

September 18, 2023

Via Email: a.cordeiomacedo@gmail.com

SUBJECT: Joint Section Comments on the Brazilian Administrative Council for Economic Defense (CADE) Draft on the Non-Horizontal Mergers Guidelines

Dear Sir/Madam:

On behalf of the American Bar Association Antitrust Law and International Law Sections, we respectfully submit these comments in response to the Brazilian Administrative Council for Economic Defense (CADE) Draft on the Non-Horizontal Mergers Guidelines.

The views expressed herein are being presented on behalf of the Sections of Antitrust Law and International Law. They have not been reviewed or approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the position of the Association.

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

Sincerely,

David A. Schwartz

Anna Shaeffer

**COMMENTS OF THE AMERICAN BAR ASSOCIATION’S
ANTITRUST LAW SECTION AND INTERNATIONAL LAW SECTION ON THE
DRAFT GUIDELINES ON NON-HORIZONTAL MERGERS PUBLISHED BY THE
BRAZILIAN ADMINISTRATIVE COUNCIL FOR ECONOMIC DEFENSE (“CADE”)**

September 5, 2023

The views stated herein are presented on behalf of the Sections of Antitrust Law and International Law. They have not been reviewed or approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the position of the American Bar Association.

The Antitrust Law Section and the International Law Section (the “Sections”) of the American Bar Association (“ABA”) submit their views to Brazil’s antitrust authority, the Administrative Council for Economic Defense (“CADE”), concerning the draft “Guidelines on Non-Horizontal Mergers” (“Draft Guidelines”), which were issued for public consultation on July 20, 2023.¹ The Sections are providing general comments related to the Draft Guidelines with the objective of focusing on those areas where we believe further clarification or reconsideration would be beneficial. The Sections are available to provide additional comments or assistance in any other way that CADE may deem appropriate.

The Antitrust Law Section (“ALS”) is the world’s largest professional organization for antitrust and competition law, trade regulation, consumer protection and data privacy as well as related aspects of economics. Section members, numbering over 9,000, come from all over the world and include attorneys and non-lawyers from private law firms, in-house counsel, non-profit organizations, consulting firms, federal and state government agencies, as well as judges, professors, and law students. The ALS provides a broad variety of programs and publications concerning all facets of antitrust and the other listed fields. Numerous members of the ALS have extensive experience and expertise regarding similar laws of non-U.S. jurisdictions. For over thirty years, the Antitrust Law Section has provided input to enforcement agencies around the world conducting consultations on topics within the Section’s scope of expertise.²

The International Law Section (“ILS”) focuses on international legal issues, the promotion of the rule of law, and the provision of legal education, policy, publishing, and practical assistance related to cross-border activity. Its members total more than 11,000, including private practitioners, in-house counsel, attorneys in governmental and inter-government entities, and legal academics, and represent over 100 countries. The ILS’s over fifty substantive committees cover competition law, trade law, and data privacy and data security law worldwide as well as areas of law that often intersect with these areas, such as mergers and acquisitions and joint ventures. Throughout its century of existence, the ILS has provided input to debates relating to international legal policy.³ With respect to competition law and policy specifically, the ILS has provided input for decades to authorities around the world.

¹ CADE, Guia de Análise de Atos de Concentração Não Horizontais [Guidelines on Non-Horizontal Mergers] (Draft, July 20, 2023), <https://www.gov.br/participamaisbrasil/guia-v> [hereinafter Draft Guidelines].

² Past comments of the ALS are available at https://www.americanbar.org/groups/antitrust_law/resources/comments_reports_amicus_briefs/.

³ *About Section Policy*, AM. BAR ASS’N, https://www.americanbar.org/groups/international_law/policy/about/.

The Sections applaud CADE's efforts in preparing and circulating for comment the Draft Guidelines, particularly as they contribute to the increased efficiency, consistency, and transparency of the merger review process and further the international discussion of state-of-the-art analysis of non-horizontal mergers. The Sections believe, however, that the Draft Guidelines could benefit from (i) more clarity and precision regarding the definition of the general terms used throughout the text, as well as more explicit references to previous guidelines and CADE's precedents; and (ii) clearer indication that non-horizontal mergers are less likely to raise competitive concerns in comparison to horizontal mergers, as well as guidance on the evidence that can be presented by the parties to demonstrate efficiencies. In addition, (iii) considering that the Draft Guidelines' aim to provide guidance that is applicable to non-horizontal mergers across sectors, the Sections respectfully suggest that, in instances in which the examples are limited to the digital market sector, CADE expand its examples to incorporate references to other sectors.

I. Definition of Key Terms and References to Previous Guidelines and Precedents

First, the Sections endorse CADE's efforts to carefully consider various scenarios involving non-horizontal mergers. However, some of the definitions in the Draft Guidelines could be more precise to reduce legal uncertainty. The Sections encourage CADE to consider clarifying or revising certain terms to further improve transparency and legal certainty. In addition, the Sections recognize that some flexibility is necessary to allow the Draft Guidelines to fulfill their goals but respectfully suggest that CADE provide as much guidance as practicable on open-ended terms such as "complex markets" for better comprehension by the legal and business community. For instance, defining a "disruptive player/maverick" would clarify the parameters CADE uses to analyze non-horizontal mergers.⁴

Also, the Sections suggest that the Draft Guidelines define terms that are key to the analysis of the reportability of the transactions to CADE. For example, a precise definition of an "interdependent relationship between the parties" would be instrumental in analyzing the nature of vertical relationships between the parties for reportability purposes.⁵ A list of suggestions of terms that the Sections believe would benefit from a more precise definition is provided in **Appendix A**.

In addition, with the goal of enhancing consistency and conciseness, the Sections respectfully propose that CADE consider limiting the scope of the Draft Guidelines to provisions not covered in the Guidelines on Horizontal Mergers (the "Horizontal Guidelines"). For the provisions that are substantially the same, CADE could include the appropriate references to the Horizontal Guidelines rather than re-defining the concepts and provisions that are already detailed therein. A chart with examples of such provisions (*e.g.*, relevant market definition, potential coordinated effects, and potential unilateral effects) is provided in **Appendix B**.

The Sections also respectfully propose that CADE consider incorporating additional references to existing precedents and pertinent agency and judicial interpretations whenever applicable to specific provisions in the Draft Guidelines, as this would help to increase legal certainty by underscoring the Draft Guidelines' basis in case law and foster consistent analysis of future cases.

⁴ Draft Guidelines, *supra* 1, Items 90, 121 and 389.

⁵ *Id.*, Item 78. Despite the importance of having a clear definition of concepts that may impact the analysis of the reportability of transactions, the Sections fully endorse CADE's approach to focus the Draft Guidelines on the competition assessment of non-horizontal transactions (analysis of the merits) rather than discussing reportability criteria.

II. Pro-Competitive Effects and Efficiencies Analysis

While the Draft Guidelines recognize that non-horizontal transactions can have pro-competitive effects, they fall short of recognizing that non-horizontal mergers are less likely to raise competitive concerns in comparison to horizontal mergers.⁶

The Draft Guidelines state that CADE would investigate the merged entity's ability and incentive to behave anticompetitively post-transaction and the expected effects of any anticompetitive conduct. The Draft Guidelines also provide a presumption of legality for transactions where the merging parties' combined share in the relevant markets is below 30%. While the Sections applaud CADE's efforts to provide concrete guidance to assist companies in evaluating risks related to non-horizontal mergers – which is consistent with existing CADE rules⁷ as well as foreign guidelines – the Sections suggest that CADE make clear that this presumption should not be interpreted to imply that non-horizontal mergers that exceed this threshold necessarily threaten to harm competition.⁸

The Sections also respectfully suggest that CADE further describe: (i) market characteristics, other than level of concentration, that could impact CADE's analysis of potential theories of harm applicable to non-horizontal mergers; and (ii) the type of documentary evidence and economic analyses on which CADE would rely as part of its analysis of specific theories of harm. In addition, while the Draft Guidelines state that CADE must analyze the transaction's "net effect on competition,"⁹ the Sections submit that the text could be further improved by providing additional information on what the parties may present to CADE as evidence of efficiencies and pro-competitive effects. The Sections respectfully suggest that the Draft Guidelines' evidentiary requirements for claimed efficiencies to be deemed valid may be overly rigid,¹⁰ while at the same time leaving significant room for CADE to disregard efficiency claims. In this respect, when providing the methodology used for the analysis of whether the parties to a vertical merger would have incentives to pursue market foreclosure post-transaction, the Draft Guidelines recognize that the proposed methodology fails to consider potential efficiencies, without providing alternative methodologies that would take such efficiencies into account.¹¹

III. Non-Horizontal Mergers Involving Digital Markets

Finally, the Draft Guidelines appear to suggest that non-horizontal mergers in digital markets may require special treatment in certain instances – for example, when defining the relevant product market to evaluate the merger's effects on competition, and when evaluating theories of harm specific to the digital sector.¹² The Sections recognize CADE's intent for the Draft Guidelines and its framework for analysis to be broadly applicable to any and all economic sectors. To better achieve this objective, the Sections respectfully suggest that the Draft Guidelines include non-digital sector examples in addition to digital examples in appropriate instances.

⁶ Joint Comments of the American Bar Association's Section of Antitrust Law and Section of International Law on the European Commission's Draft Guidelines on the Assessment of Non-Horizontal Mergers Under the Council Regulation on the Control of Concentrations Between Undertakings 7 (May 2007), https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/v8/comments_assess-mergers.pdf.

⁷ CADE Resolution No 33/22 provides that non-horizontal mergers, in which the Parties' market shares in the vertically related markets are below 30%, are eligible to the so-called fast-track procedure. [Resolução Cade nº 33, de 14 de abril de 2022.](#)

⁸ *Id.* at 9.

⁹ Draft Guidelines, *supra* 1, Items 161 and 164.

¹⁰ *Id.*, Item 164.

¹¹ *Id.*, Items 153 and 154.

¹² *Id.*, Items 107 and 125.

The Sections appreciate CADE's consideration of these comments and would be pleased to discuss them in more detail if deemed useful.

Appendix A

Terms that would benefit from a more precise definition

Section	Item	Term
I.1	78	interdependent relationships between parties
II	90	“two-sided market”
II.1	107	“complex markets”, “those that are more technology-intensive” e “where there is intensive innovation”
II.3	121	“disruptive market player”
II.3	123	“multi-homing”
II.3.2	150	“spot contracting”
II.3.2	150	“predominance of single-homing”
III.1.1	206	“input foreclosure”
III.1.1.1	213	“market balance”
III.1.1.1.1	235	“reputational costs”
III.1.1.1.2	244	“direct or indirect network effects”
III.1.1.1.2	249	“digital markets”
III. 1.1.2.3	269	“defensive strategies”
III.1.2	279	“customer foreclosure”
III.3	381	“productive symmetry between companies”
III.3	381	“technological homogeneity”
III.3	387	“technological stability of products and processes”
III.3	388	“market maturity”
IV.1.1	418	“subordinated or grouped sales”
Annex I	443	“expected deviation ratio of foreclosed rivals”
Annex I	455	“breakeven analysis”
Annex I	469	“market recovery rate (REC)”

Appendix B

Redundance/Similarities with Horizontal Merger Guidelines

Redundance/Similarities between Horizontal and Non-Horizontal Merger Guidelines			
Horizontal Merger Guidelines		Non-Horizontal Merger Guidelines	
Section	Pages	Section	Items
2.3 Relevant market (2.3.1 Introduction, 2.3.2 Relevant market dimensions, 2.3.3 Supply-side substitutability, 2.3.4 Basic concepts, 2.3.5 Methodology, 2.3.6 Considerations)	13-22	II. PROCEDURES FOR REVIEWING NON-HORIZONTAL MERGERS II.1 Step I: Definition of the Relevant Market(s)	94-107
2.4 Level of concentration (2.4.1 Market shares, 2.4.2 Concentration ratio and causal link)	22-25	II. PROCEDURES FOR REVIEWING NON-HORIZONTAL MERGERS II.2 Step II: Determination of Market Share and Concentration Ratios	108-112
2.5 Unilateral effects (2.5.1 Entry analysis, 2.5.2 Rivalry analysis, 2.6 Buyer power)	26-40	II. PROCEDURES FOR REVIEWING NON-HORIZONTAL MERGERS II.3.1 Ability to exercise market power II.3.2 Incentives to exercise market power II.3.3 Anti-competitive effects	113-159
2.7 Coordinated effects	40-42	III. VERTICAL INTEGRATIONS III.3. Coordinated Effects	195-197; 370-399