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

The Section of Antitrust Law and Section of International Law (together, the “Sections”) of the American Bar Association (“ABA”) are pleased to submit these comments to the Brazilian Administrative Council for Economic Defense (“CADE”) on its proposed amendments to regulations on associative agreements, in response to the call for public comments from Public Consultation n. 02/2016, which was opened on May 5, 2016. The Sections recognize and appreciate CADE’s continued efforts to review, refine and further improve the Brazilian merger review system. We welcome the opportunity to provide comment on the proposed changes and hope that they will assist CADE in finalizing the amendments. The Sections’ comments reflect their expertise and experience with competition law in the United States as well as in numerous jurisdictions worldwide, including Brazil.

Comments on Proposed New Definition for Associative Agreement

CADE Public Consultation n. 02/2016 proposes to repeal and replace the current rules (CADE Resolution n. 10/2014) that define when an arrangement qualifies as an “associative agreement” and is subject to Brazil’s pre-closing notification regulations.

The proposed new version of the resolution defines an “associative agreement” as one that “establishes a common enterprise for the purpose of exploring an economic activity.” The new resolution defines a “common enterprise” as “any enterprise established in cooperation between the contracting parties, in which the agreements provide for risk and revenue sharing and which term is equal or greater than 2 (two) years.” In addition, “economic activity” is defined as the “acquisition or supply of services or goods in the marketplace, even if with no intent of profit, insofar as the activity could, at least in theory, be explored by a private enterprise with intent of profit.”

The Sections have previously raised concerns that CADE’s definition of an “associative agreement” is overbroad in that it captures cooperative agreements that do not fall within the scope of pre-merger notification in other jurisdictions and does not comport with international practice and standards. The Sections recognize and appreciate CADE’s continued willingness to re-examine this

1 See http://www.americanbar.org/content/dam/aba/administrative/antitrust_law/at_comments_brazilian_201204.authcheckdam.pdf (comment on the scope of Article 90 of Law No. 12,529/2011 made in response to CADE’s 2012 public consultation); see also http://www.americanbar.org/content/dam/aba/administrative/antitrust_law/at_comments_2014amendbrazil_en.authcheckdam.pdf (comment on the definition of associative agreements made in response to CADE’s 2014 public consultation).
difficult provision and further improve the Brazilian merger review system. While the Sections understand that CADE’s proposed changes are intended to clarify the definition of “associative agreements,” we believe the proposed definition still appears to be overly broad and to capture a wide range of cooperation and collaboration agreements that are not subject to premerger notification requirements in the great majority of other jurisdictions.

The proposed language, for instance, appears to subject agreements that establish purely economic relationships between independent entities, such as non-exclusive license, franchise, or supply/distribution agreements between horizontal competitors, to pre-merger review even if the arrangements do not involve any structural links or contractual rights for one party to exercise control or influence over the management decisions or operations of the other party (and/or a business owned by the other party).

In the Sections’ view, a better approach would be to limit the definition of “associative agreements” to those that result in a meaningful transfer or change in control in a business with a current presence in the marketplace. The EU’s Jurisdictional Notice, for instance, recognizes that contracts sometimes can result in a change of control over a party’s business and have similar effects as a traditional merger or acquisition.2 In order for a contract to transfer this type of control, however, the EU has noted that it must lead to a transfer of control over the management and resources of a party that is similar to what normally occurs in an acquisition of shares or assets comprising a business with a market presence.3 Such contracts would need to have a very long duration and ordinarily could not be terminated quickly by the party granting the contractual rights.4 Likewise, the grant of an exclusive license, particularly one that transfers a revenue-generating business, may also be a reportable transaction in the EU and United States under certain circumstance since this type of agreement can result in similar market effects as an acquisition of assets that comprise a business.5

In contrast, short-lived cooperative or collaboration agreements that will not result in a lasting transfer or change in control over a business, or that do not affect the ability of the parties to independently determine how they supply their output in the marketplace are not viewed as creating that same type of structural change in the market as a traditional merger, joint venture or acquisition. Purely vertical and economic agreements, including those that involve some level of “risk and revenue sharing,” or even some type of exclusivity, often do not involve this type of transfer of control or structural change to the market (i.e., there is no integration of assets relating to each party’s

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3 Id.

4 Id.

Comments on Vertical Agreements and Market Share Thresholds

The proposed resolution also establishes new thresholds to determine which associative agreements would be subject to mandatory filing requirements:

(i) In the case of horizontal cooperation, filing would be mandatory when the sum of the market shares of the parties in at least one of the potentially affected relevant markets is at least 20% in the calendar year preceding the date of filing.

(ii) In the case of vertical cooperation between the contracting parties, filing would be mandatory only when (a) there is an obligation that creates or could create exclusivity, and (b) at least two of the parties hold market shares of at least 20% in the affected relevant markets, again in the calendar year preceding the date of filing.

As noted above, the Sections also recommend that vertical agreements with a purely economic relationship, even if they involve some type of exclusivity, should not fall within the scope of notifiable associative agreements unless the agreement involves a transfer or change in control in a business with a current presence in the marketplace, such as a long-term exclusive license that involves the transfer of a revenue-generating business. Any antitrust law concerns that could potentially be raised by vertical contractual relationships that merely involve some sharing of economic risk by companies that remain independent and separately controlled are more appropriately dealt with under other antitrust laws in Brazil that regulate conduct and provide for a broad range of remedies (including penalties) for anticompetitive conduct. Hence the Sections recommend that CADE keep these type of vertical contractual relationships subject solely to anticompetitive conduct investigations. Alternatively, CADE may consider that transactions as such should be filed under a voluntary regime, and not a mandatory pre-merger notification.

Second, in accordance with best international practices,\(^6\) the Sections recommend that if the narrower scope for “associative agreements” suggested above is adopted, that CADE consider eliminating market share criteria to determine whether or not an associative agreement should be subject to CADE review. Relevant market definition is endogenous to the review of transactions submitted for merger control, and in many cases there is no need for the antitrust agency to adopt a definitive relevant market definition to pass judgment. The regulation would be better focused solely on the nature of the “associative agreement” -- defined as agreements that result in a meaningful transfer or change in control in a business with a current presence in the marketplace, pursuant to the discussions above -- and utilize the turnover criteria already set forth in the Brazilian law for determining whether filing thresholds are met.

However, if CADE decides to maintain the proposed definition of “associative agreements” -- which, as stated above appears to capture a wide range of agreements that are not typically subject to

premerger notification requirements in most jurisdictions -- the Sections believe it would be appropriate that some form of meaningful objective screen (e.g., size of transaction thresholds and/or turnover in the relevant line(s) of business affected by the agreement) should be provided in the case of “associative agreements” to ensure that the agency is not overwhelmed with notification of a huge number of ordinary business transactions that are unlikely to have a significant effect on Brazilian commerce. In this context, a market share criterion would be preferable to no screen at all, although as indicated, the Sections recommend against the adoption of such a device.

**Conclusion**

The Sections welcome the efforts made by the CADE to modernize the review procedures and criteria for reporting associative agreements, and to expedite the review and approval of transactions that do not raise competition issues. In providing these comments, the Sections have sought to identify ways in which CADE’s regulation on associative agreements might become more consistent with international best practices, at the same time leading to a more efficient use of the resources devoted to merger review in Brazil. The Sections hope that CADE finds these comments useful as they make progress in implementing new regulations on associative agreements.

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