COMPETITION AND ANTITRUST

CRITERIA FOR NOTIFICATION OF ACQUISITION OF REAL ESTATE ASSETS

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The need to notify asset acquisition transactions to the Administrative Council for Economic Defense (CADE) has raised doubts since the enactment of the Brazilian Competition Law (Law 12.529/11). Especially, in cases involving the acquisition of real estate assets.

At CADE's Judgment Session held on February 12, CADE's Administrative Tribunal analyzed the matter and provided relevant guidance upon analyzing a consultation submitted by a company that operates in the supermarket sector. The company sought to clarify whether there was a need to notify the sale of one of its properties to a real estate company.

According to the vote issued by the Commissioner Rapporteur, Gustavo Augusto Freitas de Lima, a real estate asset should not be necessarily be viewed as an undertaking – which encompasses several tangible and intangible elements, such as equipment, inventories, warehouses, goodwill, business name, etc.

The acquisition of a real estate asset that does not amount to an undertaking would not be able to change market structure and would not amount to an act of economic concentration, according to the Brazilian Competition Law.

The judgment set forth aspects that must be analyzed to assess the obligation to notify real estate transactions, such as:

> if the real estate is part of an undertaking at the time the negotiations of the of the deal begin;

> if the real estate asset has production capacity that can be used d by the buyer in its activities, generates revenue, or represents market share for its holder, among other factors that could indicate it is a productive asset;

> if the real estate asset is subject to regulatory restraints that would make it impossible for other assets to replace it.

CADE also pointed out that the fact that the buyer does not operate directly in the same relevant market as the seller would reinforce the non-reportability of the deal. It also stressed that the guidance above do not apply to the asset deals between companies active in the real estate sector.

As usual in consultation procedures, CADE's response is limited to the object of the consultation and will be binding on the Administrative Tribunal and the consulting parties. It is now necessary to monitor how the concepts and criteria discussed in this consultation will be handled by companies when assessing the need to notify their real estate deals to CADE, and how CADE will rule on this issue in merger filings.