

ADMINISTRATIVE COUNCIL FOR ECONOMIC DEFENSE

RESOLUTION No. 36, OF MAY 19, 2004

(Published in the Official Gazette of the Federal Executive, Section I, on May 21, 2004, republished on June 25, 2004)

Provides for the amount of the pecuniary fine imposed for untimely submission of Concentration Acts, as set forth in article 54, paragraph 5 of Law 8884/94.

THE BOARD OF THE ADMINISTRATIVE COUNCIL FOR ECONOMIC DEFENSE - CADE, exercising its legal duties and in view of the provisions of article 7, XIX of Law No. 8884 of June 11, 1994,

RESOLVES AS FOLLOWS:

Article 1 - A pecuniary fine, as stipulated in article 27 of Law 8884/94, shall be imposed upon the acknowledged untimely submission of a concentration act subject to CADE's review pursuant to article 54 of Law 8884/94, based on the following criteria:

- I. - Risk of injury to free competition, the Brazilian economy, consumers and third parties, evaluated in days of delay counted from the beginning of the term defined by CADE on a case-by-case basis;
- II. - potential injury to competition;
- III. - voluntary submission;
- IV. - recidivism;
- V. - the transaction value and the economic condition of the petitioners.

Sole Paragraph. The fine shall observe the legal minimum amount of sixty thousand Tax Reference Units (60,000 UFIR) and the legal maximum amount of six million Tax Reference Units (6,000,000 UFIR).

Article 2 - Once untimely submission has been verified, CADE will impose the minimum fine of 60,000 UFIR, plus the following additions, in accordance with each criterion:

- I. - the number of days of delay counted as from the beginning of the term defined by CADE on a case-by-case basis (considering the provisions of article 27, V of Law 8884/94):

| | |
|----------------------|--|
| 1 day | No addition; |
| from 2 to 5 days | + 10 thousand UFIR |
| from 6 to 30 days | + 20 thousand UFIR |
| from 31 to 180 days | + 30 thousand UFIR |
| from 181 to 360 days | + 50 thousand UFIR |
| Above 360 days | + 100 thousand UFIR; + 100 thousand UFIR every 360-day period. |

II. - if the transaction was (a) approved without restrictions; (b) approved with restrictions; or (c) vetoed (as per article 27, III and VI of Law 8884/94):

| | |
|----------------------|---------------------|
| Without restrictions | No addition |
| With restrictions | + 60 thousand UFIR |
| Vetoed | + 200 thousand UFIR |

III. - if submission was (a) voluntary; or (b) upon request of the competition authorities (as per article 27, II of Law 8884/94):

| | |
|---|--------------------|
| Voluntary submission | No addition |
| Upon request of the Brazilian Competition Protection Authorities (SBDC) | + 60 thousand UFIR |

IV. - in the event of recidivism (article 27, VIII of Law 8884/94), the addition shall be 60 thousand UFIR;

V. - the transaction value and the economic condition of the petitioners, taking into account for such purpose: (a) the transaction value; and (b) the Annual Average Gross Turnover in Brazil of the petitioners involved in the transaction for the year prior to submission of the act. This criterion takes into account the provisions of article 54, paragraphs 3 and 5, coupled with article 27, VII, all of Law 8884/94. (The formula for determination of the amounts to be ascertained under this item and its relation to the other items may be found in ANNEX I to this Resolution).

Paragraph 1. - For the purpose of determining the percentage of the addition set out in item V, the annual average gross turnover (Fmb) shall be deemed to be the arithmetic mean of the turnover figures in Brazil of the petitioners involved in the transaction.

Paragraph 2. - When only one of the petitioners has a turnover in Brazil, such amount shall be used as the average turnover figure contemplated by this Resolution.

Paragraph 3. - When none of the petitioners has a turnover in Brazil, the worldwide turnover shall be adopted for determining the annual average gross turnover (Fmb).

Article 3 - The fine shall not exceed the transaction value, and shall be reduced to such value if, after being determined, it exceeds such value.

Article 4 - This Resolution shall take effect on the date of its publication in the Official Gazette of the Federal Executive.

ANNEX I

Criterion for determining the fine based on the Transaction Value and the Annual Average Gross Turnover of the petitioners involved in the transaction, and its relation to article 1, I through IV of the Resolution:

1. - Whenever the petitioners involved in the transaction have a high Fmb, but the Transaction Value (Vo) is low, a graduated fine may be imposed at approximately half the maximum amount of the fine (i.e., 3 million UFIR).
2. - Whenever the petitioners involved in the transaction have a low Fmb, but the Transaction Value (Vo) is high, a graduated fine may be imposed at approximately half the maximum amount of the fine (i.e., 3 million UFIR).
3. - A fine near the maximum amount prescribed by Law (6 million UFIR) may be imposed on the petitioners involved in the transaction only when the Vo is high (over R\$ 100 billion) and the Fmb is high (over R\$ 400 billion).
4. - Under this criterion, the fine is imposed ratably to the transaction value (Vo) and to the annual average gross turnover (Fmb), added by the amounts corresponding to items I through IV of articles 1 and 2 of this Resolution and the minimum value of the fine pursuant to article 2, main section. The literal formula is the following:

$$M = \frac{(Vmc \times Fmb - Vmc \times Fmin) + (Vam \times Vo - Vam \times Vomin)}{2} + Mmin + Of$$

5. - This formula is based on minimum and maximum reference values, both for the Vo and the Fmb, and each of the parts between parenthesis corresponds to one factor, one derived from calculation based on the Fmb and the other from calculation based on the Vo.
6. - The coefficient that defines how much the fine will increase in relation to an increase in the Vo is:

$$Vam = \frac{Mmax - Mmin}{Vomax - Vomin}$$

7. - The coefficient that defines how much the fine will increase in relation to an increase in the Fmb is:

$$Vmc = \frac{Mmax - Mmin}{Fmax - Fmin}$$

8. - These coefficients (items 6 and 7) are based on a proportionality relation between the fine variation and the Vo and Fmb variations.

9. - The terms of the equation are the following:

- Fmb** = Annual average gross turnover;
- Fmin** = Minimum annual average gross turnover, i.e.: four hundred million reais (R\$ 400,000,000.00);
- Fmax** = Maximum annual average gross turnover, i.e.: four hundred billion reais (R\$ 400,000,000,000.00);
- Mmin** = Minimum fine value, equal to sixty-three thousand eight hundred and forty-six reais (R\$ 63,846.00);
- Mmax** = Maximum fine value, equal to six million three hundred and eighty-four thousand six hundred reais (R\$ 6,384,600.00);
- Vo** = Transaction value;
- Vomin** = A minimum reference value for a transaction: one hundred million reais (R\$ 100,000,000.00);
- Vomax** = A maximum reference value for a large transaction, i.e. one hundred billion reais (R\$ 100,000,000,000.00);
- Vam** = Angular coefficient (Fine/Vo);
- Vmc** = Angular coefficient (Fine/FM).
- Of** = Other factors (the factors ascertained in items I through IV of articles 1 and 2 of this Resolution) - (They are simply added to the final result);
- M** = Value of the fine to be imposed.

Note: The amounts underlined indicate the formula variables

10. - The formula itself determines that the fine amount will increase as the Vo and Fmb increase. Thus, the maximum fine shall be imposed only on transactions involving large amounts (i.e. above the Vomax) between companies with an also high annual average gross turnover (i.e. above the Fmax). Intermediate values shall apply to intermediate cases. Consequently, a fine in an amount near that of a small transaction shall apply to a transaction involving an intermediate value between companies with an intermediate annual average gross turnover.

11. - For ease of calculation, the terms of the formula were rearranged as follows:

$$M = \frac{Vmc \times Fmb + Vam \times Vo - (Vam \times Vomin + Vmc \times Fmin)}{2} + Mmin + Of$$

12. - Replacing the letters with numbers in the formula set out above to determine the coefficients, one has:

$$Vam = \frac{6,384,600.00 - 63,846.00}{100,000,000.00} = \frac{6,320,754.00}{100,000,000.00} = 0.000063270811$$

$$Vmc = \frac{6,384,600.00 - 63,846.00}{400,000,000,000.00} = \frac{6,320,754.00}{400,000,000,000.00} = 0.000015817703$$

$$\begin{array}{r}
 100,000,000,000.00-100,000,000.00 \qquad 99,900,000,000.00 \\
 \\
 6,384,600.00-63,846.00 \qquad 6,320,754.00 \\
 400,000,000,000.00-400,000,000.00 \qquad 399,600,000,000.00
 \end{array}$$

$$V_{mc} \times F_{min} = 0.000015817703 \times 400,000,000.00 = 6,327.08$$

$$V_{am} \times V_{omin} = 0.000063270811 \times 100,000,000.00 = 6,327.08$$

$$(V_{am} \times V_{omin} + V_{mc} \times F_{min}) = 6,327.08 + 6,327.08 = 12,654.16$$

13. - Replacing these figures in the main formula:

$$M = \frac{0.00015817703 \times F_{mb} + 0.000063270811 \times V_o - 12,654.1621622}{2} + 63,846.00 + Of$$

14. - Making the division:

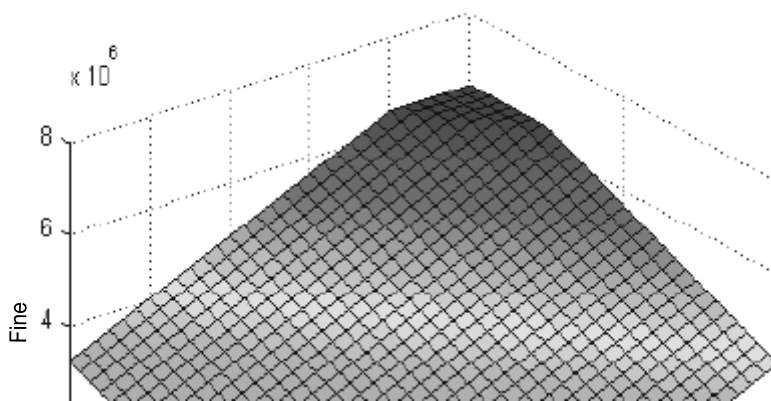
$$M = 0.000007908851 \times F_{mb} + 0.000031635405 \times V_o + 57,518.91 + Of$$

15. - In view of the necessary precision in terms of centavos, i.e. two decimal places, and considering that the amounts are in the order of up to 6 billion for the V_o and 40 billion for the F_{mb} , we should consider a precision of at least 11 decimal places in the formula figures. All figures were calculated by adopting a precision of 24 significant figures, thus representing a sufficient precision for inclusion thereof in the formula.

16. - When factorizing for ease of reading, and having already made the modifications proposed in the preceding item, we have the following:

$$M = \frac{7.90885135135 \times F_{mb} + 31.6354054054 \times V_o}{1,000,000.00} + 57,518.91 + Of$$

17. - When showing this formula in a graph, where Of equals zero, the result is as follows:



The flat portion on the upper part of this figure represents the instance in which the fine reached the maximum amount prescribed by Law.

STATEMENT OF REASONS

The amount of the fines imposed by CADE has given rise to plenty of questioning within CADE itself and the Judiciary. Therefore, this Resolution is an attempt to contribute toward standardizing the criteria to be taken into consideration to define the amount of the fine for untimely submission of a concentration act.

This Resolution is not exclusively intended to define generically the factors that would entail either an increase or reduction in the fine (which is already defined by Law 8884/94). Its purpose is actually to set the real parameters for imposition of a graduated fine based on the factors set out in article 27 of the aforementioned Law and to be taken into account when measuring the pecuniary fine.

In addition to taking legal precepts into consideration, the Resolution observed the principles that support the rationale behind the activities of the government administration. Among these principles are: (a) public interest shall prevail over private interest (b) the government authorities cannot disregard the public interest. From these principles, others arise such as (a) purpose, (b) motivation, (c) reasonableness, and (d) proportionality.

Accordingly, the purpose of this statement of reasons is to justify the criteria and amounts contemplated by the Resolution in accordance with legal and rational principles.

As expressly stated in the text itself and in its Annex I, this Resolution shall apply as from acknowledgement of untimely submission of the concentration act subject to CADE's review, under article 54 of Law 8884/94, for imposition of the pecuniary fine. As stated hereinabove, the fine shall be applied pursuant to article 27 of the same Law, i.e. it is imperative that the following criteria be taken into consideration:

- I. - Risk of injury to free competition, the Brazilian economy, consumers and third parties, evaluated in days of delay counted from the beginning of the term defined on a case-by-case basis pursuant to Law 8884/94, as interpreted by CADE;
- II. - potential injury to competition;
- III. - voluntary submission;
- IV. - recidivism;
- V. - the transaction value and the economic condition of the petitioners.

It is worth noting that, according to the criteria for determining the penalty amount, the fine shall observe the legal minimum amount of 60,000 UFIR and the legal maximum amount of 6,000,000 UFIR.

Therefore, once untimely submission is verified, the minimum fine shall be set at 60,000 UFIR as prescribed by law. This is the floor adopted by the Resolution to increase the fine. Below is a correlation between each criterion and the legal provision to be observed, with due regard for the principles concerned, attributing values for each of the events:

- I. - the number of days of delay counted as from the beginning of the term defined by CADE on a case-by-case basis (considering the provisions of article 27, V of Law 8884/94):

| | |
|----------------------|---|
| 1 day | No addition; |
| From 2 to 5 days | + 10 thousand UFIR |
| From 2 to 30 days | + 20 thousand UFIR |
| From 31 to 180 days | + 30 thousand UFIR |
| From 181 to 360 days | + 50 thousand UFIR |
| Above 360 days | + 100 thousand UFIR; + 100 thousand UFIR every 360-day period |

For this criterion, in addition to the provision taken into consideration, the principle of equality before the law warranted by article 5, main section of the 1988 Constitution, is also observed. This is because it would not be equitable nor reasonable to impose identical fines on individuals whose days of delay in submitting the transaction to SBDC are distinct. Thus, the addition by virtue of the days of delay would serve to encourage prompt submission of transactions within the 15-business day period stated in Law 8884/94, article 54, paragraph 4.

The frequency of variation is greater up to the thirtieth day because the first thirty days subsequent to performance of a significant transaction for antitrust review purposes are of paramount importance, as situations difficult to reverse may be created.

II. - if the transaction was (a) approved without restrictions; (b) approved with restrictions; or (c) vetoed (considering article 27, III and VI of Law 8884/94):

| | |
|----------------------|---------------------|
| Without restrictions | No addition |
| With restrictions | + 60 thousand UFIR |
| Vetoed | + 200 thousand UFIR |

III. - if the transaction was submitted (a) voluntarily; or (b) upon request of the competition authorities (considering article 27, II of Law 8884/94):

| | |
|----------------------|--------------------|
| Voluntary submission | No addition |
| Upon SBDC's request | + 60 thousand UFIR |

The provision contained in article 27, specifically items II and VI, applies to these last two criteria and the gist of such provision relies on the principle of good faith and on the negative effects stemming from the practice. Accordingly, we have it that:

“Good faith is an element or circumstance to be considered not only in the relations between private persons governed by private law, or in the relations governed by criminal law; to consider good-faith or bad-faith on the part of both the private person dealing with the government, or of the government officers dealing with the private person, is of the essence, thus actually constituting a principle of administrative law.

(...)

In brief, good-faith of the private person involved in the administrative proceeding must be taken into consideration when deciding whether to validate or invalidate an act, maintain or reverse a legal event (*situação jurídica*), impose or not a penalty, since the intention of the private person is of paramount relevance for the Law. This relevance is expressly stressed in article 2, IV of Law 9784/99, and reiterated in its article 4.” (Sérgio Ferraz, in *Processo Administrativo*, pp.81/83).

IV. - in the event of recidivism (article 27, VIII of Law 8884/94), the addition shall be 60 thousand UFIR;

V. - the transaction value and the economic condition of the petitioners, taking into account for such purpose: (a) the transaction value and (b) the Annual Average Gross Turnover in Brazil of the petitioners involved in the transaction for the financial year prior to submission of the act. This criterion takes into account the provisions of article 54, paragraphs 3 and 5, coupled with article 27, VII, all of Law 8884/94. (the formula for determination of the amounts to be ascertained under this item and its relation to the other items may be found in ANNEX I to this Resolution).

It is worth noting that, given the relatively complex relation between the transaction value and the economic condition of the petitioners, a mathematical formula capable of balancing such factors was created to harmonize them with the other items of the Resolution. This formula is described in detail and explained in Annex I to the Resolution.