

# GUIDE

# for Cartel Penalties

September/2023



**Ministry of Justice and Public Security**  
**Administrative Council for Economic Defense**

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**Guide for Cartel Penalties**

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## PRESENTATION

The Law 12529/2011 structures the Brazilian Competition Defense System and sets forth the prevention and suppression of antitrust violations. Articles 31 and 33 outline that individuals and legal persons governed by public and private law, and any associations are liable for antitrust violations.

In order to increase transparency of its actions and decisions, the Administrative Council for Economic Defense (CADE) follows the OECD recommendations (2019) and has published several guidelines in recent years, such as the Guide for Horizontal Merger Review (CADE, 2016a), the Guidelines for Cease and Desist Agreement for Cartel Cases (CADE, 2016b), and the Guide for Antitrust Remedies (CADE, 2018). The Guide for Cartel Penalties presents CADE's Tribunal methodology in determining the appropriate penalties for antitrust violations, founded on the case law regarding the sanctions imposed by the agency between January 2012 and December 2022. This document provides defendants and society with more information on how the Brazilian antitrust authority determines sanctions for cartel practices.

In this context, it is worth noting that CADE must ensure transparency and proportionality of the penalties, thus providing greater legal certainty for its decisions. Therefore, the authority also must be clear in the merger review process, making documents accessible to society, whenever possible. Moreover, CADE must be transparent about the criteria for determining the penalties to be applied. Concerning fines, it is also important to be transparent about the criteria adopted, especially for the basis of calculation and tax rates. In addition, fines must be proportional, appropriate, and sufficient to remove the incentives for economic agents, whether individuals or legal persons, to participate in the anticompetitive conduct reviewed. The authorities must also weigh up the aggravating and mitigating factors when calculating the penalty, to achieve the elements of adequacy of the penalty to the specific conduct, respecting the principle of equality in the strict sense. Another important factor to consider is the duration of the conduct, which reflects the severity of the violation. Long duration conducts are to be penalised more severely than those that are similar

cases of shorter duration.

The proposals in this Guide are compatible with the Guidelines for Cease and Desist Agreement for Cartel Cases (CADE, 2016b). This Guide also sets out the basis of calculation for the financial contribution in cease and desist agreements. As per the provisions of Article 85, Paragraph 1, Item 3 of Law 12529/2011 and the Statutes of CADE, financial contributions to the Fund for De Facto Joint Rights are to be established, based on the amount of the expected fine. It is subject to a percentage reduction that varies according to the extent and usefulness of the signatory's collaboration with the fact-finding and the time at which the Agreement was signed, see Articles 186 and 187 of Statutes of CADE<sup>1</sup>.

**Disclaimer: This document is neither binding nor a rule (i.e. it does not change any of the provisions of the Statutes of CADE, CADE Resolution no. 3/2012, or Law 12529/2011). Practices and procedures hereby described may be amended as CADE sees convenient and opportune, depending on the specific circumstances in the case at hand.**

This Guide is divided into five parts. The first section presents a brief overview of the topics to be detailed. The second section regards the stages for calculating the fines imposed on for-profit entities, essentially firms, and nonprofit ones, such as associations and unions, and individuals. It is important to consider that CADE must follow the legal criteria when defining penalties, such as the individualisation of conduct and other factors that can affect the calculation methodology of fines. The third section deals with non-financial penalties. The last one focuses on information regarding turnovers, followed by the final considerations.

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<sup>1</sup> STATUTES OF CADE - approved by Resolution no. 22/2019 on 19 June 2019 and updated by Amendments to the Statutes no. 01/2020 on 02 April 2020.

## CONTENT

<b>1. INTRODUCTION</b> .....	<b>8</b>
<b>2. FINANCIAL PENALTY - FINE</b> .....	<b>11</b>
<b>2.1. LEGAL PROVISIONS</b> .....	<b>12</b>
2.1.1. <i>Basis of calculation for firms</i> .....	14
2.1.1.1. The basis of calculation .....	14
2.1.1.1.1. General Principles.....	14
2.1.1.1.2. Parameters for ensuring the proportionality of penalties .....	15
2.1.1.1.2.1. Parameters related to the fiscal year .....	15
2.1.1.1.2.2. Parameters related to the gross turnover in the Brazilian territory/geographic dimension affected.....	16
2.1.1.1.3. Tax Base Updates.....	17
2.1.1.2. Effective Tax Rate .....	20
2.1.1.3. Tax rate adjustments based on the duration of the conduct.....	21
2.1.1.4. Definition of tax rates based on the occurrence of aggravating and mitigating factors .....	21
2.1.1.5. Legal Validity .....	26
2.1.1.6. Recidivism .....	26
2.1.2. <i>Base fine calculation for legal persons that do not perform any business activities</i> 26	
2.1.3. <i>The definition of the penalty for individuals</i> .....	27
2.1.3.1. The basis of calculation .....	27
2.1.3.2. General Principles.....	27
2.1.3.3. Tax rate .....	28
2.1.3.3.1. Adjustments according to the participation in the cartel .....	28
2.1.3.4. Legal Validity .....	29
2.1.4. <i>Violations committed under Law 8884/1994</i> .....	29
2.1.4.1. Legal Validity .....	30
<b>3. NON-FINANCIAL PENALTIES</b> .....	<b>30</b>
<b>4. PRESENTATION OF THE TURNOVER</b> .....	<b>32</b>
<b>5. FINAL CONSIDERATIONS</b> .....	<b>33</b>
<b>REFERENCES</b> .....	<b>34</b>

## 1. INTRODUCTION

As per the provisions of Article 37, Item I of Law 12529/2011 (Brazilian Competition Law), "in the case of a company, a fine of 0.1% up to 20% of the gross sales revenue of the company, group, or conglomerate earned in Brazil in the field of activity affected by the conduct in the year before the proceedings were initiated, which should never be less than the accrued benefits, whenever possible to estimate them".

CADE Resolution no. 3/2012, as modified by Resolution no. 18/2016, also refers to the competition law and lists the branches of economic activity to be considered for calculating penalties (Article 1). Furthermore, Article 2 (a) of Resolution no. 3/2012 states that CADE "may adapt the field of activity according to the specificities of the practice whenever the parameters set in Article 1 are found to be grossly disproportionate, upon a reasoned decision by the Tribunal".

Thus, CADE has mainly considered the gross turnover in the field of activity as the basis of calculation of the fine, which may vary from case to case. If the field of activity mentioned in CADE Resolution no. 3/2012 is found to be "grossly disproportionate", the authority may consider adapting that field in which the violation occurred, such as, for instance, the "subfields of economic activity" or the "affected market", in the year before CADE launched the administrative proceeding.

As established in Article 37, Item 1 of Law 12529/2011, regarding field of activity, CADE has used the following criteria to examine the possible disproportionality of the basis of calculation of the fine in some cases<sup>2</sup>: (1) comparison of the gross sales revenue of products affected by the conduct and (a) the gross sales revenue in the field of the activity as per CADE Resolution no. 3/2012 and (b) total revenues of the company; (2) duration of the conduct; (3) verification that information about the revenue was presented in a complete, not entirely clear or appropriate manner, as established in Article 37, Paragraph 2 of Law 12529/2011; and (4) checking whether it is possible or necessary to adjust

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<sup>2</sup> Administrative Proceedings no. 08700.003390/2016-60 (cartel in the market of PVC pipes and fittings), 08700.003340/2017-63, and 08700.006005/2019-89 (cartel in the market of car filters), among others.



the tax rate to safeguard the proportionality and dissuasive nature of the fine by CADE's case law.

When it is not possible to use the gross turnover in the field of economic activity of an enterprise, nor in the affected market or its subfield, the authority seeks to establish other criteria for measuring the basis of calculation of the fine that is adequate to the market affected by the anticompetitive practice.

CADE may also consider the total turnover of the company, as described in Article 37, Paragraph 2 of Law 12529/2011, "CADE may consider the total revenues of the company or group of companies whenever information on the turnover linked to the field of economic activity in which the violation occurred, as defined by CADE, is unavailable or whenever the information presented is incomplete, not entirely clear or appropriate, or both."

The affected market is the one potentially or truly affected by the conduct. It may be smaller than the field of activity, whether in the product or in the geographic dimensions. For instance, a firm may be involved in a cartel in only one market in a field of activity or formed a cartel in only one state, even operating on a national level. Thus, unreasonable fines may be imposed if they are based on the turnover of products in markets which are not related to the violation, or locations where the company operates, but that were not affected by the violation.

On the other hand, it is important to take the duration of the conduct and its negative effects on the market into account when calculating the rate of the fine, since these parameters determine the severity of the violation. The duration of the conduct may be used to define the rate and, consequently, to calculate the fine, considering the elements related to the undue advantage and the severity of the conduct, as per Article 45 of Law 12529/2011. It is worth noting that the Law 12529/2011 only considers a year's turnover as the basis of calculation, but the conduct often lasts longer than this. Thus, the turnover in the affected market combined with the observation of the duration of the participation in the conduct results in a good method for calculating the fine, which is in line with the international best practices.

CADE Resolution no. 3/2012 presents the definition of 144 fields of business activities (CADE, 2012). The term "field of activity" in Law 12529/2011 has an

indeterminate legal concept and is to be defined by CADE's case law, especially by regulations. Therefore, when the law came into force, CADE issued Resolution no. 3/2012 in order to make the concept more concrete. However, the fields of activities listed therein are very broad and illustrative. In some cases, using them as basis of calculation of fines may result in penalties that are disproportionate to the severity and scope of the conduct. Yet, not rarely, certain conducts do not fall within at least one of the 144 fields of activity while others fall within more than one. Hence, the next section will outline how CADE's case law has led to the inclusion of the Article 2(a) in the Resolution. Depending on the case, the Article allows the field of activity to be adapted to fit the subfield or market affected by the anticompetitive conduct, issuing more proportionate and accurate fines.

The term "field of activity" is defined by 144 fields described by Resolution no. 3/2012, with a comprehensive understanding of them. Nevertheless, the subfield or the affected market (which should not be confused with the relevant market) is more specific from geographical and goods and services perspectives, as adaptations of the fields, according to the Article 2-A of Resolution no. 3/2012.

The fine should be based on the gross turnover in the subfield or market affected by the conduct only in cases where the field of activity is clearly disproportionate and unreasonable.

In order to clarify, there are some examples of cases adjudicated by CADE at the end of this section in which the gross turnover in the subfield or market affected was adapted from the field of economic activity.

This methodology of using the affected market as the basis of calculation is common in foreign jurisdictions.

#### **Example A: Hardcore cartel in the fuel retail market (petrol and ethanol)**

CADE convicted a fuel distributor for making agreements in the fuel retail market (petrol and ethanol) between two cities in the state of São Paulo, Marília and Bauru (Administrative Proceeding no. 08012.011042/2005-61). Thus, the field of activity in question was the one listed as 89 in CADE Resolution no. 3/2012. However, the penalty would be overestimated by considering the gross turnover of the field of activity affected by the conduct, since the party operated nationwide. The solution was to apply a percentage to the gross turnover in the field of activity, in accordance with the representativeness of these two municipalities in relation to the national market, to obtain the gross turnover in the affected market.

### **Example B: Hardcore cartel in the market of fuel retail and distribution (petrol and ethanol)**

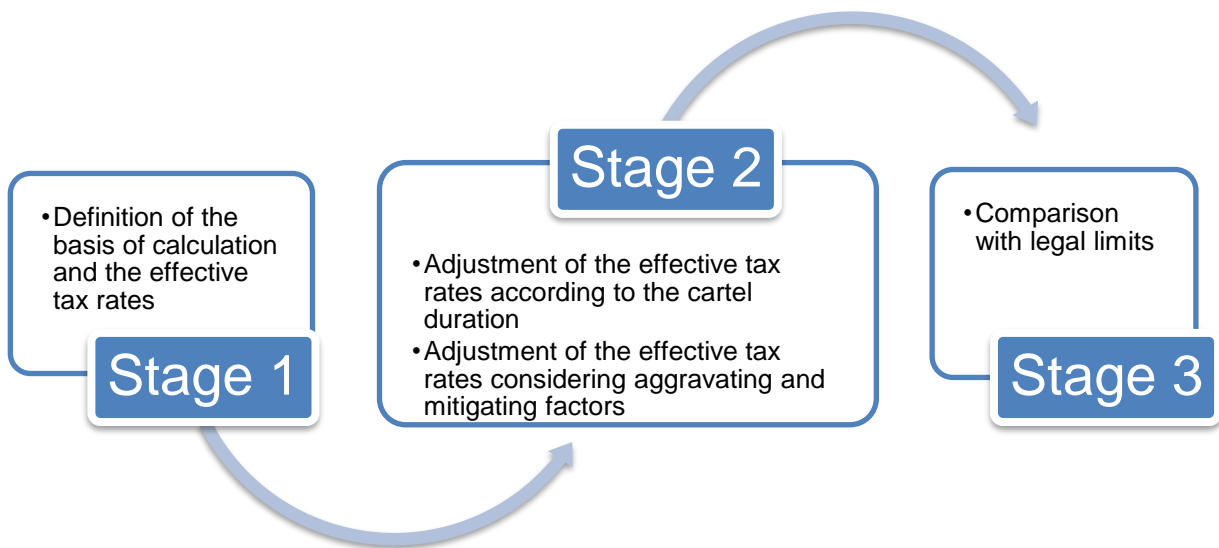
The investigations of the Administrative Proceeding 08700.010769/2014-64 concluded that there was a hardcore cartel in the market of fuel retail and distribution (petrol and ethanol) in the cities of Belo Horizonte, Betim and Contagem, in the state of Minas Gerais.

Although the field of activity in the case at hand was the fuel retail one, the fine imposed only considered the affected market, i.e., sales of petrol and ethanol. Thus, Article 2(a) of CADE Resolution no. 3/2012 was applied. If the field of activity was considered, the turnover would have to include other fuels, such as premium petrol and diesel.

## **2. Financial Penalty - Fine**

In the last years, CADE has followed a consistent pattern for the stages to calculate the fines to be imposed by the antitrust authority. CADE seeks to resemble the international experience in the matter, so that the penalties definition process follows three stages. The first stage focuses on the parameters to be used for the basis of calculation and the effective tax rates to be imposed on firms, regarding the revenues of the enterprises in the year prior to the year the administrative proceeding was initiated. In sequence, there is the analysis of the circumstances of the case and of each defendant, considering the duration of the conduct, as well as the occurrence of aggravating and mitigating factors regarding the penalty. Finally, the third stage checks whether the value predetermined for the penalty is in accordance with the limits provided by Law 12529/2011. The three stages of the process are illustrated below in Figure 1.

**Figure 1 - Stages of fine definition**



**Source:** CADE.

## **2.1. Legal Provisions**

At first, it is worth emphasising that the legal parameters for penalties in case of antitrust violations that are established in Article 37 of Law 12529/2011, state that:

- I - in the case of a company, a fine of 0.1% to 20% of the gross turnover of the company, group, or conglomerate earned in Brazil in the field of activity affected by the conduct in the year before the proceedings were initiated, which should never be less than the accrued benefits, whenever possible to estimate them;
- II - a fine amounting to between BRL 50 thousand and BRL 2 billion is applied where impossible to use the gross turnover criterion in the case of individuals and legal persons governed by public and private law, or associations of entities or individuals, whether de facto or de jure, even if temporarily established, incorporated or not, which do not perform a business activity;
- III - in case an administrator is directly or indirectly liable for a violation committed intentionally or negligently: a fine of 1% to 20% of the fine levied on the company, in the case of Item I of the head provision of this Article, or of the fine levied on the legal persons or entities, in the case of Item II of the head

provision of this Article.

Paragraph 1: Fines imposed are doubled for repeat violations.

Paragraph 2: In calculating the fine described in Item I of the head provision of this Article, CADE may consider the total turnover of the company or group of companies whenever information on the turnover linked to the field of economic activity in which the violation occurred as defined by CADE, is unavailable or whenever the information presented is incomplete, not entirely clear or appropriate, or both. (BRAZIL, 2011, emphasis added).

In other words, the law provides CADE with clear parameters for defining the penalties to be applied. As foreseen by Item I of Article 37, penalties to be imposed to firms indicate the percentage to be applied over **“the gross turnover the company, group, or conglomerate, earned in Brazil in the field of activity affected by the conduct in the year before the proceedings were initiated”**. Regarding the definition of the business activity as described by Law 12529/2011, the Resolution no. 3/2012 defines 144 business activities. Article 2 provides:

When the respondent does not fully, unequivocally, and credibly submits the gross turnover of the company in the business activities in which the violation occurred, CADE may consider the total turnover of the company or group of companies in the last fiscal year before the initiation of the administrative proceeding.

Furthermore, Article 2(a) of Resolution no. 3/2012 states that CADE "may adapt the field of activity according to the specificities of the practice whenever the parameters set in Article 1 are found to be grossly disproportionate, upon a reasoned decision by the Tribunal". (Wording given by Resolution no. 18/2016) (CADE, 2012, emphasis added).

Regarding the fines applied between January 2012 and December 2022, CADE's case law shows that several decisions considered **the gross turnover of**

the company as the basis of calculation, regarding the adaptation of the business activity suggested in the Article **2(a) of Resolution no. 3/2012. It concerns an adaptation of the business activities aimed at imposing proportional penalties, in the last fiscal year before the initiation of the administrative proceeding.**

Considering this basis of calculation, CADE establishes effective tax rates followed by a review of aggravating and mitigating factors. This process will be detailed in the following sections.

### 2.1.1. Basis of calculation for firms

#### 2.1.1.1. The basis of calculation

##### 2.1.1.1.1. General Principles

CADE clarifies that, based on Law 12529/2011 and on its case law, the basis of calculation imposed for collusive behaviour is the gross turnover of the defendant in the field of activity in Brazil. It can be adapted to the gross turnover in the subfield or the market affected by the behaviour, in the year prior to the year the administrative proceeding was initiated, when the features of the case at hand indicate a need for adjustments.

It is worth noting that, as per the provisions of Article 37, Item 1 of Law 12529/2011, the fine imposed to the company will be a percentage of “the gross turnover that the company, group, or conglomerate earned in Brazil in the field of activity affected by the conduct in the year before the proceedings were initiated”. The principle must be the use of the gross turnover of the company. The gross turnover of the group or conglomerate must be an exception, for instance, in cases involving a shell company with a very low turnover, to practice anticompetitive conducts that would benefit the group. Furthermore, the total turnover of the group has already been used in cases that the total turnover of the company was not presented<sup>3</sup>.

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<sup>3</sup> Administrative Proceeding no. 08012.001029/2007-66. In this case, public pieces of information were provided. As per the provisions of Paragraph 2 of Article 37 of Law 12529, CADE may consider the total turnover of the company or group of companies whenever information on the turnover linked to the field of economic activity in which the violation occurred, as defined by CADE, is unavailable or whenever the information presented is incomplete, not entirely clear or appropriate, or both.

An effective tax rate will be imposed on the gross turnover in accordance with the type of collusive practice. That may either increase or decrease depending on aggravating and mitigating factors. It is worth noting that the duration of the violation is an essential element for defining the fine. Hence, this Guide presents specific methodology for dealing with aggravating factors, as detailed below.

Besides, as set forth in Article 37, Item 2 of Law 12529/2011, “a fine amounting to between BRL 50 thousand and BRL 2 billion is applied where impossible to use the gross turnover criterion in the case of individuals and legal persons governed by public and private law, or associations of entities or individuals, whether de facto or de jure, even if temporarily established, incorporated or not, which do not perform a business activity”.

#### 2.1.1.1.2. Parameters for ensuring the proportionality of penalties

##### 2.1.1.1.2.1. Parameters related to the fiscal year

Although the gross turnover of the business group, in the year prior to the year the proceeding was initiated, may be the temporal criterion to define the base fine according to set forth in Article 37 Item 1, it may be changed when (1) that information is unavailable or (2) when the amount indicated is considered improper for calculating the fines, since, for instance, the company may have already ended the activities in the year prior to the year of the launch of the administrative proceeding. However, in these cases, CADE must rely on the provisions of the Article 37, item 2.

Feasible solutions previously proposed by the Tribunal to provide the application of proportional proxies are suggested **in short** on the list below:

- (i) the gross turnover, in the field of activity or in the market affected, in the last 12 months of the anticompetitive practice;
- (ii) the gross turnover, simple or weighted average, in the field of activity or in the market affected, during the period of the anticompetitive practice;
- (iii) the gross turnover, in the field of activity or in the market affected, obtained in the last year of the anticompetitive practice; and

- (iv) the gross turnover, in the field of activity or in the market affected, obtained in the year of the public procurement, in cases of bid rigging cartels.

**Example C: Bid rigging for automotive corrective and preventive maintenance in Rio de Janeiro**

When defining the fine to the firms involved in bid rigging, in online reverse auctions, according to the criteria of the lowest price, occurred in 2009, the Tribunal of CADE considered the gross turnover of the year of the auction. The antitrust authority deemed that it was the best value to ensure the proportionality of the penalty, instead of taking the gross turnover of the year prior to the Administrative Proceeding no. 08012.000030/2011-50, which is 2011.

**Example D: Hardcore cartel in the flexible packaging market**

The Administrative Proceeding no. 08012.004674/2006-50 was launched in 2014 to analyse a cartel in the flexible packaging market that aimed to divide the market and fix prices from 2001 to 2006. When defining the fines imposed to the convicted companies, the Tribunal of CADE considered their gross turnover in the last year of involvement in the cartel as the basis of calculation of the tax rate in 2006.

**2.1.1.1.2.2. Parameters related to the gross turnover in the Brazilian territory/geographic dimension affected**

The basis of calculation of the fines imposed for collusive behaviour addressed to in this Guide is the gross turnover of the defendant in the field of activity in Brazil. However, there are cases of international cartels in which these values are not listed in the Brazilian territory. Moreover, companies may, sometimes, present the gross turnover in the Brazilian territory even when the conduct was restricted to 2 municipalities. In such situations, it is possible to consider some aspects for the purpose of reasonableness and proportionality, as follows:

- (i) "virtual turnover" in the Brazilian market is the projection of the gross turnover based on the percentage of participation of the Brazilian market in the total volume of the world market of the defendant. This could also be done when there is a geographic dimension that is smaller than the national one, for instance, specific municipalities, considering the



percentage of market share in the local market in relation to the total volume in the national market, as the basis of calculation.

- (ii) other factors like estimates of the indirect sales of the defendant in the Brazilian national market or in the market affected, based on the volume of data, average prices or even import or export data provided either by government bodies or other reliable database.

**Example E: Hardcore cartel in the market of commercialization and maintenance of fire protection equipment in the Federal District**

In the Administrative Proceeding no. 08012.001794/2004-33, launched in 2004, the defendants were local companies of the Federal District. Since they did not demonstrate the respective gross turnover required by CADE, the Tribunal based the calculation of penalties on an average turnover of companies in the market of fire extinguishers. The estimates were the result of studies conducted by SEBRAE from the State of Santa Catarina-Brazil, in 2002.

**Example F: International cartel in the market of optical disk drives**

Since a defendant did not present the gross turnover in Brazil during the analysis of the Administrative Proceeding no.08012.001395/2011-00, CADE considered for the basis of calculation the value of the exports of the defendant to Brazil, in the field of activity in 2009, the last year of the conduct investigated and of available data in the case files.

### 2.1.1.1.3. Tax Base Updates

As aforementioned, the Tribunal has always considered the turnover from years prior to the conviction. Thus, there should be a monetary correction to impose the appropriate penalty. In accordance with CADE's case law, the value is updated according to the SELIC rate, the average adjusted rate for daily financing rates calculated by the Brazilian Special System for Settlement and Custody (SELIC) for government bonds<sup>4</sup>. The monetary correction shall be valid along the corresponding interval which based the turnover (the total sales in the

<sup>4</sup> The concept of the SELIC rate is available in Portuguese at: <https://www.bcb.gov.br/controlinflacao/taxaselic>. Source of the rate by the Brazilian Federal Revenue Office is available in Portuguese at: <https://www.gov.br/receitafederal/pt-br/assuntos/orientacao-tributaria/pagamentos-e-parcelamentos/taxa-de-juros-selic>. Retrieved: August 2023.

year prior to the launching of the administrative proceeding) and the month prior to the conviction with the imposition of fines.

CADE already applies this procedure of price level adjustment in the calculation of the financial contribution in Cease and Desist Agreements (TCCs). According to CADE (2016b), it is possible to adjust the rates in two different manners:

- 1) Summing the monthly fees of the adjustment period—this method considers the first month of the fiscal year that follows the turnover taken as the starting point, and the month prior to the conviction of the defendant for the culmination.
- 2) Subtracting from the monthly fee amounted at the starting point, the fee in the month of the culmination of the period that—the update in this method considers the first month of the fiscal year that follows the turnover taken as the starting point, and the month prior to the conviction of the defendant for the culmination.

As an example, there is an administrative proceeding that was launched by CADE in 2019. The conviction for anticompetitive conduct happened in October 2019, through the imposition of 15% of the turnover in the field of activity affected in the year prior to when the proceeding was initiated. Considering that the gross turnover in the field of activity was BRL 1 million in 2018, and the SELIC values were as shown in Figures 1 and 2.

- 1) Adding the monthly fees from January 2019 to September 2019 (4.56%) (see Figure 1).
- 2) Through the subtraction method, the rate accumulated in December 2018 minus the one accumulated in September 2019, results in 4.56% (see Figure 2).

Therefore, the updated sales revenue from October 2019 will be BRL 1,045,600 and the fine imposed will be BRL 156,840.

**Figure 1 - Update method based on monthly interest rates – SELIC**

Month/Year	2015	2016	2017	2018	2019
January	0.94%	1.06%	1.09%	0.58%	0.54%
February	0.82%	1.00%	0.87%	0.47%	0.49%
March	1.04%	1.16%	1.05%	0.53%	0.47%
April	0.95%	1.06%	0.79%	0.52%	0.54%
May	0.99%	1.11%	0.93%	0.52%	0.54%
June	1.07%	1.16%	0.81%	0.52%	0.47%
July	1.18%	1.11%	0.80%	0.54%	0.57%
August	1.11%	1.22%	0.80%	0.57%	0.50%
September	1.11%	1.11%	0.64%	0.47%	0.46%
October	1.11%	1.05%	0.64%	0.54%	
November	1.06%	1.04%	0.57%	0.49%	
December	1.16%	1.12%	0.54%	0.49%	

**Source:** Federal Revenue Office of Brazil.

**Figure 2 - Update method based on interest rates SELIC accumulated in the month**

Month/Year	2015	2016	2017	2018	2019
January	46.13%	33.47%	20.24%	11.22%	5.02%
February	45.31%	32.47%	19.37%	10.75%	4.53%
March	44.27%	31.31%	18.32%	10.22%	4.06%
April	43.32%	30.25%	17.53%	9.70%	3.54%
May	42.33%	29.14%	16.60%	9.18%	3.00%
June	41.26%	27.98%	15.79%	8.66%	2.53%
July	40.08%	26.87%	14.99%	8.12%	1.96%
August	38.97%	25.65%	14.19%	7.55%	1.46%
September	37.86%	24.54%	13.55%	7.08%	1.00%
October	36.75%	23.49%	12.91%	6.54%	
November	35.69%	22.45%	12.34%	6.05%	
December	34.53%	21.33%	11.80%	5.56%	

**Source:** Federal Revenue Office of Brazil.

Another way to calculate the tax rates is using the calculator of the Federal Revenue Office of Brazil (SICALC)<sup>5</sup>. This calculator uses a method based on the accumulated SELIC rate. For the previous example, in the field “Vencimento” (Expiration Date) there is “12/2018”, and in the field “Data do Pagamento” (Payment Day) there is the previous year of the coordination, in other words,

<sup>5</sup> The calculator is available on the website of the Federal Revenue Office of Brazil, in the section “Cálculo de Taxa Selic” (SELIC Rate Calculation). Available in Portuguese at: <https://sicalc.receita.economia.gov.br/sicalc/selic/consulta>. Retrieved: 20 August 2023.

"09/2019", so the result is the "Selic acumulada" (Accumulated SELIC) (see Figure 3).

**Figure 3** - Calculation using the SICALC

☒ Cálculo de taxa Selic

Última Selic disponível (07/2023)	1,07
* Vencimento (mês/ano)	<input type="text" value="12/2018"/>
* Data de Pagamento (mês/ano)	<input type="text" value="10/2019"/>
Selic acumulada de 12/2018 a 09/2019	4,56

**Source:** Federal Revenue Office of Brazil.

#### 2.1.1.2. Effective Tax Rate

CADE has already applied effective tax rates for cartel cases. The following effective tax rates should be adopted, according to the kind of conduct:

- (i) Cartels in government procurements (Article 36, Paragraph 3, Item 1, Sub-item "d", of Law 12529/2011): effective tax rate is 17%, which can be greater than this amount, or reach a minimum of 14%, considering aggravating and mitigating factors, under CADE's case law;
- (ii) Hardcore cartels (Article 36, Paragraph 3, Item 1, Sub-items "a", "b", and "c" of Law 12529/2011), meaning agreements or exchanges of information related to prices, geographical allocation, of share or clients, which have mechanisms to monitor/punish deviations and (an indicative of intention of) continuity: the effective tax rate is 15%, which can be greater than this amount, or reach a minimum of 12%, considering aggravating and mitigating factors, under CADE's case law;
- (iii) Other forms of concerted practices include softcore cartels (for instance, infrequent or non-systematic exchange of information, unilateral information disclosure, price fixing, etc.): effective tax rate of 8%, which can be greater than this amount, or reach a minimum of 5%, considering aggravating and mitigating factors, under CADE's case law.

These tax rates can be changed to higher or lower levels, according to the presence of aggravating or mitigating factors. In addition, tax rates can be influenced by other factors that take into consideration the principles of reasonableness, proportionality, and isonomy, and the criteria established by law, as further detailed below, provided in Article 45 of Law 12529/2011. There is the recommendation of an effective tax rate more elevated for cartel cases in government procurements, given the high severity of this practice, since “cartels in government procurements are even more harmful, as they affect public service provisions and represent a diversion of public funds, affecting all the taxpayers.” (CADE, 2016c).

#### 2.1.1.3. Tax rate adjustments based on the duration of the conduct

Another aspect that could directly affect the calculation of tax rates is the duration of the conduct. It is worth noting that, among the recommendations of the Organisation for Economic Co-operation and Development (OECD, 2019), the inclusion of the duration of the conduct should be a criterion for the fine definition during the peer review of Brazilian competition rules and policies, which has already happened in other jurisdictions<sup>6</sup>.

CADE recommends considering the differences in the duration of the defendant’s participation in the conduct. If the defendants participate in a conduct for a longer period, their penalties should be aggravated, regarding the penalties given to the defendant’s sideline or intermittent involvement.

#### 2.1.1.4. Definition of tax rates based on the occurrence of aggravating and mitigating factors

The effective tax rate adjustments will occur based on aggravating and mitigating factors that are related to fine calculation elements provided in Article 45 of Law 12529/2011. The elements of fine calculations should be considered in

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<sup>6</sup> See Working Paper no. 4/2020. Benchmarking internacional sobre dosimetria de penalidades antitruste (<https://cdn.cade.gov.br/Portal/centrais-de-conteudo/publicacoes/estudos-economicos/documentos-de-trabalho/2020/documento-de-trabalho-n04-2020-benchmarking-internacional-sobre-dosimetria-de-penalidades-antitruste.pdf>), elaborated by the Department of Economic Studies of CADE.

every single case, whenever possible, since the defendants will not necessarily have the same levels of responsibility for the same conduct.

Some of these legal aspects present some degree of abstraction, which results in a delegation of the legislator, so that the Tribunal can decide and ponder on the importance of each aspect, considering the specificities of the case at hand. In an attempt to standardise the interpretation of the legal aspects, as well as try to seek for consistency among them, this Guide brings some suggestions of interpretation, so that the main variables that are important for the fine calculation are related to the legal aspects.

The suggestions of interpretation of the legal aspects do not harm a diverse interpretation that is more adequate, regarding the specificities of the case at hand. Each of the aspects of the fine calculation are listed in Article 45 of Law 12529/2011.

- (i) The severity of the violation: it can be individually related to the participation of the defendant in the violation. For instance, if the defendant had a leading role in the violation and coerced someone, it is considered an aggravating factor. However, it would be considered a neutral situation if they played a secondary role, or a mitigating factor if they played a minor role. In addition, the severity can be related to the form of implementation, having the market affected, with the potential harm of the conduct, including its duration.
- (ii) Wrongdoer's good faith: it is related to the intention of the agent. Good faith is a mitigating factor, so it must be limited to cases that are considered as late repentance in the criminal law, in other words, as soon as there is an understanding of the illegality if the wrongdoer took objective measures to minimize its effects. Collaboration and loyalty can be considered to define good faith in the process. This is a relevant element because the wrongdoer's good faith increases the probability of punishment, so the severity of the penalty can be reduced to reach the intended degree of deterrence. It is worth noting that the lack of bad faith (aggravating) does not necessarily represent there is good faith (mitigating) in the conduct.
- (iii) Accrued or expected benefits: it concerns the efficiency

gain or the potential wrongdoer. However, this calculation is often not possible or is subject to a high level of inaccuracy, as this element cannot necessarily be applied to the fine calculation in the case at hand. It is important to emphasise that Article 37, Item 1, of Law 12529/11, determines that the fines will not be inferior to the accrued benefits, whenever possible to estimate them. This is a rule that is not associated with Article 45, but it regulates the same variable. In any case, this element should be considered to control the severity of the establishment of fines within the revenue criteria, without accrued benefits, regarding only the examination of the benefits of the conduct to verify aggravating or mitigating factors.

(iv) Whether the violation was consummated or not: this element should not be confused with the consummation for the purpose of conviction. Regarding cartel cases, Article 36 of Law 12529 and its interpretation by CADE's case law, the coordination of competition variables (occurrence of conduct) is a violation, and there is a generation of an adverse effect on competition. In this case, there is no need of evidence, since it is an alleged violation, or mensuration of the effects for the purpose of conviction.

(v) The level of harm or risk of harm to competition, the Brazilian economy, the consumers, or third parties: this element presents different variables, but it can be interpreted according to the kind of conduct, with a focus on a more severe penalty for the hardcore cartel, which is known as the competitive conduct that causes more negative impacts to the society. Considering bid rigging or cartel in sensitive sectors can also be considered even more severe. Other coordinated conducts are considered less severe than the first ones in CADE's case law. According to Article 12 of CADE'S Resolution no. 21/2018, there is a possibility of fine reduction when there is compensation for damages.

(vi) Economic negative effects produced in the market: this item refers to the most direct effects of the conducts. However, it is a difficult calculation to make.

(vii) Economic situation of the wrongdoer: this element can be

used mainly as a mitigating factor in cases that the wrongdoer is in a situation of economic difficulty.

(viii) Recidivism: it should be distinguished as an aggravating factor, provided for in Article 45, Item 8, of Law 12529/2011, from the specific hypothesis provided for in Article 37, Paragraph 1, of Law 12529/2011. Recidivism aiming for the imposition of doubled fines refers to a conduct that is undertaken after the first conviction (regardless of the moment it started, if it happened before the conviction, which occurs in case of violations of a permanent nature, such as cartels<sup>7</sup>). Other cases that do not constitute a possible imposition of doubled fines can be considered to apply the aggravating factors provided for in Article 45, Item 8, when they seem to have a bad record, such as previous convictions for antitrust violations.

The Figures 4 and 5 present a sample [list](#) of these requests.

**Figure 4 - Sample list of aggravating factors**

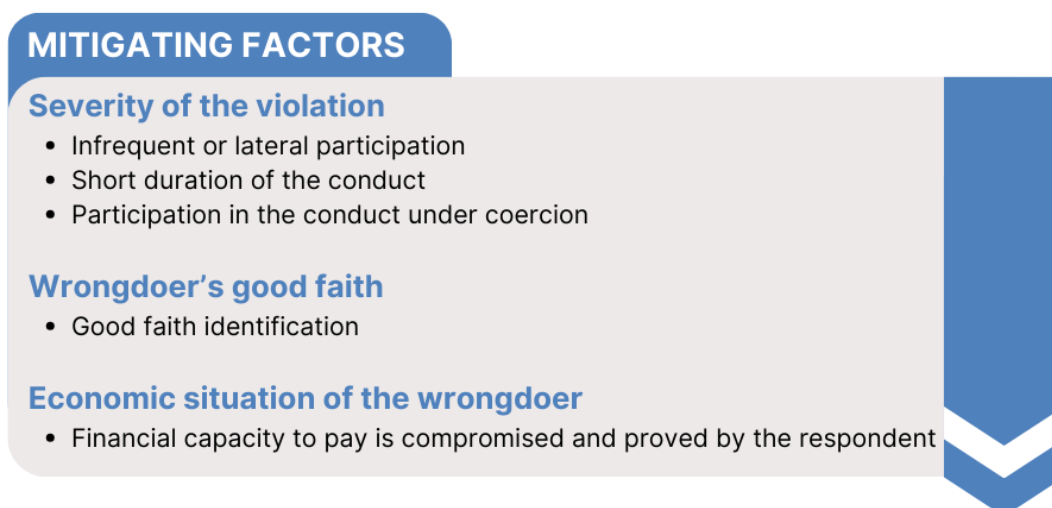


**Source:** CADE.

<sup>7</sup> According to the Administrative Proceeding no. 08700.003067/2009-67 and the requests for clarification in the Administrative Proceeding no. 08012.011508/2007-91.



**Figure 5 - Sample list of mitigating factors**



**Source:** CADE.

Regarding the severity of the violation, CADE considers the leader role of the defendant in the conduct as a penalty aggravating factor, even if the leadership was not put into practice during the coercion. Legal persons are considered leaders when they play an important role in the violation. For instance, scheduling meetings, and being responsible for issuing the guiding documents on the conduct for other people involved, such as price lists. With respect to individuals, they are usually considered leaders when they act as partners, administrators, or people with relevant positions in the firms, or when they have an important role in the conduct. Similarly, when there is evidence that the defendant was forced to take part in the conduct, it is possible to apply a mitigating factor to the fine.

When there is evidence of the wrongdoer's good faith, the fine can be mitigated, and the opposite occurs in case of bad faith. A common factor in the case law review is to consider how essential the product/service is, regarding the aggravating factors of the fine to be applied. For instance, according to CADE (2014), antitrust violations in the market of the health insurance sector should be aggravated, as the health service is a "fundamental right, strictly approved in the Constitution, where the consumers' vulnerability is clear".

Considering the high level of negative economic impact in the market, it is possible to mention cartel cases in public procurements, since "the lower is the financial availability of the state's resources due to cartel gains, the lower is the

financial availability when implementing public policies which provide improvements to citizens' lives. Thus, cartels in public procurements is an insult to the public interest and harms the effectiveness and efficiency of the provision of public services" (CADE, 2015).

In relation to the defendant's ability to pay, there is the imposition of mitigating factors in the fine when the financial capacity is jeopardized, which can be proved with a bankruptcy petition or judicial recovery of the firm.

#### 2.1.1.5. Legal Validity

After the effective tax rate adjustment due to mitigating and aggravating factors, including the aggravating factor related to the duration of the conduct, it should be checked if the fine is within the limits established by Law 12529/2011. For legal persons, there should be a fine of at least **0.1%** up to **20% of the gross turnover** of the firm, group, or conglomerate earned in Brazil **in the field of activity affected by the conduct in the year before the proceedings were initiated. (Article 37, Item 1)**. In case it is not possible to use the gross turnover criteria **(Article 37, Item 2)** the limits are **BRL 50 thousand to BRL 2 million**.

#### 2.1.1.6. Recidivism

As explained above, the recidivism considered for the imposition of doubled fines (Article 37, Paragraph 1, of Law 12529/2011) encompasses the situations that the defendant commits a new antitrust violation, after CADE convicts them, even if the conduct started before the first conviction.

The general provision of Article 45, Item 8 of Law 12529/2011 considers recidivism as a penalty enhancement, so it should be interpreted as a bad record in situations that are not encompassed by Article 37, Paragraph 1 of Law 12529/2011, when CADE had convicted the respondent before, as applicable.

#### 2.1.2. Base fine calculation for legal persons that do not perform any business activities

The fines imposed to legal persons that do not perform any business activities have legal boundaries, especially associations and unions, according to CADE's case law, provided in Item 2 of Article 37 of the Brazilian competition law:

- I - in the case of individuals or legal persons under public or private law, as well as to any associations of entities or individuals, whether de facto or de jure, even temporarily, incorporated or unincorporated, which do not perform a business activity, not being possible to use the gross sales criteria, the fine will be between BRL 50,000.00 to BRL 2,000,000,000.00 (BRAZIL, 2011, emphasis added).

In the case of sanctions imposed to firms, the Tribunal searches for proportionality for fixed penalties, considering variables, whenever needed. It is important to highlight that it is possible that membership associations present very low incomes although these institutions have great relevance either in the market or in the conduct. Thus, it is necessary to evaluate the penalty to be applied through different variables.

### 2.1.3. The definition of the penalty for individuals

#### 2.1.3.1. The basis of calculation

#### 2.1.3.2. General Principles

According to CADE's case law, the fines imposed to the administrators were based on the fines imposed to the company they were linked to during the conduct.

The criteria for repeated violations and updating the calculations previously explained also apply to individuals.

In addition, it is worth mentioning that, as a rule, the fine for individuals must be higher than the financial contribution imposed to the individuals who signed a cease and desist agreement and have similar levels of participation in the conduct. The idea is to always preserve the golden rule of collaborations. That is, the one who collaborated must not be in a worse condition than the one who did not.

### 2.1.3.3. Tax rate

#### 2.1.3.3.1. Adjustments according to the participation in the cartel

During the analysis of the administrative proceeding, it is often possible to identify people that had relevant participation in the cartel. CADE advises that their actions, as well as the actions of the administrators of the companies involved in the anticompetitive conduct, must be seen as an aggravating factor since they have leading positions and strategic functions in the companies and, therefore, in the cartel.

Thus, regarding the methodology used for applying tax rates on the fine of the companies to which the individuals were linked to at the time of the conduct, the tax rate imposed must respect the level of participation in the cartel. The bigger the role of the individual in the conduct, the bigger must be the tax rate applied. The level of participation must be considered case by case. However, as a suggestion, it is possible to briefly list some positions already used by the Tribunal to characterise leadership in the conduct, such as:

- (i) President, partners, de facto or de jure administrators, and directors as defendants; and
- (ii) Leadership in the collusion meetings.

According to CADE's case law, leadership is considered an aggravating factor in relation to the other defendants in less relevant positions in the company. It is important to emphasise that the tax rate must respect the limit set forth by Law 12529/2011 of 1% to 20% over the fine imposed on the company involved.

#### **Example G: Cartel in the private sector to hiring car park for commercial exploitation and operation services in the city of São Paulo/SP**

In the fine calculation in the Administrative Proceeding no. 08012.004422/2012-79, leadership was considered an aggravating factor, because an individual, as a defendant, shared "sensitive information and the development of the proposal to be presented in the procurement."

#### 2.1.3.4. Legal Validity

According to Law 12529/2011, the percentage of 1% to 20% of the fine established to the company must be imposed to the administrators and other individuals involved. In addition, when it is not possible to use the gross sales criteria, the fine will be between BRL 50 thousand to BRL 2 billion.

#### 2.1.4. Violations committed under Law 8884/1994

CADE may adjudicate cases of anticompetitive practices while Law 8884/1994 was in force. For these cases, CADE must analyse which law must be applied, considering which one of them is more favourable to the defendants. In general, CADE has adopted the following guidance<sup>8</sup>:

Regarding the establishment of penalties to the violations when Law 8884/1994 was in force and still waiting to be adjudicated by CADE, it is possible to presume safely that:

- (i) the parameters established in Law 12529/2011 to convict companies are more beneficial than previously provided in Law 8884/1994 and, therefore, must be applied;
- (ii) the parameters established in Law 12529/2011 to convict administrators responsible for the economic crimes are more beneficial than previously provided in Law 8884/1994 and, therefore, must be applied;
- (iii) the parameters established in Law 12529/2011 to convict associations, de facto or de jure, of entities or individuals that do not conduct business activities are not beneficial anymore as previously provided in Law 8884/1994 and, therefore, they should not be applied (CADE, 2013).

Thus, there is an understanding that the application of fines according to the previous legislation is more beneficial to legal persons that do not conduct business activities and individuals (who are not administrators) involved in collusive practices when Law 8884/1994 was in force. However, it is also possible to apply this law to other types of defendants that prove that the legislation is

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<sup>8</sup> CADE's stance in the Administrative Proceeding no. 08012.009834/2006-57 is usually mentioned in other cases as follows.

more beneficial for their case. It is worth mentioning that this law did not present tax rate parameters to be applied. It only presented minimum and maximum limits of the values of fines imposed to this type of defendants.

#### 2.1.4.1. Legal Validity

Regarding the fines imposed to antitrust violations committed when Law 8884/1994 was in force, the legal limits are: **6,000 to 6,000,000 of UFIR (Government Index Number) or subsequent monetary parameter.**

### 3. NON-FINANCIAL PENALTIES

The main penalty CADE applies is the fine. However, Article 38 of Law 12529/2011 foresees several other punishments that can be imposed on an isolated basis or cumulatively to the fine. They are:

- I the publication in the newspaper stated in the decision, in half a page and at the expense of the wrongdoer, of the summary of the judgement of conviction, for two consecutive days for one to three consecutive weeks;
- II the prohibition, for a term no shorter than five years, to enter into contracts with official financial institutions and to bid for a contract to sell, lend, carry out works and services, and provide public services for the federal, state, and local governments, the government of the Federal District, and autonomous government bodies;
- III the inclusion of the wrongdoer in the Brazilian Consumer Protection Registry; IV - the recommendation for competent public bodies of the following:
  - a) that a compulsory licence to exercise intellectual property rights held by the wrongdoer is granted whenever the infraction is connected to the exercise of this right;
  - b) that the wrongdoer in default on federal taxes should not be allowed to pay them in instalments and that all fiscal incentives or public subsidies be cancelled, partially or in its entirety;
- IV the company's spin-off, transfer of controlling interest, sale of

- assets, or partial ceasing of operations;
- v the prohibition from carrying out business on its own behalf or via a legal person for up to 5 years; and
- vi any other action or measure necessary to eliminate the anti-competitive effects (BRAZIL, 2011).

It is worth mentioning that the Item 7 of this Article establishes that CADE may impose any other action or necessary arrangements to eliminate harmful economic effects.

As a result, after the calculation of the fine that is going to be applied to the defendant, the Tribunal must apply the sanction or set of sanctions that most efficiently meet the objectives of the punishments, especially the creation of dissuasive effect against new violations. Regarding the strong dissuasive effect of the fine, the Tribunal may consider additional measures or restrictions related to the conduct on a case-by-case basis.

It is important to highlight that the sanction applied must not generate more negative than positive effects. In this regard, for example, punishments that restrict considerably the competition must be avoided, especially in government procurements. When a group with elevated market participation is convicted of cartelization, it would be advisable the restriction from contracting with the State only the participants with greater level of responsibility in the conduct, for example, the leaders.

**Example H: Cartel in government procurements regarding subways, trains, and auxiliary systems**

The prevailing opinion on the fine calculation in the Administrative Proceeding no. 08700.004617/2013-41 determined that two other penalties were to be applied to the company considered leader of the cartel, they are:

- (i) the prohibition, for a term no shorter than five years, to bid, directly or indirectly, for a contract to sell, lend, carry out works and services, and provide public services, including acquisition and maintenance of rolling stock, auxiliary systems and their integral parts, for the federal, state, and local governments, the government of the Federal District, and autonomous government bodies, from the release of the decision of the Tribunal of CADE, as provided by Article 38, Item 2, of Law 12529/2011; and
- (ii) that the wrongdoer in default on federal taxes should not be allowed to pay them in instalments and that all fiscal incentives or public subsidies are cancelled, partially or

in its entirety, for five years, according to Article 38, Item 4, Sub-item b, Law 12529/2011.

Regarding the companies that had representative participation, the so-called hardcore cartel, only Sanction 2 was applied.

#### 4. PRESENTATION OF THE TURNOVER

The Tribunal of CADE already stated in precedents<sup>9</sup> that the **most appropriate moment** in administrative proceedings for defendants to present information about the turnover, **is preferably** in the presentation of the defence. That is, upon the notification to the Office of the Superintendent General when the defendants are expressly required to provide information on the turnover linked to the field of activity affected by the anticompetitive conduct in the year prior to the launch of the administrative proceeding, as per Article 37, Item 1, of Law 12529/2011.

If they wish, in addition to providing information on the gross turnover linked to the field of activity, the defendants may present additional information on the turnover in the subfield or in the affected market. The information may include the year prior to the launch of the administrative proceeding and the turnover during the conduct, to demonstrate the manifested disproportionality and request adaptation of the basis of calculation of the fine, as per Article 2(a) of Resolution no. 3/2012 of CADE.

In any case, (turnover in the field, subfield, or affected market), the defendants must present **complete information, which allow the clear and appropriate identification of the turnover** under the pain of the application of the provisions of Article 37, Paragraph (2) of Law 12529/2011, which allows the competition authority to define the gross turnover of the company or the business group to substantiate the decision when the information is not reliable.

Usually, information is considered adequate when preferably signed by an independent accounting consultant company, by a qualified accountant or finance director or, in their absence, by the managing partner of the company, which is responsible for the authenticity of the information provided. On the other hand,

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<sup>9</sup> In this regard, for example, requests for clarification in the Administrative Proceeding no. 08700.006005/2019-89 and requests for clarification in the Administrative Proceeding no. 08700.003718/2015-67.



according to the precedents, apocryphal documents are rejected by CADE since they do not meet the legal criteria of unequivocal legitimacy.

The precedents of CADE also point towards the objection of the Tribunal to assess turnover information presented by the parties during or after the judgment of the proceedings, that is, in requests for clarification. The objection is due to the fact that this information is not usually new and, therefore, must be presented in advance by the parties.

## **5. FINAL CONSIDERATIONS**

The cartel-sentencing guidelines present the methodology used by the Tribunal of CADE to determine appropriate penalties for companies and other legal entities, which do not perform a business activity, as well as individuals convicted for cartel practices. In addition, possible alternative sanctions were presented. However, it is worth mentioning that the specificities of the cases, when justified, allow CADE to differ from the methodology presented in this Guide.

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