paragraph 1. The commitment shall provide for:

(a) the defendant's commitment to cease the action under investigation in due course;

(b) a daily fine to be imposed in the event of default under article 25 hereof; and

(c) the defendant's commitment to issue periodical reports on the defendant's market performance, and an undertaking to make proper authorities aware of any changes in its corporate structure, control, activities and location.

Paragraph 2. The case will be on hold while the cease-and-desist commitment is duly complied with, and after a preestablished time this case will be shelved if all conditions set out in the corresponding commitment have been fully met.

Paragraph 3. The conditions spelled out in the commitment may be changed by CADE if they are provenly overburdensome for the defendant, provided that any such changes do not cause damages to third parties or to the society at large, and that the new conditions do not entail a violation of the economic order.

Paragraph 4. The cease-and-desist commitment constitutes an extrajudicial execution instrument; accordingly, execution of this commitment shall be promptly petitioned in the event of default thereon or if monitoring thereof is in any way hampered, pursuant to articles 60 *et seq*. hereof.

TITLE VII.
MONITORING MECHANISMS

CHAPTER I.
MONITORING OF ACTS AND AGREEMENTS

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 authorize 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 ratably allocated among 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, organization 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. Noncompliance 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 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.

Article 55. The approval dealt with in the preceding article may be reviewed by CADE *ex oficio* or at the SDE request, if this approval was based on false or misleading information rendered by the interested party, in the event of default on obligations assumed hereunder, or if the intended benefits have not been attained.

Article 56. The commercial registries or corresponding state entities cannot file any acts related to organization, transformation, amalgamation, merger or grouping of companies, as well as changes in incorporation acts, unless all such acts contain:

I - a clear-cut and detailed statement as to the subject matter thereof;

II - the interest of each partner, and the term for capitalization thereof;

III - full name and identification of each partner;

IV - the place where the headquarters is located and its respective address, including as regards any declared branches;

V - full name and identification of the company's officers;

VI - the term of duration of the company; and

VII - the number, type and value of the outstanding stock.

Article 57. Articles of dissolution shall state the reasons thereof, apart from a statement re the amount ascertained among the partners and an indication of the persons that are to assume the company's assets and liabilities.

CHAPTER II
PERFORMANCE COMMITMENT

Article 58. The CADE Board will define performance commitments to be assumed by any interested parties that submitted acts for review pursuant to article 54 hereof, so as to ensure compliance with the conditions established in paragraph 1 thereof.

Paragraph 1. Performance commitments will take into consideration the extent of international competition in a certain industry and their effect on employment levels, among other relevant circumstances.

Paragraph 2. Performance commitments shall provide for volume or quality objectives to be attained within predetermined terms, compliance with which will be monitored by SDE.

Paragraph 3. Failure without good cause to comply with performance commitments shall cause the CADE approval to be revoked pursuant to article 55 hereof, followed by the opening of an administrative proceeding for the adoption of the applicable measures.

CHAPTER III
CONSULTATION

Article 59. (REPEALED)

TITLE VIII
COURT EXECUTION OF CADE DECISIONS

CHAPTER I
PROCESSING

Article 60. The CADE Board decisions imposing fines, as well as obligations to do or not to do, constitute an extrajudicial execution instrument.

Article 61. Executions exclusively intended to collection of fines shall be carried out pursuant to Law # 6830 of September 22, 1980.

Article 62. In the event of executions intended to collection of fines and compliance with obligations to do or not to do, the courts shall order specific performance of any such obligations, or otherwise provide for acts that ensure an outcome equilavent to compliance therewith in practical terms.

Paragraph 1. An obligation to do or not to do can only lead into a suit for losses and damages its specific performance or obtainment of an equivalent outcome in practical terms is not possible.

Paragraph 2. Losses and damages shall be paid without prejudice to any applicable fines.

Article 63. Execution shall be carried out by all means, including by way of intervention in the company, if necessary.

Article 64. The CADE decisions shall be executed at the federal courts of the Federal District, or at the courts with jurisdiction over the executed party's headquarters or domicile, at the CADE discretion.

Article 65. Motions or like action against an execution instrument shall not stay the execution itself, unless an amount corresponding to the fines imposed is deposited in court, and a bond is posted as determined by the courts to ensure compliance with a final decision on the case, including as regards daily fines.

Article 66. Depending on the severity of the violation of the economic order, and should there be sound reasons to believe in irreparable or substantial damages, the courts may order prompt adoption of all or a portion of the action required under the execution instrument, notwithstanding the deposit of fines in court or the posting of bonds.

Article 67. Daily fines on an ongoing violation shall be apply as from the deadline established by CADE for voluntary compliance with the CADE decision, up to the day of actual performance thereof.

Article 68. The execution of CADE decisions shall be afforded priority over other kinds of action, except for habeas corpus and writ of mandamus.

CHAPTER II
JUDICIAL INTERVENTION

Article 69. The courts shall order intervention in a company whenever required to ensure specific performance hereunder, and appoint a receiver.

Sole Paragraph. The court decision on intervention shall be duly substantiated, as well as accurately establish the action to be taken by the appointed receiver.

Article 70. If the executed party rebuts a court-appointed receiver within forty-eight hours on the arguments of ineptitute or lack of good standing, and if this claim is duly evidenced in three days, the courts shall render a decision thereon within this same period.

Article 71. If the rebuttal is granted, the courts shall appoint another receiver within five days.

Article 72. The intervention may be terminated early if the obligation that gave rise thereto has been provenly complied with in full.

Article 73. The court intervention shall be limited to those acts required for compliance with the court decision that gave rise thereto, and shall be effective for a maximum period of one hundred and eighty days; the receiver shall be held liable for his/her acts and omissions, especially in the event of abuse of power and departure from the original purposes of his/her appointment.

Paragraph 1. The receiver will be subject to articles 153 through 159 of Law # 6404 of December 15, 1976, to the extent applicable.

Paragraph 2. The receiver will be entitled to a compensation stipulated by the courts, which may replace him/her at any time and whenever the receiver becomes insolvent, is charged with active or passive corruption or malfeasance in office, or violation of his/her duties.

Article 74. The courts may withdraw the company's managers from their duties if they are provenly preventing performance of acts incumbent on the receiver. Any such managers shall be replaced as provided for in the company's bylaws or articles of association.

Paragraph 1. If any managers still prevent the receiver from taking proper action after adoption of the procedures set forth in the main section of this article, then the courts shall proceed as per paragraph 2 below.

Paragraph 2. If a majority of the company's managers deny assistance to the court-appointed receiver, the courts shall order that the receiver take over the company's management.

Article 75. The receiver shall:

I - perform or order performance of all acts required under the execution process;

II -advise the courts of any irregularities committed by the company's management and of which the receiver may become aware; and

III - submit to the courts a monthly report on his/her activities.

Article 76. The expenses arising from the intervention hereunder shall be borne by the executed party.

Article 77. Upon lapse of the intervention, the receiver shall provide the federal courts with a detailed report on his/her action, and either propose the dismissal or shelving of the case or ask for an extension of the intervention period should the execution decision have not been fully performed in due course.

Article 78. Whoever opposes or prevents any intervention or, after termination thereof, performs any acts that directly or indirectly annul its effects in whole or in part, or

even fails to comply with legal orders from the court-appointed receiver, will be held criminally liable for resistance, disobedience or coercion under the execution process, pursuant to articles 329, 330 and 344 of the Penal Code.

TITLE IX
FINAL AND TEMPORARY PROVISIONS

Article 79. (VETOED)

Sole Paragraph. (VETOED)

Article 80. The CADE Attorney shall henceforth become an Attorney General official duly commissioned to the independent agency created hereunder, jointly with the CADE President and Board Member positions.

Article 81. The Executive Branch shall send to the Congress within sixty days a bill of law on the permanent staff of the new independent agency, as well as on the duties and compensation applying to the CADE President, the Board Members, and the Attorney General.

Paragraph 1. While CADE is not provided with staff of its own, civil servants may be temporarily assigned to this independent agency by commission or otherwise, without prejudice to the remuneration and other benefits originally afforded thereto, including for the purposeof representing this independent agency in court.

Paragraph 2. The CADE President shall prepare and submit to the Board for approval a list of servants required for the independent agency, who may be placed at SDE disposal.

Article 82. (VETOED)

Article 83. The Code of Civil Procedure, as well as Laws # 7347 of July 24, 1985 and 8078 of September 11, 1990, also apply to the administrative and court proceedings set forth herein.

Article 84. The fines provided for herein shall be converted into Brazilian currency on the date of actual payment thereof, duly collected to the Fund dealt with in Law # 7347 of July 24, 1985.

Article 85. Article 4, VII of Law # 8137 of December 27, 1990 shall henceforth read as follows:

"Article 4. (...)

VII - increase without good cause the price of a certain product or service, in view of one's market control."

Article 86. Article 312 of the Code of Criminal Procedure shall henceforth read as follows:

"Article 312. - Preventive imprisonment may be decreed so as to safeguard public or economic order in the interest of the criminal process, or to ensure enforcement of

criminal laws, whenever a crime was provenly committed, or if there is sufficient evidence as to its perpetrator."

Article 87. - Article 39 of Law # 8078 of September 11, 1990 shall henceforth read as follows, with the additional items below:

"Article 39. The supplier of a certain product or service cannot, among other abusive practices:

(...)

IX - refuse to sell products or render services directly to whomever is willing to purchase them against prompt payment, except for intermediation cases duly regulated by special laws; and

X - increase without good cause the price of a certain product or service."

Article 88. - Article 1 of Law # 7347 of July 24, 1985 shall henceforth read as follows, with the additional item below:

"Article 1. - Without prejudice to class actions, this Law applies to actions for moral and property damages arising from:

(...)

V - violation of the economic order."

Sole Paragraph. Article 5, II of Law # 7347 of July 24, 1985 shall henceforth read as follows:

"Article 5. (...)

II - include in its institutional purposes the protection to the environment, consumers, economic order, open competition, or the artistic, aesthetic, historical, tourism, and landscape heritage;

(...)"

Article 89. CADE shall be invited to take part as assistant in court actions involving application of this Law.

Article 90. The periods for consultations submitted under article 74 of Law # 4137 of September 10, 1962, as amended by article 13 of Law # 8158 of January 8, 1991, are hereby interrupted, with due regard for Title VII, Chapter I hereof.

Article 91. This Law does not apply to dumping and subsidies cases dealt with in the Accords for Implementation of Article VI of the General Agreement on Customs Tarrifs and Trade, duly enacted by Decrees # 93941 and 93962 of January 16 and 22, 1987, respectively.

Article 92. All provisions to the contrary are hereby revoked, as are Laws # 4137 of September 10, 1962; 8158 of January 8, 1991; and 8002 of March 14, 1990, except for article 36 of Law # 8880 of May 27, 1994, which remains effective.

Article 93. This Law takes effect on the date of its publication.

ITAMAR FRANCO
President of the Republic

ALEXANDRE DE PAULA DUPEYRAT MARTINS
Minister of Justice

III. PORTUGAL

Commentary by the Government of Portugal on the Portuguese Competition Legislation

The legal framework for competition in Portugal was fully reformed in 2003. Two legal instruments supported the reform: Decree-Law 10/2003, of January 18, and Law 18/2003, of June 11.

A. The Portuguese Competition Authority - Decree-Law 10/2003

One of the main purposes of the review of the competition legal framework in Portugal was to reform the institutional structure for enforcement of competition rules.

To this extent Decree-Law 10/2003 replaced the two former entities entrusted with competition enforcement - the "Competition Council" and the "General Directorate for Commerce and Competition" - by a new single entity: the "Competition Authority" (*Autoridade da Concorrência*), to which was assigned the mission of "…assuring the enforcement of competition rules in Portugal, on the basis of respect for the principle of the market economy and that of free competition, taking into consideration the efficient functioning of the markets, the effective allocation of resources and the interests of the consumer...".

Created as a public corporation, the Portuguese Competition Authority (PCA) has been granted statutory independence for the performance of its tasks vis-à-vis the Government. The autonomy granted to manage its finances and assets, and the requirements in relation to the members of its Board with regard to their nomination, the duration of their mandate and the rules on incompatibility and impediment strengthen the independent nature of this new agency.

Nevertheless, the acts of the PCA with financial impact, such as the activities plan and budget and the annual report on its activities and accounts were subject to administrative supervision of the minister responsible for economic affairs. However, the statute of independence of the PCA is not substantially affected thereof, since the funding of its budget is to be ensured by revenues from earmarked funds, user fees and fines, with a marginal recourse to general revenue.

The PCA is composed of two bodies: the Board (*Conselho*) and the Single Auditor (*Fiscal Único*).

The Board is the PCA's highest body, being responsible for the enforcement of competition rules and for the management of the Authority's staff. It is composed of one chairperson and two or four other members (two at the present state) appointed by resolution of the Council of Ministers. Such members must be persons of recognized competence, with experience in the fields relevant to the fulfillment of the PCA's duties.

The members of the Board are nominated for a mandate of five years, renewable for five more years. On the first nomination or after the dissolution of the Board, some of its members are nominated for a period of three years and the remaining ones for a period of five years.

The Single Auditor, a chartered accountant or a firm of chartered accountants, is responsible for the control of the financial aspects of the PCA's activities. The Single Auditor is appointed by a joint order of the ministers responsible for finance and economic affairs for a period of three years, renewable for an equal period of three years.

In order to perform its mission, the PCA is entrusted with supervisory and regulatory powers along with powers to impose penalties.
Within the exercise of *supervisory powers*, the PCA investigates and decides, *inter alia*, on proceedings concerning mergers. Within the scope of *regulatory powers* it may issue general recommendations and guidelines or may approve or propose the adoption of regulations. Finally, the PCA is granted powers to investigate practices likely to infringe competition law and to decide on the correspondent proceedings by imposing the appropriate penalties.
As far as merger control and proceedings on anticompetitive practices in regulated sectors are concerned, the powers granted to the PCA are to be carried out in cooperation with the respective regulatory agencies.
The PCA's decisions may only be challenged before the courts. However, merger prohibition decisions may be appealed to the minister responsible for economic affairs, who may approve the prohibited merger whenever the resulting benefits to fundamental national economic interests exceed the inherent disadvantages for competition.

B. Competition Act – Law 18/2003

In June 2003, a new Competition Act came into force – Law 18/2003, of 11 June, which has undertaken the review of the substantive and procedural rules of Portuguese competition law.

1. Anticompetitive practices

Law 18/2003 introduced some significant changes to the legal framework of anticompetitive behavior.
As to prohibition of *collusive practices*, Law 18/2003 requires now that collusive practices have an appreciable impact on competition, which allows the so-called "cases of minor importance" to be disregarded. Furthermore, Law 18/2003 provides now automatic justification for agreements that, though not affecting trade between Member States, fulfill the remaining application requirements of any Community block exemption regulation.
On the issue of *abuse of a dominant position*, Law 18/2003 eliminated the market share based presumption of dominant position contained in the earlier legislation. On the other hand, the abusive nature of a non justified refusal to provide access to an essential facility was emphasized in this new Act by adding this type of conduct to the shortlist of abuses of dominant position already provided for in the previous law.
In what refers to the *abuse of economy dependency* - the other form of abuse of economic power provided for in Portuguese competition legislation - Law 18/2003 requires now that it has an effect on the functioning of the market or on the structure of competition to qualify as a restrictive practice.
Significant changes were also introduced to the *regime of penalties* for anticompetitive practices. Fines are now set in relation to the total turnover of the undertakings concerned and the application of periodic penalty payments is also admissible under Law 18/2003.
Finally, *limitation periods* have been extended to five years vis-à-vis the three years provide for under the ancient regime.

2. Mergers

Merger control was also reviewed under Law 18/2003. All sectors of activity, including banking and insurance, are now submitted to merger control under the new Competition Act. As a matter of fact, until the coming into force of Law

18/2003 mergers in the banking and insurance sectors fell out the scope of competition law, concentrations in these markets being only scrutinized by the correspondent regulatory agencies.
As to requirements for prior notification, thresholds based either on the market share (over 30%) or on the aggregate turnover (€ 150 million) of the undertakings concerned in Portugal remain the basic criteria for notification. However, as far as the turnover thresholds are concerned, Law 18/2003 requires now, in addition, that at least two of the undertakings taking part in the merger have a turnover that exceeds EUR 2 million.
The rule on merger appraisal has also changed under the new Competition Act. Indeed, under the previous legislation a merger which adversely affected competition within the national market could be cleared, should the undertakings succeed to make the argument on the contribution of the envisaged merger to their competitiveness at an international level. According to Law 18/2003, mergers that create or strengthen a dominant position which may result in significant barriers to effective competition in the national market shall be prohibited, enhancement of international competitiveness being just one of the criteria to take into consideration when evaluating the impact of a merger on competition.
Finally, several procedural issues were revisited under the reform undertaken by Law 18/2003.
Merger proceedings are now divided into two phases: the first phase with duration of 30 working days and a second phase, with duration of 90 working days, which is only to be opened if the merger is likely to produce anticompetitive effects. Since most cases are decided in the first phase, this has allowed a significant shorting of the time limits for deciding on mergers when compared with which were set out before the coming into force of Law 18/2003.
Furthermore, third parties are now fully allowed to participate in merger proceedings on their own initiative, the publication of the essential elements of the merger, within 5 working days after its notification, becoming mandatory with Law 18/2003.
Penalties for infringements of merger control rules have been also revised, in line with the reform of sanctions applying to anticompetitive behavior mentioned above. Thus, fines are now set in relation to the total turnover of the undertakings concerned and the application of periodic penalty payments has also become admissible.

First Amendment to Law 18/2003

The Portuguese Competition Act has been amended by Decree Law No. 219/2006, of 2 November 2006, a statute enacted mainly to transpose EC Directive 2004/25/EC regarding public bids. The two amended provisions of the Act, articles 9 and 36, concerned merger control. The new wording of article 9(2), clarifies the seven working days deadline for filing of the notification in case of public bids. Moreover, a new paragraph 3 was introduced in article 9 establishing the possibility of a pre-notification assessment of a transaction by the Competition Authority. This paragraph was complemented on 3 April 2007 with the adoption by the Competition Authority of guidelines on the procedure of pre-notification.
Finally, the new wording of article 36 of the Act has shortened the phase II review period (formerly 90 working days, counted from the date of the decision to open such phase II and extendible if requests for additional information are made by the Competition Authority). According to such new wording a phase II in-depth investigation must be completed within a maximum of 90 working days, counted from the date the notification was filed and this deadline may only be extended up to a maximum of 10 working days if requests for additional information are made by the Competition Authority.

Guidelines for a Prior Evaluation of Mergers

In 2007, the PCA enacted guidelines for a prior evaluation of mergers. Based on PCA's experience and on the European Commission's experience in enforcing the EC Merger Regulation and the Commission Guidelines issued in this area, the PCA adopted a set of guidelines aiming to inform the undertakings of the procedure set out for the applications of prior evaluation of mergers[3]. Prior evaluation is an optional procedure for undertakings, offering the opportunity, if needed, to hold discussions with the PCA officials on the legal and procedural aspects of the operation envisaged, in an informal and absolutely confidential manner, and, when possible, seeking to identify the most problematic competition aspects of the projected merger.

The new procedure does not imply that any formal decision is taken by the PCA on the merit from the point of view of merger control, but may lead to a shorter phase I in case the merger is notified and will tend to prevent gaps and inaccuracies in the information supplied on the notification form, limiting the need for additional information requests.

When a prior evaluation application has been received, it is the PCA's responsibility to decide, within a reasonable period of time, on the appropriate type of contact it will have with the requesting undertakings, taking into account the complexity of the operation in question, and in accordance with the information that has been gathered.

In most cases the PCA will arrange preliminary meetings with the requesting undertakings, for them to outline the merger operation and to provide for a discussion of the main features of the operation.

Following the assessment of a prior evaluation request, the PCA will take a position limited by the information provided by the undertakings involved. This position does not prevent the PCA from adopting a final decision of a different nature at the end of the future merger control proceeding initiated by the formal notification of a merger operation.

Simplified Decision for Merger Operations

Also in 2007, PCA introduced a simplified decision procedure that seeks to expedite the analysis of less complex mergers. This new procedure consists of a simplified form of decision-making, which will be limited to the key elements of the analysis that are strictly necessary to a final decision by the PCA[4].

Among the cases that may lead to a simplified decision are the following *i)* if there is no significant change in the competitive structure of the market; *ii)* the establishment of a joint company, qualified as a merger, whose economic activity in the national market is deemed to be negligible or non-existent or without significant horizontal and/or vertical effects; and *iii)* a transaction which does not qualify as a merger or does not meet the criteria of prior mandatory notification.

The simplified procedure will not be applied where there are third interested parties or where there is otherwise a need of holding a public hearing of interested parties.

3. Leniency

Law No. 39/2006, of 25 August

In 2006, Law No. 39/2006, of 25 August, introduced the Leniency regime in Portugal, which includes granting of immunity from or a special reduction in a fine imposed to an infringement of both the Portuguese Competition Law and

[3] The Guidelines are available at the PCA website: www.autoridadedaconcorrencia.pt.

[4] The Guidelines on the Simplified Decision Procedure are available at www.autoridadedaconcorrencia.pt.

Articles 81 and 82 of the EC Treaty. According to the Law, total immunity is available for the first member of a cartel to come forward with evidence of an alleged cartel, before PCA has started an investigation. A reduction in penalty of at least 50 per cent is available when the undertaking is the first to come forward with information/evidence of an existent cartel, but does it after PCA has started an investigation and before issuing the statement of objections. Moreover, a reduction in penalty of up to 50 per cent would be granted to the second member of the cartel that provides PCA with evidence of the alleged cartel which, in PCA.s view, represents significant added value with the respect to the evidence in PCA.s possession at the time of the application, and before issuing the statement of objections.

Furthermore, the Leniency law provides an incentive for a cartel member to come forward with information related to any other cartel in which it may be involved with. Therefore, under the Leniency Law if an undertaking that is already being investigated in connection with one cartel comes forward with information that enables it to be granted immunity in relation to a second cartel, then it may receive a reduction or an additional reduction in the penalty applied in connection with the first cartel.

Both immunity and reduction of fines applicants must cooperate fully and on a continuous basis from the time of their submission of an application with PCA until the conclusion of the case. This duty of cooperation includes, for example: *i)* provide PCA promptly with all the relevant information and evidence that comes into the applicant possession and control; *ii)* stand ready to reply promptly to any PCA request that may contribute to the establishment of the relevant facts; *iii)* cease its involvement in the cartel from the time it comes forward with the information; and *iv)* not disclose the fact or the content of the application submitted to PCA to other cartel members.

Regulation No. 214/2006, of 22 November

Following Law No. 39/2006, of 25 August, the PCA enacted the administrative procedure for the new leniency legislation, Regulation No. 214/2006, of 22 November. By setting out the mechanisms for the granting of immunity from, or a reduction of, infringement fines, the procedure is expected to contribute to enhance anti-cartel enforcement, which remains a key strategic priority.

This procedure sets forth the written form for the submission of an application, as well as a *"marker system"* and the possibility of *"summary applications"*, when the infringement affects more than three Member States, if the applicant has presented or is about to present an application to the European Commission (Communication on Cooperation, paragraph 14, JO C 101 27.04.2004, p. 43).

The PCA's final position on the leniency application is taken in the decision that terminates the case. The granting of immunity or a reduction of fine depends on the fulfilment of all requirements established in Law No. 39/2006, namely full and continuous cooperation with the PCA.

LAW 18/2003 OF 11 JUNE 2003

The English version of the texts of the Law 18/2003 of 11 June 2003 as well as of the Law 39/2006 of 25 August 2005 are available at the Internet website http://www.autoridadedaconcorrencia.pt

IV. SWITZERLAND

Commentary by the Government of Switzerland on the Competition Legislation of Switzerland

A. Description of the reasons for the introduction of the legislation

The reasons for the latest revision of Swiss competition law (Federal Act on Cartels and other Restraints of Competition of 1995, Cartel Act) in 2003 were twofold:

First of all, lack of competition had been identified as one of the main reasons for the high prices of many products and services on the Swiss market.

Secondly, international developments had made it clear that despite the fact that reforms had been introduced to improve the competitive environment since the early 1990s, the scope and pace of reform had been too timid to tackle the competitive problems encountered. Although the possibility existed to impose fines on firms that infringed the law, this instrument could only be used if the offence was repeated by the same parties. Other than having a shaming effect, a first breach of competition law in Switzerland was effectively 'free', unlike in most other OECD countries. This legal barrier, which for constitutional reasons turned out to be particularly frustrating in the well-known global "vitamin case", also helped to trigger further reform efforts in Switzerland. While the cartel members were sanctioned with record fines in the USA and in the EU, Switzerland's Competition Commission (Comco) was only able to issue a decision confirming that the vitamin cartel had infringed competition law, despite the fact that the leading cartel member was a Swiss firm established in Switzerland–. As a result, the Federal Council initiated a partial revision of the 1995 Cartel Act in early 2000.

One of the main objectives of the revision therefore concerned the introduction of direct sanctions in the form of fines ranging to up to 10% of turnover generated in Switzerland in the previous three business years for the most damaging types of anti-competitive behaviour, i.e. hard core cartels and abuse of a dominant position. This was accompanied by several other measures all intended to improve the preventive effect of the law and to bring Swiss competition law more in line with the EU framework. In addition to direct sanctions, the main reforms also included the introduction of:

- Leniency, authorising reduction or exemption from fines in exchange for co-operation with a cartel investigation;
- Presumption of illegality for vertical agreements on prices and territories;
- New investigation procedures, in particular dawn raids;
- Clearer application of the law to both public and private enterprises.

The revised competition law was adopted in 2003 with full application commencing in April 2005 following a transition period. Two existing ordinances on merger controls and emoluments were also amended following revision of the Act.

Other pieces of legislation completing Switzerland's competition policy are the 1986 Unfair Competition Act, the 1995 Internal Market Act instituting the

principle of mutual recognition[5] for goods and services in Switzerland, and the 1985 Price Supervision Act. The Internal Market Act has recently been revised to make it more effective against restraints of competition that still remain on Switzerland's domestic market.

B. Description of the objectives of the legislation and the extent to which they have evolved since the introduction of the original legislation

Foundations of competition law

Swiss competition law is derived from Article 96 of the Federal Constitution which provides for freedom of trade and commerce and empowers the legislature to remedy any economically or socially harmful effects of cartels or similar groupings and hence to combat private restraints of competition.

There have been four phases of competition legislation: first, the period before the first revision of the Cartel Act in 1985; second, the phase between the revision of 1985 and the 1995 Act on Cartels and Other Restraints of Competition (1995 Cartel Act); third, the implementation of the 1995 Cartel Act, from 1 July 1996 to 31 March 2004; and finally, the phase marked by the revision of the law in 2003 and the entry into force of the new law on 1 April 2004 (2003 Cartel Act).

The period before 1985

Performing its constitutional duty, the federal legislature passed its first Cartel Act in 1962. This period was marked by a philosophy of freedom of contract under which companies could not be prevented from concluding agreements not to compete. A firm not participating in the cartel should at least have the possibility of competing with the cartel members. The law therefore prohibited boycotts. The Cartel Commission used a rule of balancing positive and negative effects of the conduct at issue. The Cartel Commission had no decision-making powers however, instead proposing measures by which the Federal Department of Economic Affairs to remedy challenged practices.

The phase after 1985 and before the 1995 Cartel Act

The revised Cartel Act was passed in 1985. The 1985 law, like the first, principally covered cartels and dealt only to a lesser extent with abuses by powerful firms on the market. The new law introduced a distinction between the suppression of effective competition, which it prohibited, and obstacles to competition, which it assessed along the lines that are now included in Art. 5.2of the Cartel Act.[6] Towards the end of the 1980s, this revision led to the decision by

[5] In fact, this principle is similar to the “Cassis de Dijon” principle which has been widely accepted in the European Union since the 1970s. When the German company Rewe wanted to start selling the French liquor, Cassis de Dijon, in their stores, German authorities objected. The potion did not have the prescribed 25 per cent alcohol, which was mandatory for fruit liquor in Germany. Rewe went on to sue the German authorities successfully before the European Court of Justice, arguing that this boiled down to an import prohibition. The European Court recognised Rewe’s claim, so that since 1979 every EU-country is obliged to give free access to products from another EU country. The “Cassis de Dijon“ principle applies to all sectors that have not yet been harmonised by EU law. Among the Swiss cantons, similar "inter-cantonal" import restrictions persisted. As a remedy, the "Cassis de Dijon" principle was introduced in Switzerland's internal market.

[6] "An agreement is deemed to be justified on grounds of economic efficiency:

the minister of economic affairs to prohibit cartel agreements in the banking sector (notably with regard to brokerage). However, the Cartel Commission's lack of powers, coupled with the shortcomings of the investigation procedures instituted by the law, made it all the more difficult to enforce competition law effectively in Switzerland. Consequently, in 1992 the Federal Department of Economic Affairs asked a working group to draft a new competition law, resulting in a draft law on cartels and other restraints of competition which was passed on 6 October 1995.

Implementation of the 1995 Cartel Act

The Cartel Act was passed at the same time as the Internal Market Act and the Technical Barriers to Trade Act as part of a programme to revitalise the Swiss economy launched in 1992 after voters and the cantons rejected membership of the European Economic Area.

The Ordinance of 17 June 1996 on the control of mergers of enterprises was adopted at the same time as the Cartel Act, supplementing the Act's provisions regarding business concentrations. An ordinance on emoluments within the framework of the Cartel Act was adopted in February 1998.

When the Act was revised in 1995, the substantive provisions for assessing restraints of competition drew extensively from EU competition law. Although the Cartel Act is based on the principle of regulating abuse and EU competition law is based on the principle of prohibition, the revision brought the two bodies of law significantly closer together. Swiss competition law thus became closer to that of many other OECD countries. In particular, the law clarified the distinction between the 'suppression of effective competition' and 'obstacles to competition' by explicitly providing for a presumption (which had been implicit in the 1985 law) that agreements on price, quantities and geographic division of markets could not, as matter of principle, be justified by claims of economic efficiency.

One significant feature of the 1995 Cartel Act was to give Comco the power to issue decisions prohibiting unlawful restraints of competition. Its decisions could be challenged before an appeal tribunal, before going to a federal court. The merger control provisions of the 1995 Cartel Act also gave Comco the power to issue binding decisions.

C. Description of the practices, acts or behaviour subject to control, indicating for each;

a) The type of control -for example- outright prohibition, prohibition in principle or examination on a case-by-case basis

In contrast to competition law in many other countries, Swiss cartel law is based on the prevention of abuse, not prohibition. One effect of this stance was to preclude certain stricter rules from the Cartel Act (direct sanctions were introduced only for certain types of anticompetitive behaviour). Another consequence relates to the burden of proof which, in a system based on preventing abuse, lies entirely with the competition authorities.

a) when it is necessary in order to reduce production or distribution costs, improve products or production processes, promote research into or dissemination of technical or professional know-how, or exploit resources more rationally; and
b) when such agreement will not in any way whatsoever allow the enterprises concerned to eliminate effective competition."

Unlawful agreements (Art 5 Cartel Act)7

The term "agreements affecting competition" means binding or non-binding agreements and concerted practices between enterprises operating at the same or at different levels of the market, the purpose or effect of which is to restrain competition.

Agreements that significantly affect competition in the market for certain goods or services and are not justified on grounds of economic efficiency and all agreements that lead to the suppression of effective competition are unlawful.

An agreement is deemed to be justified on grounds of economic efficiency:

a) when it is necessary in order to reduce production or distribution costs, improve products or production processes, promote research into or dissemination of technical or professional know-how, or exploit resources more rationally; and

b) when such agreement will not in any way allow the enterprises concerned to eliminate effective competition.

The conditions under which agreements affecting competition are as a general rule deemed to be justified on grounds of economic efficiency may be determined by way of ordinances or communications. The following in particular will be taken into consideration in this respect:

a) co-operation agreements relating to research and development;

b) specialisation and rationalisation agreements, including agreements concerning the use of schemes for calculating costs;

c) agreements granting exclusive rights to deal in certain goods or services;

d) agreements granting exclusive licences for intellectual property rights;

e) agreements with the purpose of improving the competitiveness of small and medium sized enterprises, in so far as they have only a limited effect on the market.

Under the Cartel Act there is a presumption that certain horizontal agreements and, since the 2003 reform, certain vertical agreements are unlawful. For these types of horizontal and vertical agreement, the presumption brings Swiss law closer to laws based on the principle of prohibition. With regard to horizontal agreements, Article 5.3 of the Cartel Act states that agreements among actual or potential competitors are presumed to lead to the elimination of effective competition when they directly or indirectly fix prices or restrict the quantities of goods or services to be produced, bought or supplied or allocate markets geographically or according to trading partners.

The 2003 reform introduced a new presumption that certain types of vertical agreement are unlawful. Parliament expressly wanted the new measure to prevent vertical restrictions that cause high prices in Switzerland by compartmentalising the national market. Article 5.4 of the Cartel Act states that the elimination of effective competition is also presumed in the case of agreements between enterprises at different levels in the market regarding fixed or minimum prices as well as in the case of agreements in distribution contracts regarding the allocation of territories insofar as sales by other distributors into these territories are not permitted. If the presumption is upheld, the agreement is unlawful. However, even if the presumption of the elimination of competition is refuted, the agreement can still be deemed unlawful if it constitutes a significant restraint of competition and cannot be justified on grounds of economic efficiency. The

[7] For the complete articles (Cartel Act art 5, 7, 9) see www.weko.admin.ch/publikationen/00213/index.html?lang=en

conditions for assessing vertical agreements are laid down in two Comco communications. [8]

Unlawful practices of enterprises having a dominant position (Art 7 Cartel Act)

Practices on the part of enterprises with a dominant market position are deemed unlawful when such enterprises, through the abuse of their position, prevent other enterprises from entering or competing in the market or when they injure trading partners.

The following in particular may constitute unlawful practices:

a) refusal to deal (e.g. refusal to supply or buy goods).

b) discrimination between trading partners with regard to prices or other conditions of trade.

c) the imposition of unfair prices or other unfair conditions of trade.

d) the under-cutting of prices or other conditions directed against a specific competitor.

e) restrictions on production, outlets or technical development.

f) the conclusion of contracts only on condition that partners agree to supply additional goods or services.

Notification of concentrations (art 9 Cartel Act)

Concentrations of enterprises have to be notified to the Comco before they are carried out. The following thresholds in the last accounting period prior to the concentration apply:

1. the enterprises concerned reported joint turnover of at least CHF 2 billion or turnover in Switzerland of at least CHF 500 million, and

2. at least two of the enterprises concerned reported individual turnover in Switzerland of at least CHF 100 million.

Concentrations of enterprises subject to notification shall be investigated by the Competition Commission if a preliminary review (Article 32, para 1) reveals signs that they create or strengthen a dominant position.

The Competition Commission may prohibit the concentration or authorise it subject to conditions or obligations if it transpires from the investigation that the concentration:

1. creates or strengthens a dominant position liable to eliminate effective competition, and

2. does not lead to a strengthening of competition in another market which outweighs the harmful effects of the dominant position.

In all three cases (agreements affecting competition, practices of enterprises having a dominant position whose unlawful nature has been ascertained by the competent authority as well as prohibited concentrations of enterprises) an exceptional authorisation (Art. 8 and 11 Cartel Act) on the grounds of compelling public interests can be granted by the political instances (i.e. the Swiss government). The interests taken into account concern issues other than competition and the respective authorisation is granted only in highly exceptional

[8] These and all the other communications issued by Comco are published at: http://www.weko.admin.ch/publikationen/00213/index.html?lang=en

cases. So far, such an authorisation has been requested only once and was rejected.

b) The extent to which the practices, acts or behaviour in section D, paragraphs 3 and 4, of the Set of Principles and Rules are covered by this control, as well as any additional practices, act or behaviour that may be covered, including those covered by controls relating specifically to consumer protection, for example controls concerning misleading advertising.

Articles 5, 7 and 9 of the Cartel Act cover the practices, acts or behaviour in section D, paragraphs 3 and 4, of the Set of Principles and Rules.

The Cartel Act does not expressly touch upon consumer issues as such, the idea being that unhindered competition benefits consumers as well. More specifically, consumer protection is covered - among others - by the Unfair Competition Act[9] which protects fair competition and by the same token good faith in business dealings and fair business practices. However, it is not limited to consumer issues but protects all market players and their organisations from unfair business practices: competitors, clients at all levels of trade, in particular consumers, trade and business associations and consumer organisations. The Unfair Competition Act contains rules on clear, comparable and clearly stated prices, whether in a display window, shop or advertisement and promotes fair competition in general. The Unfair Competition Act therefore contains the basic rules for the correct publishing of prices and for the prevention of misleading price comparisons. Detailed provisions are laid down in the Ordinance on the Notification of Prices.[10]

D. Description of the scope of application of the legislation, indicating:

a) Whether it is applicable to all transactions in goods and services and, if not, which transactions are excluded;

Swiss competition law does not contain lists of sectoral exclusions. The only general exclusion mentioned in the Cartel Act concerns the effects on competition that result exclusively from laws governing intellectual property (article 3 para. 2 Cartel Act). According to Art. 3, para. 1 Cartel Act, the Act is not applicable to actions of enterprises in accordance with legal provisions that do not allow competition in a market for certain goods or services. This particularly concerns provisions which establish an official market or price system or provisions which entrust certain enterprises with the performance of public interest tasks, granting them special rights.

In these cases, the competition authorities have to clarify whether or not these provisions leave room for competition. The law is based on the assumption that an official market organisation only exists if it was actually the legislator's intention to exclude competition in a specific area. As long as room is left for competitive behaviour, competition law applies.

The following list contains sectors which are more or less affected by exclusions of competition law:

- Agriculture
- Pharmaceuticals
- Railway
- Telecommunications
- Postal services

[9] See http://www.admin.ch/ch/f/rs/241/index.html
[10] See http://www.admin.ch/ch/f/rs/c942_211.html

- Banking and insurance
- Radio and TV broadcasting
- Health care
- Electricity
- Gas
- Electric and sanitary installations

The following case illustrates how competition authorities have interpreted the above mentioned article with regard to the electricity sector which has not yet been liberalised:

Electric installations - Watt-Migros/EEF

In 2000, Comco opened an investigation to clarify whether Entreprises Électriques Fribourgeoises (EEF) abuses its dominant position while refusing the transmission of electricity by a third party (Watt) on the network owned by EEF.

EEF alleged that the Cartel Act is not applicable because EEF was entrusted by the canton of Fribourg with a legal mandate to supply power in this canton, which amounts to a public interest task. Furthermore, the electricity tariffs of EEF are subject to the approval of the said canton. They also argued that the transmission of electricity from third parties could jeopardise this task and endanger security of supply.

In a decision dated 17 June 2003, the Federal Supreme Court ruled that the monopoly on the operation and construction of the power grid does not imply a monopoly on the use of the network. Electricity prices are not regulated. The transmission of power from competitors through the power grid is neither detrimental to security of supply nor does it imply that EEF is per se an unprofitable business. If, under particular circumstances, the security of the energy supply were to be at risk, the government could intervene by excluding the application of competition law for political reasons (exceptional authorization according to art. 8 Cartel Act[11]). There are therefore no legal provisions preventing the application of the Cartel Act. Consequently, the Federal Supreme Court stated that EEF was abusing its dominant position and ordered it to comply with the provisions contained in Art. 7 Cartel Act.

b) Whether it applies to all practices, acts or behaviour having effects on the country in question, irrespective of where they occur;

The Cartel Act applies to all concerted practices and agreements which have a direct, substantial and reasonably foreseeable effect within Swiss territory (the so-called "effects doctrine"). Therefore, agreements concluded abroad, or conduct that takes place outside Switzerland, but which has such effects in Switzerland, may fall under Swiss jurisdiction.

Cartel Act, Art 2 Para 2:
"The present law applies to restrictive practices whose effects are felt in Switzerland, even if they originate in another country."

[11] Article 8: Exceptional authorisation on the grounds of compelling public interests
"Agreements affecting competition and practices of enterprises having a dominant position whose unlawful nature has been ascertained by the competent authority may be authorised by the Federal Council at the request of the enterprises concerned if, in exceptional cases, they are necessary in order to safeguard compelling public interests."

c) Whether it is dependent of the existence of an agreement, or on such agreement being put into effect.

In order to be applied properly, the 'effects doctrine' depends on the existence of co-operation agreements. The necessary enforcement tools (e.g. dawn raids, imposition of sanctions) cannot be used against firms situated in the territory of foreign countries as this would be a violation of international public law. So far, Switzerland has concluded only some agreements containing co-operation rules in the field of competition. These are briefly described below (F). In most cases, these agreements form part of existing free trade agreements and are therefore seen as complementary to trade liberalisation. A pure co-operation agreement between competition authorities does not yet exist.

E. Description of the enforcement machinery (administrative and / or judicial), indicating any notification and registration agreements, and principal powers of body (ies)

Competition policy institutions

The competition authorities consist of the Competition Commission (Comco) and its Secretariat. Comco is the decision-making body and the Secretariat is the investigative arm. Under Article 18 of the Cartel Act, Comco takes all decisions that are not expressly reserved for another authority. Comco has three chambers with competencies for services, manufactured goods and infrastructure respectively.

Comco also has powers to ensure that the Confederation, the cantons, the communes and other bodies performing public duties comply with the Internal Market Act. It can make recommendations to them concerning planned or existing legislative acts and conduct inquiries and forward the recommendations to the authorities concerned (Article 8 of the Internal Market Act).

The Federal Council institutes Comco and appoints the members of the presiding body (Article 18.1 of the Cartel Act). Comco has between eleven and fifteen members, the majority of whom are experts, that is, not representatives of a particular interest group (Article 18.2). Membership of Comco, including of the presiding body, is a non-occupational public service activity. Comco currently has fifteen members, seven of whom represent interest groups (SMEs, trade and industry, trade unions, retailers, small farmers and consumers).

The Comco Secretariat has a staff of about 60 whose conditions of service are governed by the law applicable to federal government employees. The Federal Council appoints the Secretariat's directors and the Commission appoints the remainder of the staff (Article 24). The Secretariat has three departments corresponding to Comco's three chambers.

Other authorities dealing with competition matters

Other authorities may have cause to intervene in competition matters. They include cantonal civil courts, appeal bodies such as the Federal Administrative Court, the Federal Supreme Court, the Federal Council, and bodies whose powers are determined by laws other than the Cartel Act and that have an influence on competition matters, such as the Office of the Price Supervisor, the Federal Communication Commission, and the Postal Services Regulatory Authority.

The Price Supervisor's task is to prevent increases in or the maintenance of abusive prices set by cartels and enterprises with market power. The Office of the Price Supervisor focuses mainly on prices administered by the government and

set by powerful enterprises. Measures to eliminate or prevent abuse are taken with the consent of the interested parties, but firms or associations that fail to comply with recommendations (decreed negotiated prices) may be fined up to CHF 100,000. When Comco and the Office of the Price Supervisor carry out parallel proceedings, proceedings under the Cartel Act take precedence over those under the Price Supervision Act except in the event of a decision to the contrary taken by common consent by the Competition Commission and the Price Supervisor (Article 3.3 of the Cartel Act). The Federal Council's appointment of the Price Supervisor depends to a considerable extent on political considerations. As a rule, the Price Supervisor is a member of parliament. He attends Comco meetings in an advisory capacity. The two authorities' powers rarely overlap as market regimes or government-set prices and special rights granted to enterprises performing public tasks are often exempt from direct application of the Cartel Act.

The Federal Office of Communications (Ofcom) deals with matters relating to telecommunications and broadcasting (radio and television). In these areas, Ofcom is both the regulator and the national authority. As an office of DETEC, the Federal Department of the Environment, Transport, Energy and Communications, Ofcom prepares the decisions of the Swiss government (Federal Council), DETEC and the Federal Communications Commission (ComCom). ComCom was created in September 1997 as the licensing authority for the liberalised telecommunications market. Under the Telecommunications Act of 30 April 1997, it has the following powers: a) to issue licences to telecommunications service operators (Article 4), universal service licences (Article 18) and licences to use radio communications frequencies (Article 22); b) to fix the conditions for interconnection at first instance when service providers are unable to reach agreement (Article 11); c) to approve the national frequency allocation plan (Article 25) and national numbering plans and to set terms and conditions for number portability and the free choice of service provider (Article 28); d) to decide measures in the event of an infringement of applicable legislation and, where appropriate, to withdraw the licence (Article 58). ComCom is an independent authority instituted by the Federal Council. It has seven members who must be independent experts. It is not subject to any guidelines from the Federal Council or DETEC, the Federal Department responsible for communication matters. It has its own secretariat. ComCom co-operates with Comco on matters relating to interconnection. Comco has been given an advisory role in this sphere. Only enterprises in a dominant position can be required to provide interconnection. Comco has to rule on the question of dominant position on ComCom's behalf (Article 11.3 of the Telecommunications Act).

As the Swiss postal service, Swiss Post, is owned by the Confederation, the Confederation found itself with a dual role when opening up the postal market to competition: namely that of owner and market regulator. The Federal Council therefore created PostReg, a postal regulatory authority. Its main tasks are defined under Article 41 of the Postal Ordinance, namely to monitor the quality of universal service provision and access to universal service, to review compliance with accounting principles and the prohibition on cross-subsidy, and to deal with complaints to the regulatory authority relating to universal service.

Competition law enforcement

Procedures

A distinction needs to be made between procedures relating to restraints of competition (agreements affecting competition and abuse of dominant position) and merger control procedures.

Restraints of competition

Restraint of competition procedures are carried out by means of preliminary reviews and investigations. The competition authorities are free to decide whether or not to initiate a procedure. The decision to initiate a procedure cannot be appealed. The Comco Secretariat is not obliged to give a complainant its reasons for not initiating a procedure. However, under Article 39 of the Cartel Act and Article 71 of the Administrative Procedure Act, complainants may request the supervisory authority to examine the grounds for the Secretariat's decision. The origin of the complainant (Swiss or foreign national) plays no role in the decision of whether or not to open a procedure. The Secretariat may conduct preliminary reviews on its own initiative, at the request of enterprises concerned or on the basis of information received from third parties (Article 26 of the Cartel Act). If there are signs of an unlawful restraint of competition (revealed by a preliminary investigation or from other sources), the Secretariat opens an investigation with the consent of a member of Comco's presiding body. It opens an investigation in all events if asked to do so by the Commission or by the Department (Article 27.1). Comco determines the order in which investigations that have been opened should be conducted (Article 27.2).

The Secretariat gives notice of the opening of an investigation in an official publication (Article 28.1). Should the Secretariat consider that a restraint of competition is unlawful, it may propose an amicable settlement to the enterprises involved concerning ways of removing the restraint (Article 29.1). However, such a settlement must be in writing and approved by Comco (Article 29.2).

On a proposal from the Secretariat, Comco takes its decision on measures to be taken (for example, prohibition of the behaviour in question) or on approval of the amicable settlement (Article 30.1). The participants in the investigation may provide their opinions on the Secretariat's proposal in writing. Comco may also conduct hearings and instruct the Secretariat to take additional steps for the requirements of the investigation (Article 30.2). Comco takes its decision on the basis of all these elements, either in plenary session or in a Chamber. Managers and staff members with an interest in the cases concerned attend Comco's decision-taking sessions.

Decisions on agreements affecting competition are mainly based on the following criteria: the elimination of effective competition, which is deemed to exist when there is no longer any internal or external competition (meaning internal or external to the agreement); material effects on competition, which are assessed according to qualitative criteria (the aims of the agreement) and quantitative criteria based on analysis of the current and potential competitive situation and the power of the partners involved.

Decisions concerning the abuse of dominant position are assessed mainly on the basis of the current and potential competitive situation and the power of the partners involved.

Merger control procedures

For concentrations of enterprises, transactions subject to notification are investigated (in detail) by Comco if a preliminary review reveals signs that they create or strengthen a dominant position (Article 10.1). The procedure is thus conducted in two phases: a preliminary review lasting no more than one month, and a detailed investigation lasting no more than four months.

During the review phase, the participating enterprises must refrain from carrying out the concentration for one month following notification unless, at their request, Comco has authorised them to do so for important reasons (Article 32.2). If an investigation is initiated, Comco decides at the outset whether the concentration may be carried out provisionally by way of exception or whether it should remain suspended.

The review and investigation consider the effects of the merger in principle on the markets for the products and on the geographical markets affected by it. Under Article 11.1.c of the merger control ordinance[12], a market is deemed to be affected by a merger if two or more of the enterprises involved jointly hold 20 per cent or more of the Swiss market or if one of the enterprises involved holds 30 per cent or more. In these markets the creation or strengthening of a dominant position capable of eliminating effective competition is considered in the light of three criteria: current competition, potential competition and the power of the partners involved.

New direct sanctions

Under the 2003 Cartel Act, the following infringements are liable to direct sanctions:

participation in a hard-core cartel (Article 5.3), a category which covers enterprises that enter into agreement with direct competitors on prices or quantities of goods and services or allocate markets geographically; participation in a hard-core vertical cartel (Article 5.4), which covers distribution systems that set fixed or minimum prices and distribution contracts that allocate territories insofar as sales by other distributors are excluded; abuse of dominant position (Article 7).

Sanctions are administrative by nature and take the form of fines. Under Article 49.1, an enterprise that participates in an unlawful agreement within the meaning of Article 5.3 (horizontal hard-core cartel) or 5.4 (vertical hard-core cartel) or that behaves unlawfully within the meaning of Article 7 (abuse of dominant position) is required to pay an amount equal to up to 10 per cent of its aggregate turnover in Switzerland in the previous three business years. The Sanctions Ordinance of 12 March 2003 sets the criteria to be used for deciding the actual amount of the fine. Under Article 2.1 of the ordinance, the sanction is calculated in several stages.

First, a base amount (starting point) is determined. Depending on the severity and type of the violation, it may be up to 10% of turnover by the relevant enterprise on the relevant markets in Switzerland in the last three business years (Article 3 of the Sanctions Ordinance). Second, the base amount is adjusted according to the length of the violation. If the anticompetitive practice has lasted between one and five years, it is increased by up to 50%. If the anticompetitive practice has lasted longer than five years, it is increased by a supplement of up to 10 per cent per year (Article 4 of the Sanctions Ordinance). Third, any aggravating circumstances are taken into consideration on a case-by-case basis.

If there are aggravating circumstances, the amount calculated in the first two phases is increased further, particularly when an enterprise repeatedly breaches the Cartel Act, has achieved particularly high profits as a result, refuses to co-operate with the authorities or otherwise attempts to obstruct the investigation (Article 5.1 of the Sanctions Ordinance). In the case of horizontal and vertical agreements that eliminate effective competition, the amount calculated in the first

[12] See http://www.weko.admin.ch/publikationen/00213/index.html?lang=en

two phases is further increased if the enterprise instigated the restriction of competition, played a leading role or has instructed or carried out retaliatory measures against the other participants to the restriction of competition in order to implement the anticompetitive agreement (Article 5.2 of the Sanctions Ordinance).

If there are mitigating circumstances the amount calculated in the first two phases is reduced, in particular if the enterprise terminates the restraint of competition after the first involvement of the Comco Secretariat, and at the latest before the opening of a procedure (Article 6.1 of the Sanctions Ordinance). In the case of horizontal and vertical agreements that eliminate effective competition, the amount is reduced if the enterprise has played an exclusively passive role or has not carried out retaliatory measures that had been agreed in order to impose the agreement (Article 6.2 of the Sanctions Ordinance).

Article 7 of the Sanctions Ordinance states that the sanction may not in any case amount to more than 10 per cent of the enterprise's turnover generated in Switzerland in the previous three business years.

The law contains a mechanism for the exemption from or the reduction of direct sanctions which is mainly invoked when notification is voluntary (exemption from the sanction) and when a leniency programme applies (total or partial remittance of the sanction).

Any enterprise may voluntarily notify a possible restraint of competition due to a specific project, such as a research and development or distribution contract, before it takes effect (Article 49a.3a of the Cartel Act). Notification may enable the enterprise to avoid the risk of a direct sanction. The law contains a provision to prevent enterprises from abusing the system by notifying a blatant restraint of competition and deploying it immediately afterwards for benefit until the competition authority decides whether or not it is unlawful (Article 49a.3a of the Cartel Act).

Leniency programme

Under the leniency programme instituted by the 2003 Cartel Act, Comco may wholly or partially waive a direct sanction if an enterprise that is a member of a cartel assists in the discovery and removal of the cartel concerned (Article 49a.2 of the Cartel Act). The introduction of this whistle-blowing mechanism occasioned much debate in parliament as it was not considered to be consistent with Switzerland's judicial culture. The terms of the leniency programme are defined in Article 8 of the Sanctions Ordinance, which sets out the conditions under which an enterprise may be completely or partially exempted from sanctions.

The system for total exemption from sanctions was inspired by existing practice in other countries. At a time when the competition authority has no knowledge of the cartel, the enterprise must acknowledge its involvement and be the first to deliver information which enables the competition authority to open an investigation. If an investigation has already been opened, the enterprise must provide the necessary evidence to prove a violation. The other conditions are ongoing co-operation with the competition authorities and cessation of the unlawful behaviour at the latest at the time of self-notification, unless the competition authorities give others instructions in order not to compromise the investigation. However, if the enterprise was the instigator or leader of the cartel, a total exemption is not possible. A sanction may be reduced by up to 50 per cent if an enterprise voluntarily provides information or documents and can be reduced by up to 80 per cent when an enterprise provides information or evidence

unasked regarding further competition violations. A partial reduction is also possible when the competition authorities have already opened a procedure on their own initiative or when another member of the cartel has already qualified for a complete exemption.

Appeals

There are two legal channels for appeals against decisions taken by the competition authorities. An appeal may be lodged with the Federal Administrative Court, the first instance of appeal in administrative matters against decisions by Comco or the Secretariat and for the enforcement measures at Article 42.2 relating to proceedings initiated in respect of the treaty between Switzerland the EC regarding air traffic. It is competent in first instance (Article 44 of the Cartel Act).

The Federal Supreme Court is the highest court of appeal against decisions taken by the Federal Administrative Tribunal and cantonal civil courts.

In contrast to procedures relating to unlawful restraints of competition (agreements affecting competition and abuse of dominant position), third-party enterprises that are not participants in a merger are not treated as parties. Consequently, they do not have access to files and have no power of appeal.

When Comco issues a decision finding that a restraint of competition is unlawful, the interested parties may request an exceptional authorisation from the Federal Council on the grounds of compelling public interests (Articles 8, 11 and 31 of the Cartel Act). Such a request may also be submitted if appeals to the above-mentioned appeals authorities have failed. A request to the Federal Council is based on political considerations and is not therefore a legal remedy.[13]

Disclosure policy

Article 48.1 of the Cartel Act states that the competition authorities may publish their decisions.

Article 48.2 states that the courts must provide a complete copy of any judgments they may render pursuant to the Cartel Act to the Secretariat without being asked to do so. The Secretariat collects such judgments and may publish them periodically.

Comco has a very open disclosure policy. Its decisions and those of other authorities with powers in competition matters (Federal Administrative Tribunal, Price Inspector, etc.) are published in a journal of competition law and policy (*Droit et Politique de la Concurrence*) which appears five times a year. Comco's activities and publications (communications, ordinances, etc.) are also published on its website (www.weko.ch).

Under Article 49.2, Comco draws up an annual report for the Federal Council.

13 See page 5.

Other means of enforcement

The cantonal civil courts are the specific civil law authorities in competition matters. Since the 1995 Cartel Act took effect, the assessment criteria in civil and administrative law have been based on uniform substantive norms. In a civil action, a person whose access to or exercise of competition is hampered by an unlawful restraint of competition can ask the civil courts to order removal or cessation of the obstacle, award damages and reparations and return any illicitly earned profits (Article 12). If the lawfulness of a restraint of competition is questioned in the course of a civil proceeding, the case is referred to Comco for an opinion (Article 15). Recourse has rarely been made to the civil courts in Switzerland to date, as firms apparently prefer to go directly to Comco, thus avoiding the cost of proceedings whose outcome is uncertain, although this is now changing.

Finally, the law also provides the possibility of imposing penal sanctions (fines). However, these provisions have so far never been applied in practice.

F. Description of any parallel or supplementary legislation, including treaties or understandings with other countries, involving cooperation or procedures for resolving disputes in the area of restrictive business practices

Existing supplementary legislative acts such as the Internal Market Act, the Price Supervision Act and the Unfair Competition Act have already been described earlier on.[14]

As the Cartel Act applies to restrictive practices whose effects are felt in Switzerland, even if they originate in another country (Article 2), this raises the issue of investigations into practices orchestrated by foreign enterprises and enforcement of the corresponding decisions. Switzerland has not concluded any co-operation agreements relating to competition. Co-operation between the Swiss competition authorities and foreign authorities is limited and carried out on a case-by-case basis. A distinction can be made between formal and informal co-operation.

Formal co-operation is based on:

- the free trade agreement of 22 July 1972 between the European Economic Community and Switzerland, Article 27.3 of which states that if an anticompetitive practice is incompatible with the proper functioning of the agreement within the meaning of Article 23.1, the contracting parties should supply the joint committee with all relevant information and provide it with all the assistance it requires in order to examine the case and, where appropriate, to eliminate the practice objected to.
- the bilateral agreement between the European Community and the Swiss Confederation on air transport, especially Articles 8, 9, 10 and 11 thereof. The agreement, which entered into force on 1 June 2002, provides that the entire Community *acquis* relating to air transport should apply to relations between Switzerland and the EU. Competition rules and merger control are applied by the EU institutions pursuant to the EU legislation set out in the annex to the agreement. Comco co-operates with the European Commission in enforcing decisions and taking procedural measures in Switzerland. Switzerland retains exclusive competence with regard to state aid and Comco is the independent authority which monitors compliance with Swiss rules on state aid. Regular

[14] See pages 1, 6, 9.

contacts take place between the Swiss and EU authorities with a view to ensuring that the air transport agreement is properly implemented;

- most of the free trade agreements concluded between the EFTA states (Iceland, Norway, Switzerland and Liechtenstein) and third countries contain a competition chapter with substantial provisions as well as rules on co-operation;
- two OECD recommendations:

- the 1995 Recommendation of the Council concerning Co-operation between Member States on Anticompetitive Practices affecting International Trade;

- the 1998 Recommendation of the Council concerning Effective Action against Hard Core Cartels.

Informal co-operation allows for certain contacts with foreign competition authorities without involving the exchange of confidential information.

Where merger procedures are involved Comco, with the agreement of the enterprises concerned, cooperates with the other competition authorities dealing with the same transaction.

G. Description of the major decisions taken by administrative and/or judicial bodies, and the specific issued covers:

- Unlawful agreements:

Credit cards:

Comco concluded the investigation in the field of credit cards and approved in a formal decision the amicable settlement signed by the institutions involved. The subject matter of the investigation was a charge agreed between the issuers of credit cards (including UBS AG, Credit Swiss, Cornèr Banca SA and Viseca Card Services SA) and the providers of acceptance agreements (the acquirers, currently comprising Telekurs Multipay AG and Aduno SA) for domestic payment transactions (known as the domestic multilateral interchange fee; DMIF) in the two Visa and MasterCard credit card systems. This multilaterally agreed charge is levied as a percentage of the related transaction price (price for the purchase of a product or of a service) and paid by the acquirer to the issuer.

The decision includes in particular the limitation of the DMIF at the effective cost of the network, the abrogation of the “non discrimination clause” (NDR) and the obligation of the acquirers to communicate on request with the tradesmen the value of the DMIF applicable to their sector. The issuers are committed to reducing within three years, the current DMIF to a maximum amount fixed in the decision corresponding to the effective costs of the network. When this period expires, the effective costs of the network will be recalculated and the maximum amount will be adapted. The Comco limited its approval to four years.

www.weko.admin.ch/publikationen/00188/JB-2005-E.pdf?lang=en

Price fixing in the book market:

In 2005, Comco examined for the second time the question of price fixing in the book market in Switzerland. Comco had confirmed the illegality of the single price for books for the first time in September 1999. On appeal, the Federal Supreme Court referred the matter back to Comco for it to examine whether the restriction affecting competition caused by the standard book price could be justified on grounds of economic efficiency. At the time Comco examined whether it led to greater choice, a greater variety of products or to an improvement in sales due to an increase in the number of points of sale and better customer service. It confirmed that the positive effects claimed for the single book price could not be proven and cannot justify the

restraint of competition, which must be considered unlawful in this case. The question of knowing whether a system of this type is desirable on the grounds of cultural policy cannot be considered by Comco, by virtue of the Cartels Act.

www.weko.admin.ch/publikationen/00212/rpw2005-2-130705-ohneschriften-2.pdf?lang=fr p.269 et seq.

- Abuse of a dominant position:

Feldschösschen/Coca-Cola:

The contractual agreement between Feldschösschen and Coca-Cola in which Feldschösschen supports the sale of Coca-Cola's products is acceptable from the point of view of competition law because there are other channels of distribution. On the other hand, Comco noted that there were unlawful agreements restraining trade in the relationship between Feldschösschen and the operators of hotels and restaurants.

- Concentrations of enterprises:

Tamedia/BZ-20 Minuten:

For the first time in a procedure regarding enterprise concentrations, Comco took the decision to forbid this merger because it would have created a dominant position capable of removing effective competition from the market with regards to readership and advertising in the Bern area.

Source: DPC 2004/2, p. 529 available in German
www.weko.admin.ch/publikationen/00212/RPW20042.pdf?lang=fr

- Dawn raids

Air Cargo:

Comco opened an investigation against several airline companies concerning agreements in the air cargo sector. Comco initiated the procedure with dawn raids at various company premises. Acting on information received, Comco knew of the existence of agreements between air cargo carriers relating to different surcharges on air cargo transport. These agreements deal with surcharges on fuel, security, customs and war risk. The investigation will have to demonstrate the existence of such agreements and their consequences in Switzerland. Based on the air transport agreement with the European Union, Comco is conducting this investigation in co-operation with the European Commission and third countries.

www.weko.admin.ch/publikationen/pressemitteilungen/00243/160206-PC-Luftfracht-F.pdf?lang=fr.

H. Short bibliography citing sources of legislation and principal decisions, as well as explanatory publications by Governments, or legislation, or particular parts thereof

Sources of legislation:

- *Federal Act on Cartels and Other Restraints of Competition (Cartel Act)*

Homepage address:
www.weko.admin.ch/publikationen/00213/index.html?lang=en

Languages: German, French, Italian, English

- *Federal Act of 6 October 1995 on the Internal Market*

Homepage:www.weko.admin.ch/publikationen/00213/index.html?lang=fr

Languages: German, French, Italian

- *Federal Act of 19 December 1986 on Unfair Competition*

http://www.admin.ch/ch/f/rs/c241.html

- *Federal Act of 20 December 1986 on Price Supervision*

http://www.admin.ch/ch/f/rs/c942_20.html

- *Federal Act of 30 April 1997 on Telecommunications*

http://www.admin.ch/ch/f/rs/784_10/index.html

- Ordinance on the Control of Mergers of Enterprises of 17 June 1996

Homepage address:

- Ordinance on Sanctions for Unlawful Restrictions of Competition (Sanctions Ordinance) of 12 March 2004 which included the Leniency application.

Homepage address:
www.weko.admin.ch/publikationen/00213/index.html?lang=en

- Ordinance on the Prescription of Fees

Homepage address: www.weko.admin.ch/publikationen/00213/index.html?lang=fr

Principal decisions:

- "Law and policy of competition" (casebook)

Homepage address: www.weko.admin.ch/publikationen/00212/index.html?lang=fr

Languages: German, French, Italian

- Administrative Procedure Act

Homepage address: www.admin.ch/ch/f/rs/rs.html

Explanatory publications:

Homepage address:
www.weko.admin.ch/publikationen/00213/index.html?lang=en

- Notice Regarding the Competition Law Treatment of Vertical Agreements
- Notice Regarding the Competition Law Treatment of Vertical Agreements in the Motor Vehicle Trade
- Remarks on the Ordinance on Fines

Homepage address: www.weko.admin.ch/publikationen/00213/index.html?lang=fr

- Remarks on the Notice Regarding the Competition Law Treatment of Vertical Agreements in the Motor Vehicle Trade
- Notice Regarding Small- and Middle-Sized Undertakings
- Notice Regarding the Ratification and Sponsoring of Sporting Goods
- Notice Regarding the Use of Aids of Calculation
- Remarks on the Progress of House Searches

Press publications:

Homepage address:
www.weko.admin.ch/publikationen/pressemitteilungen/index.html?lang=en

FEDERAL ACT ON CARTELS AND OTHER RESTRAINTS OF COMPETITION (CARTEL ACT) OF 6 OCTOBER 1995

The English version of the text of the Federal Act on Cartels and Other Restraints of Competition of 6 October 1995 and other acts of the competition legislation of Switzerland available at the Internet website http://www.weko.admin.ch/publikationen/00213/index.html?lang=en

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