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Via Email:
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President Alexandre Barreto, CADE’s President
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SUBJECT: CADE Draft Guidelines on Cartel Fines

Dear Sir/Madam:

On behalf of the American Bar Association Antitrust Law Section, I am pleased to submit the attached comments in response to the request for public comments on the CADE Draft Guidelines on Cartel Fines.

Please note that these views are being presented only on behalf of the Antitrust Law Section. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and should not be construed as representing the policy of the American Bar Association.

If you have any questions after reviewing this report, I will be happy to provide further comments.

Sincerely,

Brian R. Henry
Chair, Antitrust Law Section

Attachment
The views stated in this submission are presented on behalf of the Antitrust Law Section. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and therefore should not be construed as representing the policy of the American Bar Association.

The Antitrust Law Section (“Section”) of the American Bar Association (“ABA”) appreciate the opportunity to submit their views to Brazil’s antitrust authority, the Administrative Council of Economic Defense (“CADE”), concerning the draft “Guidelines on Cartel Sanctions” (“Draft Guidelines”), which were issued for public consultation in July 2020. The following comments reflect the experience and expertise of the Section’s members as retained counsel, in-house counsel, and/or government enforcers in addressing issues involving merger policy, notification thresholds, and antitrust law guidance in the United States and other jurisdictions.

I. EXECUTIVE SUMMARY

The Section commends CADE for its efforts to provide transparency and predictability regarding the calculation of cartel fines. The Section offers these comments to assist CADE in further refining the Draft Guidelines, especially in regards to the methodology used to set the base amount of the fine, the circumstances that give rise to adjustments to the base amount, and the predictability and proportionality of the fines imposed. In particular, the Section recommends adjustments to the steps for the calculation of fines and clarification on some aspects of the basis of calculation. The Section further recommends that CADE provide clarification on the adjustment to the base amount, specifically regarding the duration of conduct, recidivism, and aggravating/mitigating factors. The comments reflect the expertise and experience of the Section’s members with antitrust laws and enforcement practices around the world. In particular, the Section’s members are familiar with issues regarding the calculation of antitrust fines imposed on companies and individuals for antitrust violations. The Section
is available to provide additional comments, or otherwise to assist CADE as it may find helpful.

II. INTRODUCTION

The Draft Guidelines comprise two sections: (i) calculation of fines, consisting of multiple sub-parts, including: (a) basis of calculation, (b) base amount, (c) adjustment to the base amount regarding the duration of the conduct, (d) adjustment to the base amount regarding aggravating/mitigating factors, (e) verification of legal threshold, (f) recidivism, and (ii) alternative penalties.

With respect to the first section, the Section respectfully suggests that CADE may wish to address some aspects, such as: (i) adjusting the steps for the calculation of fines, so that no aggravating or mitigating factor is disregarded in Step 3; (ii) clarifying the meaning of gross turnover in the year before the initiation of proceedings; (iii) adjusting turnover before the year of the initiation of the Administrative Proceedings only by inflation until the year of the initiation of the proceedings; (iv) explicitly stating that the statutory rule should be disregarded whenever it would result in a deviation of 10% or more from the average annual turnover with the product or services affected by the conduct throughout its duration; and (v) providing a more exhaustive list of examples of ancillary sanctions that may be applied and the situations that would warrant imposing these sanctions.

The Section also identified some practical issues regarding (i) fines for non-submission of bids or unsuccessful attempts and (ii) fines for international cartels. The Section would welcome clarity on how fines should be calculated in cases of complementary bids.

Finally, the Section proposes that CADE consider establishing objective criteria for the adjustment to the base amount, in relation to (i) the duration of the conduct, (ii) recidivism and (iii) aggravating/mitigating factors, in order to provide transparency and avoid a high level of abstraction. The Section also recommends that CADE include compliance programs as a mitigating factor, in order to encourage such efforts.
III. GENERAL COMMENTS

a) Elimination of Step 3 by adjusting Step 2

The Draft Guidelines state that CADE’s case law has established that three steps are taken to calculate a fine. The first is the definition of the base turnover and the base percentage. The second is the adjustment for the duration of the cartel and for aggravating or mitigating factors. The last one is the verification if the resulting fine is within the 0.1% to 20% statutory range.

The fact that the first two steps could reach fines outside the statutory range may result in ultimately disregarding in Step 3 either the adjustment for the duration of the cartel or some aggravating and mitigating factors, since distinct adjustments (e.g., for different durations) could lead to the same result when both exceed the limit (20%). The Section therefore recommends that the aggravating or mitigating factors always be applied as a percentage of the margin available between the base fine and the statutory limit (or ceiling for cartel cases), so that no aggravating or mitigating factor is disregarded in Step 3.

For example, instead of adding a fixed percentage for each year of the conduct besides the first, CADE should increase a fine in percentages of the range still available until the statutory 20% limit is reached. Thus, each year could add 10% of the range still available, for each year besides the first year of the cartel, until the limit of ten years is reached. As a result, a base fine of 15% for a cartel of 7 years’ duration (6 years plus the initial one) would result in adding 60% (10% × 6) of the 5% still available until the 15% base fine reaches the 20% statutory limit. The fine in this example would, therefore, be 18%, equal to the 15% base plus the 3% (60% of 5%) addition for the duration of the conduct. The same would occur with a base fine of 14% for a cartel of 11 years’ duration – it would result in adding 100% (10% × 10) of the 6% still available until the 14% base fine reaches the 20% statutory limit. The fine would be 20%, equal to the 14% plus the 6% (100% of 6%) addition for the duration of the conduct.

Through this method, the statutory limit could be reached, but never exceeded, thus avoiding any need to disregard aggravating or mitigating factors.
b) Clarifying the meaning of gross turnover in the year before the initiation of proceedings

The Draft Guidelines clarify that the general rule is to calculate the fine based on the “gross turnover” in the “year preceding” the opening of the Administrative Proceeding. The Section suggests further clarifying that “gross turnover” is the amount of sales including all applicable taxes, regardless whether payable by the company on its own behalf or as a collector of taxes payable by the customers (like the Brazilian ICMS\(^1\)). It also recommends making it clear that such turnover should exclude intragroup sales, which are usually not affected by cartel conduct.

The Section further suggests that it would be helpful to include an example of how the preceding year is identified under Article 37, I.\(^2\) The Section also welcomes clarification of the relevance of the “preceding year” as opposed to another starting point for the fine calculation. Specifically, it should be clarified the provision refers to the year before the opening of the formal proceedings and not the beginning of the investigation through a preliminary probe or an administrative inquiry.

IV. COMMENTS ON SPECIFIC PROVISIONS

a) Basis of calculation (revenue / rate):

1) Adjustment of the base turnover by the SELIC rate

The Draft Guidelines refer to the gross turnover in the year preceding the opening of the Administrative Proceedings as the basis of calculation, but include exceptions for cases in which the turnover of such year is non-existent or the market has increased or decreased significantly. The Section commends CADE for taking other criteria into account in cases in which the statutory criteria would not be a sufficient deterrent or would result in excessive punishment.

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\(^1\) ICMS refers to the Brazilian Tax on the Circulation of Goods and on Services of Interstate and Intermunicipal Transportation and Communication.

\(^2\) Law 12,529/2011: “Art. 37. A violation of the economic order subjects the ones responsible to the following penalties: I - in the case of a company, a fine of one tenth percent (0.1%) to twenty percent (20%) of the gross sales of the company, group or conglomerate, in the last fiscal year before the establishment of the administrative proceeding, in the field of the business activity in which the violation occurred, which will never be less than the advantage obtained, when possible the estimation thereof;”
In furtherance of avoiding excessive fines, the Section recommends that, when using base turnover prior to the year preceding the opening of the Administrative Proceedings, it does not apply SELIC\(^3\) rate until January of the year in which that proceeding is opened.

The SELIC rate includes compounded interest and inflation adjustment, which would result in the company paying a fine with interest on turnover accrued even before it was aware of the Administrative Proceedings. This may result in excessive fines, specifically if periods of economic crisis and high interest rates are considered. Whenever turnover before in the year of the initiation of the Administrative Proceedings set forth in Law No. 12,529/2011 (the “Brazilian Competition Act”) are used, they should be adjusted only by inflation until the year of the initiation of the proceedings. SELIC should apply only from such year on, given the lack of statutory ground for charging interest rates before this period.

2) **Line of business and affected market and relevant year(s)**

The Section commends CADE for acknowledging that, in most cases, the most appropriate turnover is that achieved with the products or services affected by the conduct. This often requires limiting the statutory base geographically or by excluding other products or services in the same line of business to achieve proportionality. The Draft Guidelines are not clear, however, as to what is sufficiently disproportionate to allow a deviation from the statutory rule, i.e., the gross turnover in the year preceding the opening of the Administrative Proceeding.

Therefore, the Section suggests that CADE explicitly state that the statutory rule should be disregarded whenever it would result in a deviation of 10% or more from the average annual turnover of the products or services affected by the conduct throughout its duration, adjusted by inflation until the same year of the turnover set by the statutory rule. In addition, this average should always be the basis of the calculation of the fine when the statutory rule is set aside. The myriad of criteria set forth on pages 14 and 15 of the Draft Guidelines as possible alternatives to the statutory rule will result in uncertainty regarding the base fine and potentially unreasonable fines, as described in the examples below:

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\(^3\) SELIC stands for the Brazilian Special Liquidation and Custody System.
i) taking the turnover in the last year of the conduct or the year with the highest turnover may result in excessive or insufficient punishment, as it may deviate substantially from the average turnover during the duration of the conduct;

ii) using the turnover of the product in the year of the affected public bid could result in fines that include a relevant amount of sales to private parties or sales in public bids not affected by the conduct.

The Section also recommends that the use of the proxy to calculate the applicable turnover described on page 17 (i) of the Draft Guidelines as “virtual turnover”, should apply only to cartel cases with indirect effects in Brazil, for which CADE is unable to calculate the turnover related to the products sold directly or indirectly to Brazil and affected by the conduct.

3) Fines for non-submission of bids or unsuccessful attempts

The Draft Guidelines contain provisions regarding cartels in public or private bids but do not detail how fines should be calculated in cases in which the participant has not been awarded a contract or achieved sales as a result of the conduct, such as in agreements not to submit a bid or to submit complementary bids. For example, the U.S. Sentencing Commission has noted that:

“Understatement of seriousness is especially likely in cases involving complementary bids. If, for example, the defendant participated in an agreement not to submit a bid, or to submit an unreasonably high bid, on one occasion, in exchange for his being allowed to win a subsequent bid that he did not in fact win, his volume of commerce would be zero, although he would have contributed to harm that possibly was quite substantial.”

Therefore, the U.S. Sentencing Commission provides that in a bid-rigging case in which the defendant submitted one or more complementary bids, the defendant’s volume of commerce for purposes of fine calculation should be “the greater of (A) the volume of commerce done by the organization in the good or services that were affected by the violation, or (B) the largest contract on which the organization submitted a complementary bid in connection with the bid-rigging conspiracy.”

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5 Ibid.
The Section therefore welcomes clarity on how fines should be calculated in cases of complementary bids and recommend addressing this issue similarly to the way that it is done in the United States.

4) **Fines for international cartels**

In international cartel cases and/or cases concerning worldwide companies, the Section would welcome: (i) confirmation that only domestic sales will be covered, (ii) guidance on what sales constitute domestic sales, and (iii) clarification of applicable exchange rates.

The Section specifically suggests that domestic sales should consist of products or services delivered in Brazil for use in the country, regardless of where payment or procurement takes place. To avoid double-counting, revenues from contracts executed in Brazil but related to the supply of products and services overseas or to be exported should be excluded from the base turnover for the calculation of the fine, even if affected by the conduct. In fact, everything related to exportation, even if indirectly, must be excluded from the base turnover, as it will be considered as an indirect effect in another jurisdiction.

In cases involving freight transportation, the Section suggests that the turnover to be considered is the average of the turnover attributable to transportation of products to Brazil and from Brazil, regardless of the point of sale, if both have been affected by the conduct.

5) **Fines for individuals**

The Section suggests that the Draft Guidelines clarify that the rule setting forth that fines for individuals who settled should be lower than those for individuals that do not settle should be applicable only to individuals with similar involvement in the conduct and similar personal circumstances relating to the calculation of the fine. This is intended to avoid a situation in which, for example, a CEO who agrees to settle a case for a high amount prevents lower-ranked employees with limited involvement in the company from being fined at a level closer to the lower end of the statutory range.

6) **Ancillary sanctions**

The Section recommends that there be a more exhaustive list of examples of ancillary sanctions that may be applied and the situations that would warrant imposing these sanctions. The Section further suggests that sanctions related to interference in the
governance of sanctioned companies, including change in ownership and change of directors, be limited to specific situations outlined in the Draft Guidelines, in order to avoid the misuse of such a serious remedy. Specifically, regarding debarment, the Section would welcome a more clear definition of the requirements for a defendant to be subject to this sanction, including the circumstances in which a defendant could be considered the leader of the conduct.

**b) Adjustment to the base amount:**

1) **Duration of conduct**

Section 2.1.1.3 of the Draft Guidelines provides that the fine shall be increased by 0.5 percentage points (p.p.) for each year of the infringement after the first year. The Draft Guidelines further clarify that a “period of less than one semester will be considered as half year and a period of more than six months, but less than one year, will be counted as a full year.”

The Section commends the Draft Guidelines for proposing a clear calculation methodology and for eliminating uncertainty regarding how periods of less than one year will be treated in calculating the duration of the infringement. However, the Section notes that increasing the magnitude of the fine based simply on annual increments, with no clear threshold (i.e., a maximum number of years), could introduce subjectivity and therefore fail to provide legal certainty.

In the United States, the duration of the cartel affects the amount of the fine through the calculation of the volume of commerce affected, which in turn is the basis upon which the fine is set. The calculation of the fine under the U.S. Sentencing Guidelines begins with the determination of a “base” fine of 20% of the affected volume of commerce. That volume is measured as the amount of goods or services sold by the entity that is affected by the violation, i.e., the total volume of goods and services sold during the entire course of the cartel. Thus, the duration of the cartel alone (which may or may not have any bearing on its perniciousness) is not, in and of itself, a factor in the fine calculation.

In Brazil, the Section understands that Brazilian revenues in the year preceding the opening of the Administrative Proceeding is, as a rule, used to define the basis to calculate the fines. The Draft Guidelines provide, however, that this rule may not apply

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Ibid.
“in the cases in which it is not possible to obtain this amount or the amount informed is not considered adequate for calculating the fine” (see Section 2.1.1.2.1 of the Draft Guidelines). This may be the case, for example, when a company has undergone significant growth or reduction in the market precisely in the year prior to the opening of the Administrative Proceeding.

The Section respectfully suggests that CADE consider stating instead that duration should not be an automatic multiplier in the calculation of fines, and that the Draft Guidelines provide that the fine would be increased in percentages up to the statutory limit (i.e., 20%), as described in Section III(a) above. By doing so, the Draft Guidelines would make clear that the statutory limit could be reached but never be exceeded. Alternatively, also with the goal of preventing disproportionate and excessive fines, the Section respectfully suggests that CADE consider setting forth the maximum number of years by which a penalty may be multiplied.

2) Recidivism

Section 2.1.1.6 of the Draft Guidelines sets forth that “in the event of a recidivism, double the fine should be imposed when the Defendant was previously sentenced for antitrust violations by CADE’s Administrative Tribunal.” The Section commends CADE for providing transparency and clarity with respect to this point.

Nevertheless, for the sake of completeness and to avoid any doubt, it would be helpful for the Draft Guidelines to clarify whether recidivism will be found to have occurred only in cases in which the party engages in the same conduct again (e.g., whether a company found to have engaged in abuse of dominant position for imposing exclusivity clauses would be considered a recidivist for later engaging in price discrimination or for participating in a cartel agreement). In the United States, the EU, and UK, recidivism is based on the commission of the same or a similar offense, and we recommend that CADE adopt the same rule. For example, section 8C2.5 of the United States Sentencing Commission’s Sentencing Guidelines provides:

“(1) If the organization (or separately managed line of business) committed any part of the instant offense less than 10 years after (A) a criminal adjudication based on similar misconduct; or (B) civil or administrative adjudication(s) based on two or more separate instances of similar misconduct, add 1 point; or (2) if the organization (or separately managed line of business) committed any part of the instant offense less than 5 years after (A) a criminal adjudication based on similar.
misconduct; or (B) civil or administrative adjudication(s) based on two or more separate instances of similar misconduct, add 2 points.^[7]

3) Aggravating/mitigating factors

Section 2.1.1.4 of the Draft Guidelines sets forth the legal aggravating and mitigating factors established under Article 45 of the Brazilian Competition Act: (i) severity of the violation; (ii) good faith of the offender; (iii) advantage obtained or intended by the offender; (iv) consummation or not of the violation; (v) degree of damage, or danger of damage, to free competition, the national economy, consumers, or third parties; (vi) negative economic effects produced in the market; (vii) economic situation of the offender; and (viii) recidivism.

The Draft Guidelines provide that CADE’s Tribunal should set the fines on a case-by-case basis: “the sentencing guidelines elements must be considered in all cases, whenever possible, individually, since in the same violation the levels of culpability of the parties against whom judgment was entered will not necessarily be the same.” The Section agrees that aggravating and mitigating factors are useful to set forth fines that adequately reflect the specific conduct carried out by the defendant. Given the importance of such factors, however, the Section respectfully submits that the Draft Guidelines provide additional details as to how these will be assessed in practice. Below we discuss some of the factors that would benefit from further clarification in the Draft Guidelines:

i) Severity of the violation: The Draft Guidelines state that this factor may be related to a leadership role and to whether the offenders were subject to coercion. The Section notes that it is often challenging to ascertain the roles of each cartel participant. For instance, in long-lasting cartels the roles may change over time and new players may join the cartel. While the organizer of the cartel might deserve the greatest punishment, it may be impracticable to determine which cartel member had such a leading role. Investigation into this element may complicate and lengthen investigations, as investigated parties may challenge the arguments and defenses submitted by the other defendants in order to achieve higher antitrust exposure for competitors (and lower exposure for themselves). Accordingly, the Section recommends that CADE further consider this factor, and elaborate further on it in the Draft Guidelines.

^[7] Ibid., §8C2.5.
ii) **Good faith of the offender:** As stated in the Draft Guidelines, “*this element is related to the intention of the perpetrator*” and could be ascertained, for instance, if the perpetrators commit a violation knowing that it is an illegal act (*e.g.*, by means of secretive exchanges), if the affected markets are essential, or based on the level of collaboration in the process and procedural loyalty. The Section agrees that the “*intention of the perpetrator*” may be relevant, but suggest that it would be advisable to further clarify it with examples of what CADE would consider evidence of good faith behavior, and conversely, of the absence of such behavior. The lack of clarity through examples could result in such factor being applied in an arbitrary manner.

iii) **Consummation or not of the violation:** The Section agrees that “*in case the effects have not materialized, this can be interpreted as a mitigating factor.*” Deterrence considerations suggest, however, that punishment should be determined primarily according to the specific conduct carried out by the defendant rather than on its success. From a purely practical perspective, it may also be difficult for the authority to obtain economic evidence to establish consummation, and the issue may invite extensive debate and challenge by other defendants. Again, this may add further complexity and delay of proceedings. Accordingly, the Section recommends that CADE give additional consideration to the relevance of this factor and elaborate further in the Draft Guidelines on how much weight such factor will receive in the calculation of a sanction.

iv) **Negative economic effects produced in the market:** Typically, there is a presumption by antitrust authorities that cartels produce negative economic effects. The Section agrees that “*this is a calculation that is generally difficult to perform,*” and encourage CADE to provide additional clarification as to how it intends to determine the effects of any given conduct. In addition, the Section commends the Draft Guidelines for acknowledging that all measures taken to reduce harm could be considered as mitigating factors in setting the penalties.

v) **Economic situation of the offender:** as stated in the Draft Guidelines, “*this element can serve mainly as mitigation in situations where the party against whom judgment was entered is evidently in a situation of economic hardship.*” The Draft Guidelines provide that this impairment “*can be proven by bankruptcy or court-supervised reorganization petitions by the company.*” However, the Draft Guidelines do not address the risk of insolvency that might
result from the payment of the fine, or even the lack of financial means to pay
the fine in full. In the United States, the U.S. Department of Justice has agreed
to allow the offender to pay fines in instalments in appropriate cases.8 The
Section recommends that CADE consider adopting the same policy and
expressly state that the only place where economic hardship should be a factor
is in the ability to pay context. The Section notes that, in this context, a fine
that exceeds what the company can afford to pay overtime may seriously
jeopardize its continued viability and possibly result in decreased competition
in the market.

Finally, the Section recommends the inclusion of the existence of an effective
compliance program as a possible mitigating factor. Compliance programs are the first
line of defense to prevent antitrust offenses and the corresponding harm to consumers.
The efforts made by a company to prevent antitrust offenses should be encouraged and
not disregarded. Competition authorities in other countries have recognized that
compliance programs can be a mitigating factor in appropriate circumstances, i.e., where
the existence of effective compliance measures can be supported by evidence. For
example, in April 2019, the Antitrust Division of the U.S. Department of Justice9
published updated guidance for corporate compliance programs in criminal antitrust
investigations, providing factors that prosecutors should consider when evaluating the
effectiveness of compliance programs for determining how to prosecute or resolve
criminal enforcement actions:

- What role did the antitrust compliance program play in uncovering the antitrust
  violation?
- Did anyone who had responsibility to report misconduct to the compliance
  group/officer know of the antitrust violation? If so, when was the violation
  discovered, by whom, and how was it uncovered? If not, why not?
- Has the company conducted an analysis to detect why the antitrust compliance
  program failed to detect the antitrust violation earlier?
- Has the company revised its antitrust compliance program as a result of the
  antitrust violation and lessons learned? How did the company address, and
determine how to address, failures in the compliance program? Was outside
counsel or an advisor involved?

8 See, e.g., ibid., § 8C3.3(b): “(b) The court may impose a fine below that otherwise required by §8C2.7 (Guideline
Fine Range - Organizations) and §8C2.9 (Disgorgement) if the court finds that the organization is not able and, even
with the use of a reasonable installment schedule, is not likely to become able to pay the minimum fine required by
§8C2.7 (Guideline Fine Range - Organizations) and §8C2.9 (Disgorgement)”.
9 U.S. DEP’T OF JUSTICE, EVALUATION OF CORPORATE COMPLIANCE PROGRAMS IN CRIMINAL ANTITRUST INVESTIGATIONS
• What role did the senior leadership play in addressing the antitrust violation and revising the compliance program to better detect the conduct that resulted in the antitrust violation?

• Does the company believe that changes to the antitrust compliance program will prevent the recurrence of an antitrust violation? What modifications and revisions did the company make? How will the company evaluate the continued effectiveness of its antitrust compliance training? How did the company convey the changes to antitrust policies and procedures to employees? Were employees required to certify they understood the new policies?

• Does the antitrust compliance program provide guidance on how to respond to a government investigation? Does the program educate employees on the ramifications of document destruction and obstruction of justice?

• Did the compliance program assist the company in promptly reporting the illegal conduct? Did the company report the antitrust violation to the government before learning of a government investigation? How long after becoming aware of the conduct did the company report it to the government?

The Section therefore respectfully suggests that CADE consider including similar guidance in the Draft Guidelines.

V. CONCLUSION

The Section appreciates the opportunity provided by CADE to comment on the Draft Guidelines and remains available for any clarification and/or questions that CADE may have.