

## CALCULATION OF GROUP TURNOVER FOR CADE PURPOSES

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The Antitrust Law (Law No. 12,529/2011) establishes three objective criteria that determine whether a corporate transaction must be filed with the Administrative Council for Economic Defense (Cade), namely whether it produces effects in Brazil, characterizes economic concentration and meets the turnover threshold.

The turnover threshold is met when one of the economic groups involved in the transaction has registered annual gross turnover or volume of business in Brazil equal to or greater than R\$ 750 million on the balance sheet of the fiscal year prior to the transaction, and another group involved in the transaction has registered annual gross turnover or volume of business in Brazil equal to or greater than R\$ 75 million in the same period.

According to the interpretation traditionally adopted by Cade, in order to calculate group turnover each of the parties involved in the transaction should first identify which companies were part of the group, pursuant to Cade Resolution No. 02/2012, at the end of the fiscal year prior to the transaction. Based on this information, the gross turnover of the companies established in Brazil and the volume of business of the foreign companies with sales to Brazil were added together.

This practice was modified after the interpretation adopted by Cade's General Superintendence in three merger filings in which the parties questioned which companies should be included in their economic group, namely whether they should be only those that were part of the group at the end of the previous fiscal year or at the moment immediately prior to the transaction submitted to Cade's review.

In those cases, the configuration of at least one of the groups involved in the transaction had changed from one year to another year. If the companies that belonged to the economic group at the end of the last fiscal year were taken into account, the turnover threshold would be met. On the contrary, if the companies that belonged to the economic group immediately before the transaction were taken into account, the threshold would not be met due to the divestment of group companies during that period.

Cade's General Superintendence decided to dismiss those filings on the grounds that one of the criteria for mandatory filing was not met, and clarified that the composition of the economic groups of the buyer(s) and seller(s) to be taken into account for turnover calculation purposes should be the one at the date of the transaction, which in practical terms would be the date of execution of the agreement that formalized the transaction to be potentially filed with Cade.

Therefore, in order to calculate the gross turnover of an economic group for Cade's purposes, one should disregard the turnover of the companies that were part of that group in the year prior to the transaction, but which were sold before the date of execution of the transaction agreement; and take into account the turnover in the last fiscal year of companies that were not part of the group in the year prior to the transaction but were acquired by the group before the date of execution of the transaction agreement.

Considering the constant changes in the composition of economic groups due to the dynamics of buying and selling companies in the market, attorneys and businesspeople involved in M&A transactions that produce effects in Brazil and entail economic concentration should rely on these guidelines when calculating group turnover and assessing the need to submit the transaction for Cade's review.

