



**INTERNATIONAL BAR ASSOCIATION  
ANTITRUST COMMITTEE  
COMMENTS ON THE BRAZIL'S GUN-JUMPING REGULATIONS**

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**1. INTRODUCTION**

- 1.1 In June 2019, Brazil's competition law authority, the Conselho Administrativo de Defesa Econômica ("**CADE**") the Brazilian antitrust authority, made available for comments its proposed Resolution for the Administrative Procedure to Investigation Transactions (the "**Resolution**") in Brazil. These comments have been prepared by the Antitrust Committee ("**Committee**") of the International Bar Association ("**IBA**") with the assistance of its Merger Working Group ("**MWG**"). The comments aim to provide input which will assist CADE to finalize the Resolution in a form that will increase legal certainty and confirm the availability of rights of full defense of various steps in the procedure.
- 1.2 The IBA is the world's leading organization of international legal practitioners, bar associations and law societies. The IBA takes a keen interest in the development of international law reform and helps shaping the future of the legal profession across the globe. It is the global voice of the legal profession.<sup>1</sup>
- 1.3 The IBA has over 55,000 individual lawyer members from around the world, including many from Brazil. The IBA's Antitrust Committee includes competition law practitioners with a wide range of jurisdictional backgrounds and professional experience, which places it in a unique position to provide international and comparative analysis in the development of competition laws and enforcement practices.<sup>2</sup>
- 1.4 The Committee maintains working groups, which provide input on the development of competition laws around the world, including the MWG. Having regard to its interest in important international legal developments in significant jurisdictions such as Brazil, the Committee respectfully submits its comments and suggestions on the proposed Resolution.
- 1.5 The Committee appreciates CADE's decision to consult with interested stakeholders regarding the important issues related to merger notification compliance. The guidance provided by the Resolution will be beneficial both to CADE's staff as well as to parties to merger transactions and their local and international advisors.
- 1.6 The Committee considers that the proposed Resolution provides valuable guidance and would like to assist CADE in providing even more precise and practical guidance. The Committee offers these comments in the spirit of constructive input and hopes that CADE will find this contribution

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<sup>1</sup> Further information about the IBA is available at <http://www.ibanet.org/>.

<sup>2</sup> Further information about the IBA Antitrust Committee can be found at <https://www.ibanet.org/LPD/Antitrust-Section/Antitrust/Default.aspx>.

to be helpful in the development of sound administrative practices for the investigation of merger transactions.

- 1.7 The MWG's comments, including suggested additions and revisions to the (English translation<sup>3</sup> of the) proposed Resolution are set out in the chart below. It is important to note that the comments provided by the Committee do not address issues that are essentially local, technical and/or procedural in nature, as we understand that those are being addressed by local professionals.

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<sup>3</sup> The comments have been prepared taking into consideration a free English translation of the proposed Resolution, prepared by Pinheiro Neto Advogados, which is reproduced in the left column of the chart.

**COMMENTS AND SUGGESTIONS ON CADE'S RESOLUTION:**  
**ADMINISTRATIVE PROCEDURE TO INVESTIGATE TRANSACTIONS**  
**("PROCEDIMENTO ADMINISTRATIVO PARA APURAÇÃO DE ATO DE CONCENTRAÇÃO", OR "APAC")**

Writing Proposed by CADE	Justifications and Comments	MWG Suggested Writing
<b>Section I – General Part</b>		
<p><b>Article 1</b> The administrative procedure to investigate a concentration act ("<i>Procedimento Administrativo para Apuração de Ato de Concentração</i>", or "APAC") will have as its object:</p> <p>I – concentration acts filed and consummated before being assessed by CADE, pursuant to paragraph 3 of art. 88 of Law 12,529 of 2011;</p> <p>II – concentration acts non-filed and consummated before being assessed by CADE, pursuant to paragraph 3 of art. 88 of Law 12,529 of 2011;</p> <p>III – concentration acts non-filed, but whose submission may be requested by CADE, under the terms of paragraph 7 of art. 88 of Law 12,529 of 2011.</p>	<p>No comments.</p>	

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<p><b>Article 2.</b> The APAC shall be initiated by the General Superintendent <i>ex officio</i> upon determination of any of the members of the CADE Tribunal or upon denunciation or substantiated representation of any interested party.</p> <p><b>Sole Paragraph.</b> Prior to the final APAC's decision, the parties must be notified for adversarial purposes and full defense.</p>	<p>It is crucial for the integrity of CADE's decision-making and due process that merging parties have prompt notice of the availability of an adversarial procedure at the beginning of the APAC and a meaningful opportunity to present a full defense. The MWG suggests the inclusion of wording that promptly establishes an adversarial procedure within CADE's General-Superintendence ("<b>GS</b>") scope.</p>	
<p><b>Article 3</b></p> <p>In the event the General-Superintendence decides to dismiss the APAC, CADE Tribunal may, upon the initiative of one of its members and upon a grounded decision, request to review the case ("call-back order" - "avocação"), within a period of fifteen (15) days counted as from the issuance of the General Superintendence's decision.</p> <p><b>Sole paragraph.</b> The member of CADE's Tribunal who pronounces the call-back order - as provided in the caput of this article -- will inform the General-Superintendence of his/her decision, pursuant to which the APAC will be referred to the Tribunal.</p>	<p>No comments.</p>	

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<p><b>Article 4.</b> The APAC shall be distributed, by lot, to a Reporting Commissioner, which shall be the reporting commissioner of the related concentration act, within 48 (forty-eight) hours of CADE's Judgment Session that homologated the decision of avocation/call-back of the APAC by CADE's Administrative Tribunal.</p>	<p>No comments.</p>	
<p><b>Article 5.</b> The APAC shall, regardless of agenda, be brought to the table for judgment by the Plenary of CADE's Tribunal.</p>	<p>No comments.</p>	
<p><b>Article 6.</b> If it remains configured that there was consummation of the transaction in disagreement with art. 88, paragraph 3, of Law 12,529 of 2011, the determination of any pecuniary penalty shall be suspended until a decision on merits of the concentration act is reached.</p>	<p>No comments.</p>	

<p><b>Article 7</b> When the concentration act is at the CADE's General Superintendence's level for review, the General Superintendence will be responsible for initiating and conducting the fact findings to verify the eventual consummation of the transaction in disagreement with art. 88, paragraph 3, of Law 12,529 of 2011, being able to decide:</p> <p><b>I.</b> for the dismissal of the APAC, pursuant to this Resolution;</p> <p><b>II.</b> for the consummation of the transaction in disagreement with art. 88, paragraph 3, of Law 12,529 of 2011;</p> <p><b>III.</b> for the opening of an administrative proceeding, pursuant to art. 69 of Law 12,529 of 2011.</p>	<p>The MWG considers that it would be important to clarify the following points:</p> <p>(i) the availability of an adversarial procedure and full rights of defense to the parties;</p> <p>(ii) the action taken by the GS is an opinion, giving CADE's Tribunal the final decision on APAC; and</p> <p>(iii) the distinction between the analysis of the concentration act and the APAC, which may be dealt with under different timelines.</p>	<p><b>Article 7.</b> When the concentration act is in CADE's General Superintendence, it will be responsible for establishing and instructing APAC to verify the eventual consummation of the transaction in disagreement with art. 88, paragraph 3, of Law 12,529 of 2011, being able to decide:</p> <p><b>I</b> – for the dismissal of the APAC, pursuant to this Resolution;</p> <p><b>II</b> – for drafting an opinion on the consummation of the transaction in disagreement with art. 88, paragraph 3, of Law 12,529 of 2011;</p> <p><b>III</b> – for the opening of an administrative proceeding, pursuant to art. 69 of Law 12,529 of 2011.</p> <p>§ 1º. In case of the occurrence of what is foreseen in item II above, CADE's General Superintendence shall forward to CADE's Tribunal, for final judgment, its opinion on the merits of APAC.</p> <p>§ 2º. The parties shall be assured the full rights of defense and may use all legal means to produce evidence in their favor.</p> <p>§ 3º. CADE's General Superintendence may issue independent opinions on the merits of the concentration act and of the APAC.</p>
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Writing Proposed by CADE	Justifications and Comments	MWG Suggested Writing
<b>Section II - The procedure applicable to concentration acts filed and consummated before being assessed by CADE</b>		
<p><b>Article 8</b> When the concentration act is at the CADE's Tribunal's level for review, the Reporting Commissioner responsible for the case will be in charge of determining that the General Superintendence initiate and conduct the investigations to verify the eventual consummation of the operation in disagreement with art. 88, paragraph 3, of Law 12,529 of 2011.</p>	<p>The MWG considers that it would be important to clarify the following points:</p> <p>(i) the availability of an adversarial procedure and full rights of defense to the parties; and</p> <p>(ii) the distinction between the analysis of the concentration act and the APAC, which may be dealt with under different timelines.</p>	<p><b>Article 8.</b> When the concentration act is under the scrutiny of CADE's Administrative Tribunal, it will be for the Reporting Commissioner to determine that the General Superintendence establish and instruct it, to verify the eventual consummation of the operation in disagreement with art. 88, paragraph 3, of Law 12,529 of 2011.</p> <p>§ 1º. CADE's General Superintendence shall forward to CADE's Tribunal, for final judgment, its opinion about the APAC. The parties shall be assured the full rights of defense and may use all legal means to produce evidence in their favor.</p> <p>§ 2º. The opening of the APAC will follow independently of the analysis of the related concentration act.</p>
<p><b>Article 9</b> In accordance with the criteria set forth in art. 88, paragraph 3, of Law 12,529 of 2011, CADE's Administrative Tribunal may decide:</p> <p><b>I.</b> for the dismissal of the APAC, pursuant to this Resolution;</p> <p><b>II.</b> for the application of a penalty of pecuniary fine, in an amount not less than BRL</p>	<p>No comments.</p>	

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<p>60,000.00 (sixty thousand reais) nor more than BRL 60,000,000.00 (sixty million reais);</p> <p><b>III.</b> for the annulment of the concentration acts that meet the filing criteria set forth at the caput of article 88 of Law 12,529 of 2011, when consummated before appreciated by CADE, and take the necessary measures to ensure that the effects of the transaction remain suspended until their final appreciation;</p> <p><b>IV.</b> for the opening of an administrative proceeding, pursuant to article 69 of Law 12,529 of 2011.</p>		
<b>Section III - The procedure for concentration acts non-filed and consummated before being assessed by CADE</b>		
<p><b>Article 10</b> Identifying a possible concentration act described in item II of art. 1 of this Resolution, it will be incumbent upon CADE's General Superintendence to initiate an APAC to identify eventual fulfillment of the criteria set forth in articles. 88 and following of Law 12,529 of 2011.</p>	<p>No comments.</p>	
<p><b>Article 11</b> CADE's General Superintendence may decide:</p> <p><b>I.</b> for the dismissal of the APAC, pursuant to this Resolution;</p> <p><b>II.</b> for the mandatory notification of the concentration act, pursuant to art. 88 of Law</p>	<p>The MWG considers that it would be important to clarify the following points:</p> <p>(i) the availability of an adversarial procedure and full rights of defense to the parties; and</p> <p>(ii) the action taken by the GS is an opinion, giving CADE's Tribunal the final decision on APAC.</p>	<p><b>Article 11.</b> CADE's General Superintendence may decide:</p> <p><b>I-</b> for the dismissal of the APAC, pursuant to this Resolution;</p> <p><b>II-</b> for the mandatory notification of the concentration act, pursuant to art. 88 of Law</p>

Writing Proposed by CADE	Justifications and Comments	MWG Suggested Writing
<p>12,529 of 2011;</p> <p><b>III.</b> for the opening of an administrative proceeding, pursuant to article 69 of Law 12,529 of 2011.</p>		<p>12,529 of 2011;</p> <p><b>III-</b> for the opening of an administrative proceeding, pursuant to article 69 of Law 12,529 of 2011.</p> <p><b>Sole Paragraph:</b> In the case provided for in item II above, the General Superintendent shall forward to CADE's Tribunal, for final judgment, its opinion on the merits of the APAC. The parties shall be assured the full rights of defense and may use all legal means to produce evidence in their favor.</p>
<p><b>Article 12</b> In accordance with the criteria set forth in art. 88, paragraph 3, of Law 12,529 of 2011, CADE's Tribunal may decide:</p> <p><b>I.</b> for the dismissal of the APAC, pursuant to this Resolution; or</p> <p><b>II.</b> for the mandatory notification of the concentration act, case in which it may also decide:</p> <p><b>a.</b> for the application of a penalty of pecuniary fine, in an amount not less than R\$ 60,000.00 (sixty thousand reais) nor more than sixty million reais (R\$ 60,000,000.00);</p> <p><b>b.</b> for the annulment of the concentration</p>	<p>No comments.</p>	

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<p>acts that meet the filing criteria set forth at the caput of article 88 of Law 12,529 of 2011, when consummated before appreciated by CADE, and take the necessary measures to ensure that the effects of the transaction remain held until their final appreciation;</p> <p><b>III.</b> for the opening of an administrative proceeding, pursuant to article 69 of Law 12,529 of 2011.</p> <p><b>Sole Paragraph:</b> In the cases provided for in this section, the APAC shall be brought to judgment, regardless of the agenda, in up to two (2) ordinary judgment sessions for CADE's Administrative Tribunal to decide on the obligation to notify.</p>		
<p><b>Article 13</b> In cases in which CADE determines the notification of the concentration act, the parties must file it, pursuant to arts. 53 and following of Law 12,529 of 2011, of arts. 108 and following of CADE' Internal Regulation and its Resolution No. 02, 2012, within 30 (thirty) days, counted from the knowledge of the decision of CADE's Administrative Tribunal to determine the mandatory notification of the concentration act.</p> <p><b>Sole Paragraph:</b> In cases where there is a decision determining the amendment of the filing, according to art. 53, paragraph 2 of Law 12,529 of 2011, it will be up to the General</p>	<p>Considering that there is no legal provision for the application of a penalty in cases in which CADE determines an amendment of the concentration act, the MWG suggests the exclusion of the sole paragraph.</p>	<p><b>Article 13.</b> In cases in which CADE determines the notification of the concentration act, the parties must present it, pursuant to arts. 53 and following of Law 12,529 of 2011, of arts. 108 and following of CADE' Internal Regulation and its Resolution No. 02, 2012, within 30 (thirty) days, counted from the knowledge of the decision of CADE's Administrative Tribunal to determine the mandatory notification of the concentration act.</p> <p><del>Sole Paragraph: In cases where there is amendment, according to art. 53, paragraph 2 of Law 12,529 of 2011, it will be up to the</del></p>

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<p>Superintendent to determine the term for the amendment and to stipulate the fine for noncompliance.</p>		<p><del>General Superintendent to determine the term and stipulate the fine for noncompliance.</del></p>
<p><b>Section IV - The procedure for concentration acts non-filed but which notification may be required by CADE</b></p>		
<p><b>Article 14</b> Verified criteria of opportunity and convenience of Public Administration, in accordance with the provisions of art. 88, § 7, of Law 12,529 of 2011, CADE's General Superintendence will initiate the APAC before requesting that the concentration act be notified to CADE.</p>	<p>No comments.</p>	
<p><b>Article 15</b> In accordance with the provisions of art. 88, paragraph 7, of Law 12,529 of 2011, CADE's General Superintendence may decide:</p> <p><b>I.</b> for the dismissal of the APAC, pursuant to this Resolution;</p> <p><b>II.</b> for the mandatory notification of the concentration act, pursuant to art. 88 of Law 12,529 of 2011;</p> <p><b>§ 1º</b> In the hypothesis of item II, the company participating in the concentration act may appeal to CADE's Administrative Tribunal within 15 (fifteen) days, counted from its knowledge of the decision of CADE's General Superintendence.</p> <p><b>§ 2º</b> The Appeal filed by the participating company will be processed in APAC's own records</p>	<p>No comments.</p>	

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<p>and, upon its receipt, will follow the procedure set forth in arts. 4 and 5 of this Resolution.</p> <p><b>§ 3º</b> The avocation provided for in art. 3 and the Appeal provided for in this article shall have suspensive effect.</p>		
<p><b>Article 16</b> In cases in which the notification of the concentration act is determined, the parties must present it, in accordance with the terms of arts. 53 and following of Law 12,529 of 2011, of arts. 108 and following of both CADE's Internal Regulation and Resolution No. 02, 2012, within 30 (thirty) days, counted as from the in-year event of the term established in art. 15, paragraph 1, of this Resolution or of the decision of CADE's Administrative Tribunal to determine the mandatory notification of the concentration act.</p> <p><b>§ 1º</b> The procedural fee related to CADE's suitability processes must be collected at the time of the filing of the concentration act, pursuant to art. 23 of Law 12,529 of 2011.</p> <p><b>§ 2º</b> In cases where there is amendment, according to art. 53, paragraph 2, of Law 12,529 of 2011, it will be up to the General Superintendent to determine the term and stipulate the fine for noncompliance.</p>	<p>Considering that there is no legal provision for the application of a penalty in cases in which CADE determines an amendment of the concentration act, the MWG suggests the exclusion of the second paragraph.</p>	<p><b>Article 16.</b> In cases in which the notification of the concentration act is determined, the parties must present it, in accordance with the terms of arts. 53 and following of Law 12,529 of 2011, of arts. 108 and following of both CADE's Internal Regulation and Resolution No. 02, 2012, within 30 (thirty) days, counted as from the in-year event of the term established in art. 15, paragraph 1, of this Resolution or of the decision of CADE's Administrative Tribunal to determine the mandatory notification of the concentration act.</p> <p><b>Sole Paragraph:</b> The procedural fee related to CADE's suitability processes must be collected at the time of the presentation of the concentration act, pursuant to art. 23 of Law 12,529 of 2011.</p> <p><del>§ 2º In cases where there is amendment, according to art. 53, paragraph 2, of Law 12,529 of 2011, it will be up to the General Superintendent to determine the term and stipulate the fine for noncompliance.</del></p>
<p><b>Article 17</b> For the purposes of this Resolution,</p>	<p>No comments.</p>	

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<p>after the notification of the concentration act, CADE will observe the deadlines indicated in art. 88, §§ 2 and 9, of Law 12,529 of 2011.</p>		
<b>Section V - Incidental Issues</b>		
<p><b>Article 18</b> Since the opening of the APAC, the General Superintendent or the Reporting-Commissioner may enter into an agreement to preserve the reversibility of the transaction ("APRO") with the parties or determine the adoption of any precautionary measures necessary to preserve competition.</p> <p><b>Sole paragraph:</b> The APRO celebrated by the General-Superintendence will be ad referendum of the Plenary of CADE's Administrative Tribunal.</p>	<p>No comments.</p>	
<p><b>Article 19</b> For the precautionary decisions issued in the course of APAC, it will be possible to appeal to CADE's Administrative Tribunal or, still, appreciation by the Plenary by request of an avocation made by one of its members.</p>	<p>No comments.</p>	
<b>Section VI - The Penalties</b>		
<p><b>Article 20</b> In case of conviction in the hypotheses of art. 1, items I and II, a penalty of a pecuniary fine in the amount of BRL 60,000.00 (sixty thousand reais) and BRL 60,000,000.00 (sixty million reais) shall be fixed.</p>	<p>No comments.</p>	
<p><b>Article 21</b> CADE's Administrative Tribunal will adopt the following methodology for calculating</p>	<p>The MWG has the following comments and concerns relating to the proposed penalty factors:</p>	<p><b>Article 21.</b> In the cases in which a pecuniary fine is applicable, CADE's Administrative</p>

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<p>the pecuniary fine:</p> <p><b>I. Basic penalty</b> in the amount of BRL 60,000.00 (sixty thousand reais);</p> <p><b>II. Aggravating Circumstances:</b> for the duration of the term, in the amount equivalent to 0.01% of the value of the transaction per day of delay, from the date of consummation until notification of the concentration act or amendment, if any;</p> <p>a) by the severity of the conduct, from 2% to 4% of the value of the transaction, if the concentration act is approved with restrictions or blocked;</p> <p>b) by intentionality, from 0.1% to 0.4% of the average turnover of the economic groups or conglomerates, in the year prior to the consummation of the transaction, if the good faith of the parties involved is not demonstrated.</p> <p><b>III- Reduction by the time of notification,</b> which will be levied on the value of the basic penalty plus the increases and will be equivalent to:</p> <p><b>a)</b> 50% in the case of spontaneous notification of the concentration act, prior to receipt of the complaint or representation, of the ex officio</p>	<p>(i) <b>Discretion in the imposition of fines</b> According to the international best practices (e.g., United States), it is sometimes the case that for a failure to file premerger notification the agencies will use their discretion not to impose fines for a first violation. Although there is discretion in the previous articles regarding whether to impose a penalty, that appears to be in tension with Article 21. The MWG first suggestion for this article aims to make it compatible to the rest of the resolution on this regard.</p> <p>(ii) <b>Proxy</b> The general idea of a merger control notification obligation is to allow the authority to review transactions upfront and capture potentially critical concentrations. In the MWG's understanding, the deal value (of which only a fraction might apply to the Brazilian aspect of a transaction, as explained below), is not the right indicator of whether a deal could be problematic. Otherwise, CADE would risk to "over-fine" deals that are unproblematic but have high deal values and "under-fine" deals that are problematic in Brazil but have an overall low deal value.</p> <p>A more appropriate basis for the calculation of fines could therefore be the local turnover of the target.</p> <p>(a) Turnover is a readily available and objective financial measure. They are normally identified in the review of concentrations in any event and could</p>	<p>Tribunal will adopt the following methodology for calculating the <b>amount of the</b> pecuniary fine:</p> <p><b>I. Basic penalty</b> in the amount of BRL 60,000.00 (sixty thousand reais);</p> <p><b>II –Aggravating Circumstances:</b></p> <p><del>a) — for the duration of the term, in the amount equivalent to [0.01% of the value of the transaction] per day of delay, from the date of consummation until notification of the concentration act or amendment, if any;</del></p> <p>b) by the severity of the conduct, <b>up to a maximum of 4%</b> of the value of the <b>target's turnover in Brazil</b>, if the concentration act is approved with restrictions or blocked;</p> <p><b>a)</b> by intentionality, <b>up to a maximum of 0.4%</b> of the <b>target' turnover in Brazil value</b>, if <b>the bad faith</b> of the parties involved <b>is proved</b>.</p> <p><b>III- Reduction by the time of notification,</b> which will be levied on the value of the basic penalty plus the I. Upper Bounds and will be equivalent to:</p> <p><b>a)</b> 50% in the case of spontaneous notification of the concentration act, prior to receipt of the complaint or representation, of the ex officio</p>

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<p>establishment by the General Superintendence or by determination of any members of CADE's Administrative Tribunal;</p> <p><b>b)</b> 30% in the case of notification after receipt of the complaint or representation and prior to the initiation of the APAC;</p> <p><b>c)</b> 20% in the case of notification after the initiation of the APAC and before the final decision of CADE's Administrative Tribunal.</p> <p><b>Sole Paragraph:</b> In case of recidivism, in the hypothesis of art. 1, item I, will be calculated double the basic penalty and, in the hypothesis of art. 1, item II, will be calculated double the basic penalty and the increase over the term.</p>	<p>provide a more appropriate form of measure. (b) It would also be important that the penalty calculations be limited to the turnover of the target that are being acquired in the transaction in Brazil, which would have a connection to the significance of the breach of filing requirements. Neither the total value of the transaction nor the worldwide turnover of the parties involved in the transaction relate to the potential damaged caused by a failure to notify, especially when it comes to foreign-to-foreign transactions, that involve the acquisition of (or investment in) companies which have operations in various countries worldwide and which generate the majority of turnover (and thus the majority of the deal value) outside of Brazil. In many of those cases, the amount paid by the acquirer/investor will have very little relationship, if any, with the size of the target's operations in Brazil.</p> <p>Therefore, the core criterion for fine calculation in gun jumping cases should be what merger control law is supposed to assess in the first place, i.e., the effect of a transaction on local competition.</p> <p>(iii) <b>Duration term</b> Considering that the purpose of a notification is to make an authority aware of a deal so that it can be analyzed (i) the time needed by the authority to act upon such awareness and finalize its analysis should not be relevant and (ii) tying the fine to "the duration of the term per day</p>	<p>establishment by the General Superintendence or by determination of any members of CADE's Tribunal;</p> <p><b>b)</b> 30% in the case of notification after receipt of the complaint or representation and prior to the establishment of APAC;</p> <p><b>c)</b> 20% in the case of notification after the establishment of the APAC and before the final decision of CADE's Tribunal.</p> <p><b>IV – Other reductions, which may also be levied on the value of the basic penalty plus the I. Upper Bounds:</b></p> <p><b>a)</b> Will take into consideration the impact of the transaction on Brazilian competition and the complexity of the legal and factual analysis of a filing obligation.</p> <p><b>Sole Paragraph:</b> In case of recidivism, in the hypothesis of art. 1, item I, will be calculated double the basic penalty and, in the hypothesis of art. 1, item II, will be calculated double the basic penalty and the increase over the term.</p>

**Writing Proposed by CADE****Justifications and Comments****MWG Suggested Writing**

of delay, from date of consummation until notification” as proposed in Article 21 II can be counterproductive. Such a methodology could deter companies from coming forward the longer the time lapse between closing and the realization that potentially there might have been a notification obligation. The longer that time gap, the higher the fine, the less incentive for a company to self-report (and rather wait for the statute of limitations to apply).

(iv) **Intentionality** In assessing intentionality, the focus should be on the existence of evidence of bad faith, not on proof of good faith. Given the high degree of difficulty in producing negative evidence, it will be very complex for the parties to prove good faith in the absence of submission of the transaction to CADE. It is worth noting that bad faith cannot be presumed in a system that provides due process.

**\*Note:** The analysis of a filing obligation under Brazilian merger control law is more complex than for many other jurisdictions around the world. First of all, Brazilian competition law captures minority shareholdings as low as 5%, provided that there is vertical or horizontal overlap. The latter may require a complex market definition analysis. In addition, the calculation of the Brazilian turnover thresholds is also quite complex, as the rules on what constitutes group turnover (potentially involving seller group turnover) are not always fully

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	<p>developed. Therefore, the filing analysis for Brazilian merger control can easily lead to incorrect evaluations by businesses –in particular, international businesses.</p> <p>(v) <b>Other reductions</b> It is important to take into account (as mitigating factors) the impact of the transaction on Brazilian competition and the complexity of the legal and factual analysis of a filing obligation.</p> <p>(vi) <b>General comment-</b> In the United States, for premerger notification violations under the HSR Act, there is a maximum dollar amount daily penalty which is adjusted annually, rather than a percentage of the value of the transaction.</p>	
<p><b>Article 22</b> In cases which, due to the nature of the concentration, there is no transaction value, turnover and additional elements, if available, will be used to estimate an amount of the transaction to be applied in the calculation of the pecuniary fine in items "a" and "b" of item I of art. 21.</p>	<p>No comments.</p>	
<p><b>Article 23</b> For the purpose of calculating the pecuniary fine, the average turnover amounts and the transaction value shall be monetarily updated using the SELIC rate applied to simple interest until the date of the APAC.</p>	<p>See the comments related to transaction value (Article 21).</p>	<p><b>Art. 23.</b> For the purpose of calculating the pecuniary fine, the average turnover amounts <del>and the transaction value</del> shall be monetarily restated using the SELIC rate applied to simple interest until the date of the APAC.</p>
<p><b>Article 24</b> In exceptional cases, duly justified, CADE's Administrative Tribunal may not apply the criteria set forth in art. 21 of this Resolution,</p>	<p>The MWG considers that this provision is potentially very far-reaching and imprecise. It does not appear to be necessary given the other provisions relating</p>	<p><del><b>Art. 24.</b> In exceptional cases, duly justified, CADE's Administrative Tribunal may not apply the criteria set forth in art. 21 of this Resolution,</del></p>

Writing Proposed by CADE	Justifications and Comments	MWG Suggested Writing
<p>observing the principles of reasonableness and proportionality and respecting the limits established in art. 20.</p>	<p>to the basic penalty and upper bounds. In order to provide legal certainty to the parties, the MWG suggests that this article should be excluded. In addition, the Second Paragraph of Article 21 provides some scope to deal with the existence of exceptional cases.</p>	<p><del>observing the principles of reasonableness and proportionality and respecting the limits established in art. 20.</del></p>
<p><b>Article 25</b> APACs may be dismissed by an agreement with CADE, according to the convenience and opportunity criteria of the authority.</p> <p><b>Sole Paragraph.</b> In case of agreement, a discount of 15% will be granted on the value of the monetary fine.</p>	<p>The MWG suggests that the application of upper bounds and reductions should be referenced in cases of agreements with CADE. The calculation should consider the provisions of article 21, which deals with the methodology for calculating the monetary fine.</p>	<p><b>Art. 25.</b> APACs may be dismissed by an agreement with CADE, according to the convenience and opportunity criteria of the authority.</p> <p><b>Sole Paragraph.</b> In case of agreement, a discount of 15% will be granted on the value of the monetary fine, and <b>should consider the upper bounds and reduction provided for article 21 of this Resolution.</b></p>
<b>Section VII - Final Provisions</b>		
<p><b>Article 26</b> This Resolution shall enter into force on the date of its publication.</p>	<p>In addition to stipulating that the resolution shall enter into force on the day of its publication, the Resolution should specify the cases to which the resolution applies, or at least provide for a transitional period. According to the best international practices, we understand that the resolution should apply solely to closings taking place after the adoption of the resolution and should clearly exclude any retroactive application.</p>	<p><b>Article 26</b> This Resolution shall enter into force on the date of its publication.</p> <p><b>Sole Paragraph.</b> This resolution is applicable to closings taking place after the Resolution entered into force and is not applicable retroactively.</p>