I - Historical

The Defense of the Competition wins prominence recently in Brazil with the promulgation of the Law no. 8.884, of June 11, 1994. However, the history of the Competition defense is much older.

In old Greece there was already the regulation of the monopolies to generate considerable revenues to the government and, in periods of economical difficulties, to do with that didn't lack “products” for the populations of the cities. In Rome, the existence of the state monopolies, as the one of salt, warranty great part of the revenues of the State.
The Decree of Zeno, 483 ad., regulated the politics of the monopolies that came being adopted by Rome, mainly in the end of the Empire, with the great concession of monopolies of distribution of victuals to the matters by retribution, to increase the resources of the State. In the Decree of Zeno the Roman State also regulated the price agreements, in order to impede, among other, the monopolizing of goods, the abuse of prices, and to guarantee market prices.

However, it is in the Middle Age that we found institutes that bring larger likeness with the Competition on its current apprenticeship. The monopoly in that historical period was exercised directly by the State or for matters that received the concession of the State by retribution, and they end up presenting characteristic aspects of the great contemporary capitalist concentrations. But it is the artisans' associations, called “occupation corporations”, that offer several Competition norms and it is the richest example of the period.

Amid the appearance of the trade in the cities, especially with the “trade fairs”, the artisans of common interests meet to protect those interests, appearing with that the occupation corporations. The spontaneous appearance of the occupation corporations starting from the economical agents' association resembles each other with the “current associations” or “cartels”. It is on that moment that appears several Competition rules that somehow inspire the legislators until today.

In Mercantilism the distinction appears between the lawful monopolies and the illicit ones. The lawful monopolies were those carried out directly by the State or for
matters by concession. It is enough to remind of the monopoly of the metropolis in the trade with her colonies (colonial pact). In that time it was permitted that the metropolises retain metals (gold, silver) originated of that trade monopolist that went of the product marketed until the transport of the goods.

In that period the great settlers from America, Portugal and Spain, didn't worry in developing their manufacture and, for that reason, they ended up using the gold and the silver that obtained in their American colonies to buy practically everything that they needed in England. It is that gold and silver that went out to England, the necessary capital to make possible the Industrial Revolution financially.

The Competition still wins larger proportions in the Liberalism, period marked by the Industrial Revolution, 1760, that modified the production system completely. The production center migrates of the artisans' workshops for the factories, where the high investments in machines and the need of employed labor take the organization of industries. The conquest of markets turn to be essential and the establishment of the Competition is a demand.

With Liberalism ideas the situation of the State intervention in the economy begins to be modified. In 1776, Adam Smith in "The Wealth of the Nations" writes on the “invisible hand”, exposing that the State should not intervene at the market, because it would be auto-regulated by the laws of the offer and of the search.
The Competition becomes faced as the solution for the damages caused by the monopolies, and in condition to regulate the markets and to propitiate the consumer's well-fare, independently of the State intervention.

In the economical field the Industrial Revolution had already made the great modification in the structure of the market, but it is the French Revolution, 1789, that will guarantee the rupture with the partner-juridical model existent.

The French Revolution, concisely, was done by the bourgeoisie and for the bourgeoisie. The bourgeois class, unsatisfied with the impossibility of imposing their wills and for always being ignored by the clergy and for the nobility, once it never got the majority in weight of votes in General States, found in the Revolution the possibility to alter that situation.

The Ordinance of Allarde, of March of 1791, aimed at to establish to all the citizens the freedom of trade and industry, without the connection need with some occupation corporation. The Chapelier Act, of June of 1791, ends for prohibiting the professional associations (occupation corporations), guaranteeing the necessary trade freedom for the new order preached by the interests of the bourgeoisie with the Industrial Revolution and of the liberal thoughts of the time.

In that way, with the Industrial Revolution and the French Revolution, it happens the economical-social rupture with the old model. The merchant begins to have a large prominence front to the State, besides dictating rules, the population begins to
migrate to the urban centers to work in the industries, leading off the proletariat, and the Competition begins to win its features today.

In 1865 there is the 2nd Industrial Revolution that feels in two countries out of Europe. In Japan, the great Imperialist of the East, and in the United States of America (USA), which interests us to analyze the Competition Law? In that period begins in the USA a process of commercial fomentation, with the mass production. The economy in frank expansion and the Competition taking predatory stamps among the companies. Therefore, the entrepreneurs of several sections noticing that the Competition was not beneficial for them, opted for the cartels. However, the cartels didn't guarantee to its members that the agreements would be respected by all the members.

For that reason it was decided to use a traditional Anglo-Saxon institute, the trust. For the trust, the industrial transferred the derived power of its actions to a trustee, in change of a trust certificate. The economical agents that acted at a same market had a centralized administration, being avoided with that the Competition, and being guaranteed the profit of their activities.

It was not long a lot and the population and the press answered the monopoly prices and the position of the other agents' subjection of the market to the economical power. Like this, that freedom of performance in the market preached by the Liberalism it begins to be answered in the USA in the end of the century XIX. It is promulgated then in 1890 the Sherman Act, considered the legal mark of the antitrust. In that
context it is promulgated in 1914, also in the USA, the Clayton Act that comes to complement the Sherman Act and to inspire several legislation of Competition defense.

In Brazil, the project of Agamemnon Magalhães, dated of 1948, after a long procedure in the Congress, it was approved in 1962 appearing the Law no. 4.137, practically the Brazilian first legislation of Competition defense. The Law no. 4.137/62 had the purpose of regulating the repression to the abuse of the economical power to the market, according to the Federal Constitution of 1946. In that same Law the Administrative Council for Economic Defense (CADE) is created.

However, in that weighs Agamenon Magalhães’ efforts and the efforts of all of those that insisted in the implantation of effective laws of Competition defense, the structure of Brazilian economy was an intervenient State, what impedes the market Competition. Besides the Brazilian State determines prices the State also hold companies. The market economy was closed and the Competition doesn’t exist.

Such scenery begins to change in the government Collor with the opening of the markets, in spite of the precipitate form as it was made that process that didn't assure to companies of several sections of the economy the period of necessary structuring for the arduous Competition.

In 1990 the Law no. 8.137 was published, for which the acts contrary to the economical order were configured as crimes. Therefore the Law no. 8.158/91 was
published with the purpose of instructing norms for the Competition defense. Actually, Brazil was before a range of different legislation turning on a same theme that, besides not contributing with the Competition defense, it impeded their application to the concrete cases.

The stabilization of the currency with “Plan Real” and the privatization process, with which of intervenient Brazilian State becomes regulator, the elements that lacked were so that the Competition in fact it was established.

Important to point out that the 1988 Brazilian Federal Constitution disposes in art. 170, IV, that the economical order, founded in the valorization of the human work and in the free enterprise, aims to assure to all existence deigns, the social justice, observed the principle of open Competition. The art. 173, § 4th, determines that the Law will repress the abuse of the economical power that it seeks to the dominance of the markets, to the elimination of the Competition and the arbitrary increase of the profits. In spite of the Federal Constitution demonstrates how the performance of the State would be at the market, it lacked a Law to guarantee the Competition, in order to take precautions and to repress abuses of economic power.

Such situation is solved once and for all with the promulgation of the Law no. 8.884, of June 11, 1994, the Brazilian Competition Law.
II - Concept and Purpose

In a market economy the Competition is something fundamental, once besides making possible a larger variety of products and the developing of the quality of the same ones, contributes directly to the reduction of prices. The Competition is revealed the essence of the balance relationship between the offer and the search.

The companies, in a competitive market, always need to be investing in researches and development of products and services, as well as studying the peculiarity of each market and the respective consumers' longing. With that, the market and, consequently the consumers, obtain the benefits generated by the Competition.

We began to notice that the Competition exists to guarantee the development of the markets and, as great beneficiary, the consumer that will enjoy the current improvements of the Competition.

Besides the consumer's economical well-fare generated by the Competition, it also contributes strongly to the development of the economy of a country to enter and to stay competitive in the external market. However, a law of Competition defense determines applications in certain juridical systems and in given historical moments.

The economists of the School of Chicago and of Harvard joined intense discussions concerning which the mark of the law of Competition defense and that Competition
type should protect. However, discussions just of economical theory divert the law of
Competition defense of its objective, and the apparent juridical safety offered by the
mathematical formulas can end up committing the whole system.

The School of Harvard, nailing the workable Competition, it points that the excessive
concentrations of economical power should be avoided, therefore they can result in
dysfunctions that harm the own economical relationships. That understanding is
directly related to the problem of the number of economical agents in performance in
certain section. The Competition is looked for as an end in itself, with the maintenance
or increase of the number of participants in the market. The protected thesis for the
School of Harvard can be summarized with the sentence “small is beautiful”.

On the other hand, the School of Chicago understands that the Competition defense is
centered in the benefits to the consumer guaranteed by the efficiency on the market,
independently of the economical agent to be in position monopolist or in the middle of
the Competition.

In Europe, the Competition defense is related to the goals of the own European Union,
in other words, the Competition is not limited to be an end in itself, more than that, it
is an instrument with which the European Union pursues its purpose. In this way, any
interpretation that reduces the Competition to an only end, although it is economical
efficiency or it tutors of the consumer, the European Community's Agreement it
doesn't tend the authorization.
It can be noticed on several experiences of Competition defense in different legislations. We can distinguish then the Competition defense in relationship to the type of prohibition of restrictive practices under two focuses. One is that the restrictive practices of the Competition are forbidden for producing a potential damage to the economy. The other is just the repression to the practices that culminate in an effective damage.

In the case of the Competition-end, or theory of the Competition-condition, it settles down a generic and previous prohibition to all the agreements and practices that can reach the competitive structure of the market, against the concentration or practices on that can result. That model (per se condemnation) it is focused in the danger that the practices represent for themselves, independent of the result in fact reached. The Competition is had as a value in itself, and it should be preserved, therefore it is what will allow the progress and the economical balance.

Already in the other model, denominated Competition-middle, or Competition-instrument, the economical agents’ of the market effective behaviors are privileged, once the Competition is had as something common, being able to be sacrificed legally in favor of other goods protected. It is inferred that that model doesn't combat agreements, oligopolies, monopolies or any form of market dominance, but it seeks the repression of those acts when they reveal being harmful to the general interest. In that hypothesis, those acts or agreements since not justified for any reason are declared illicit for producing negative effects to the Competition.
III - Relevant Market

To do any Competition analysis and to verify the market power of a company (the imposing conditions of a company in the market) it is necessary to define which the important market of the act or conduct that it is studied. It is essential to understand two concepts to establish the relevant market: product market and geographical market.

In what it refers to the product market, it should be defined initially which the product or service in subject and to verify if such product or service has some substitute, due to its characteristics, prices and applicability, considering for that answer the consumers' search for the product.

The geographical market is the area, the place, where that product offers or service happens sufficiently in Competition conditions homogeneous in terms of prices and characteristics of another product or service, to assist the consumers’ demand. In that case, it is also done necessary the analysis of eventual barriers to the entrance of new participants in that market, in other words, the difficulties or impossibilities that restrict new incoming to compete.

It is defining the important market that eventual exercise of economical power on the part of an agent, so much in concentration acts as in conducts, can be indeed forewarned or reprehended.
Interesting to point out the understanding of the concept of “market” of Prof. Washington Albino Peluso de Souza (p. 502) starting from the focus of the Economical Law.

“The Economical Law, in our point of view, treats the ‘market’ in face of the economical politics of the circulation of the wealth in the society, in agreement with the ideology that is taken by reference. There are no doubts that the theoretical construction of that institute has become pregnant in that the fact ‘circulation’, while expression of the ‘change’, is verified in any other social model, from the most primitive and moved away, or not, of the Liberalism.” (Open translation)

Prof. Peluso continues (p. 502) writing that “... the liberal model, combining Smith with Darwin, was projected in the Economy and in the Law, for the imposition of the rigidities of the institute of the bankruptcy (legal death), to the defeated by the strongest in the Competition (natural selection).” (Open translation)

The importance is verified of settling down the relevant market to analyze the implication of certain practices or operations in the Competition and its effects to the market and, consequently, to the consumer.
IV - The Brazilian System for Protection of Competition (SBDC)

The Brazilian System for Protection of Competition (SBDC) is comprised by the Economic Law Office (SDE), Economic Monitoring Secretariat (SEAE) and for the Administrative Council for Economic Defense (CADE), for the enforcement of the Law no. 8.884, of June 11, 1994.

In order to understand the SBDC structure is necessary to know the performance of these three Agencies, the highlights of the Law no. 8.884/94 and how Competition defense is considered in Brazil.

- The agencies that integrate SBDC:

As exposed the beginning of this item, The Brazilian System for Protection of Competition (SBDC) is integrated by Secretariat of Economic Law (SDE), by Secretariat for Economic Monitoring (SEAE) and for Administrative Council for Economic Defense (CADE).

The SDE of the Ministry of Justice is subdivided in two departments: the Department of Protection and Defense of the Consumer (DPDC) and the Department of Protection and Economical Defense (DPDE).
The DPDC deals with subjects related to the Law no. 8.078 of September 11, 1990, and it disposes about the consumer’s protection, not getting confused with antitrust matter, that is under the responsibility of DPDE.

The DPDE analyzes the subjects of Competition defense, especially related to the Law no. 8.884, June 11, 1994, and instruct the processes, mainly in their juridical aspects, for subsequent final decision of CADE.

The SEAE of the Ministry of Finance has the task to approach the subjects of Competition defense under the economical aspect of the matter and to elaborate a technical study that will aid SDE in the instruction of the process and CADE in its final decision.

The CADE, with authority and jurisdiction all over Brazilian territory, is a federal autarchy (independent agency) reporting to the Ministry of Justice. Composed by a President and six Counselors (Board Members), it will decide under the subjects foreseen in the Law no. 8.884/94, in other words, matters of Competition defense.

We should point out that SDE and SEAE have analytical and investigative functions, issuing non-binding opinions on mergers and anti-competitive cases, in other words, their “legal opinions” are merely suggestive to CADE, that can adopt them in its decision or not.
- The Law no. 8.884, June 11, 1994:

This Law of Competition Defense disposes on the prevention and the repression to the infractions against the economical order, guided by the constitutional principles of free enterprise, open Competition, social role of property, the consumer protection, and restraint of abuses of the economical power, being society at large entrusted with the legal rights protected by this Law.

The prevention is willing in the article 54 of the Law and it refers to the performance of SBDC in the analysis of acts, under any form manifested, that can limit or in any way to harm the open Competition, or to result in the dominance of relevant markets of goods or services.

The repression is willing in the arts. 20 and 21 of the Law and it refers to the performance of SBDC in the investigation and it combats to the infractions of the economical order that constitute, independently of blame, the acts under any form manifested, that have for object or can harm the free Competition or the free initiative, to dominate relevant market of goods or services, to increase the profits arbitrarily and to exercise an abusive dominant position.

- Territoriality and Ultra-territoriality:
The Law of Competition Defense is applied to the practices made in every national territory or that on it can produce or in fact produce effects, without damage of the conventions or agreements that Brazil is signatory.

CADE has the competence to analyze and to decide on matter of Competition defense in the Brazilian territory. However, we should attempt that even if a supposed operation among companies in other countries, but that in some way at least can contemplate at the Brazilian market, for instance if one of those companies has a subsidiary in Brazil, SBDC should act. SDE and the SEAE are able to appreciate the operation for at the final judgment by CADE.

It is inferred of the study of the Competition Law that frequently an operation (Merger or Acquisition, for instance), or a conduct, generates effects in several markets, what means that it should be appreciated by several antitrust agencies worldwide. Evidently the territoriality of the law prevails, assuring the jurisdiction for each agency of a country or economic block. It is easy to understand the importance of defining the relevant market in analysis.

In the United States of America, for instance, the incumbency of the analysis of cases of antitrust is assured to Federal Trade Commission (FTC) and to the Department of Justice (DOJ). In Europe, besides the agencies of Competition defense of each country-member, like Autorità Garante della Concorrenza e del Mercato (AGCM) in Italy and Bundeskartellamt in Germany, there is the European Commission of Competition Defense (DG-4), to analyze the case related to the European market.
- Judiciary Control:

It is CADE, inside of SBDC structure, which will rule the final decision on cases of Competition defense. It is the public administration carrying out its executive activity through juridical acts denominated administrative acts.

The autonomy of CADE is based on and justified in the specificity of the matters of Competition defense that demands knowledge in Law and Economy.

In the cases of conducts, the legal disposition, art. 50 of the Law no. 8.884/94, disposes that the decisions of CADE don't accept revision in the ambit of the Executive Branch. It is important to emphasize that CADE executes its own decisions and immediately after the judgment the Public Prosecution service shall be officially reported for other pertinent providences.

However, every CADE’s decision can be appreciated by the Judiciary Branch, but only in case of lesion or threatens to right, pursuant the art. 5th, XXXV of the Brazilian Federal Constitution: “the law won't exclude of the appreciation of the Judiciary Power lesion or threatens to right”.

- Revision of the Decisions of CADE:

The article 54 of the Competition Defense Law foresee the performance of SBDC in the control of acts and contracts, under any form manifested that can limit or in any
way to harm the open Competition. Such analysis proceeds for also to avoid that those operations results the dominance of relevant markets of goods or services.

After accomplishing the whole analysis, CADE can authorize the acts since assisted the legal requirements as: the increase of the productivity, the improvement of the quality of goods and services, to propitiate the efficiency and the technological development.

However, the Law of Competition Defense on article 55 assures to CADE the revision of its own decisions. In this sense, CADE can review the approval of the acts and contracts according to the article 54, if the decision has been based on false information or deceiving rendered by the interested, in case it happens the noncompliance of any of the obligations assumed by the interested or the sought benefits don't be reached.

- No-retroactivity:

The Law of Competition Defense is no retroactive. The norm for the judicial or anti-judicial facts is applied in validity when it occurs.

The Law no. 8.884/94 is applied to the acts happened after the Law in force. The past facts of Competition matters can be appreciated by previous laws, as the Law no. 8.158/91 and the Law no. 4.137/62.
Certainly, the beneficial retroactivity of the Law is assured. In this regard, to the facts happened during the validity of the Law no. 4.137/62 the dispositions of the Law no. 8.158/91 are not applied. The same principle is applied to the Law no. 8.884/94, excepted if more beneficial to the person/company investigated.

- Statue of limitation:

The article 28 of the Law no. 8.884/94 that disposes of limitation was revoked by the Law no. 9.783, of November 23, 1999. That Law establishes the period of limitation for the exercise of punitive action by the Federal Public Administration.

According to the article 1st of the mentioned Law, the action of the punitive of the Federal Public Administration in the exercise of police power prescribes in 5 years, in order to clean infraction to the legislation in force, counted of the act or practice of the act or, in the case of infraction permanent or continuous, of the day it has ceased.

The limitation is suspended when the validity of the ceasing commitments and acting, pursuant the articles. 53 and 58 of the Law no. 8.884/94, as disposes the article 3rd, I, of Law no. 9.783/99.
- Competition Law Applied:

The Law of Competition Defense acts in two stages, the prevention and the repression of practices to the competitive market. In each of those cases the procedure path is specific.

Brazilian law establishes that mergers must be reported, previously or in until 15 useful days of your accomplishment, when the merger results in a market share in excess of 20 percent or when one of the parties had sales in excess of BRL (reais) 400 million in the preceding year. These sales include those of the parent company abroad; pursuant article 54, Law 8884.

The all necessary documentation of the Act of Concentration (M&A), as it disposes the Resolution no. 15 of CADE, August 19, 1998, should be send in three counterparts of the corresponding documentation to SDE, that immediately will address one such counterpart to CADE and other to SEAE.

In SEAE the operation will be submitted to its first analysis and it should be ended in up to 30 days. It is followed by SDE that will conclude its analysis in equal period. In CADE within 60 days the operation, together with the technical opinions of SEAE and of SDE, it receives the analysis of the Attorney's office firstly for subsequent direction to the Counselor-Reporter (Board Member) that rules the operation for judgement for the Plenary Session after his analysis.
CADE can approve the operation without restrictions or approve the operation with restrictions, submitting some dissolution or performance commitments. CADE is also able to deny the operation. The interested can appeal of CADE’s decision to the own CADE, and those Counselors (Board Members) that judged in the first opportunity will also judge the revision request. It is also assured the direction of the subject to the Judiciary Department.

It should be pointed out that in spite of the Law set up the total period of 120 days for the final judgement, CADE, SDE and SEAE constantly officiate the parts in the operation (case) to answer some questions, what cause the suspension of the period, culminating with operations whose analysis extends for more than a year.

In the cases of the arts. 20 and 21 of the Law (repression), any interested can offer a Representation to SDE that will analyze the facts and indications presented in the same and will decide, depending on the robustness of the presented elements, for opening an Administrative Procedure, a Preliminary Verification or an Administrative Process.

SEAE can be officiated by SDE to analyze the concerning economical repercussions of the conduct investigated in the process and to instruct the decision of SDE. SDE’s decisions can be the filling of the Representation or the condemnation of the Represented part. But the case is decided ultimately by CADE, that can agree or do not with the understanding of SDE.
It is important to point out that the title-holder of the responsible process for the analysis is the State, represented by SDE. The person/entity/company that made the Representation to SDE is an auxiliary part of the Secretariat. Another fundamental point is that the accusation cannot be limited to the damages that a company is suffering for a competitor's anti-competitive conducts, but the damages that supposed practice causes to the relevant market, consequently, to the consumer's economical well-fare.

- Complementary Laws:

According to the report “Competition Policy in Brazil”, issued by the Ministry of Finance and the Ministry of Justice, in July 2002, we can point out two complementary legislations to the Brazilian Competitive Defense Law.

The Law no. 10.149 of 21st of December, 2000, amends Law no. 8.884/94, including the Leniency Program and disposes that the procedural fee for the SBDC to analyze the monitoring acts and agreements shall amount to R$ 45.000,00, which shall be shared in equal parts by CADE, SDE and SEAE.

The Directive no. 849, 22 September 2000, approves the regulations governing the competence of SDE concerning the investigation of infringements of the economic order.
V - Conclusion

Notwithstanding the large discussion involving Competition Defense and Competition Law, the doctrine didn't formulate a definition for the matter yet. Besides the current doctrine points the Competition Law as a “Diffuse Right”, there are three considerable doctrines that discuss the theme.

The first doctrine tries to link the Competition Law to the concept of Police Power, one of the own institutes of the “Administrative Right”. Nowadays, such a doctrine has less followers than in the past.

Another doctrine understands that the nature of the antitrust law should be studied under its endogenous features, which in the opinion of Prof. José Inácio Gonzaga Franceschini leads to the field of the “Economical Penal Law”.

Finally, we have the doctrine that places the Competition Law as part of the Law & Economics (Economical Law). Prof. Washington Albino Peluso de Souza is an exponent of that understanding and he wrote concerning the Competition concept:

“... We have presented the active political-economical element, moved away of the strict liberal absence and marching for the Competition (workable Competition). We are, therefore, in territory of Economical Law, with applications of the rules of reason, of the equivalence, among others.” (Free translation)- (p. 503)
However, independently of which doctrine would be inserted the Competition Law, as we could observe in that general vision of the Competition Defense, the Competition is something present and fundamental for a market economy and for the consumer's economical well-fare.

The performance of the Authorities of Competition Defense is fundamental to assure the full Competition among the applicants of a market, to make possible the development of the markets and to help the insertion of the Companies of a country in the Competition of a global economy.

After all, the legislation of Competition defense also contributes to transnational investors start to act at that market, once they have the judicial safety. Competition advocacy is essential to maintain a free-market-based economy that produces the products and prices that consumers demand and deserve

VI - Bibliographical References

- Cartilha do CADE, CADE.

- Competition Policy in Brazil. Brasília: Ministry o Finance, Ministry of Justice, 2002


