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## CADE decision signals new interpretation of criterion for notification of concentration Acts

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October 12 – 18, 2008

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The provisions of Law 8884/94, which lays down the rules on competition in Brazil, are quite broad when it comes to the criteria for mandatory notification of acts and contracts to CADE review and approval.<sup>1</sup> Pursuant to article 54, main section of Law 8884/94, “*any acts that may limit or otherwise restrain open competition, or that result in a dominant position in relevant markets for certain products or services, shall be submitted to CADE for review and approval.*”

Under paragraph 3 of said article 54, these acts that require mandatory notification include transactions which create any type of economic concentration with effects in Brazil and: (i) in which the resulting company or group of companies accounts for twenty percent (20%) of a relevant market, or (ii) in which any of the participants has posted in its latest balance sheets an annual gross turnover equal to or above R\$ 400 million.

With respect to the turnover criterion, the interpretation given to date is that one should consider not only the gross turnover of the notified act participants, but also that of their economic groups and that posted exclusively within the Brazilian territory (pursuant to CADE Case Law Statement No. 1, published in the Official Gazette of the Federal Executive on October 18, 2005).

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<sup>1</sup> The Administrative Council for Economic Defense (CADE) is the government agency in charge of administrative decisions in proceedings underway at the Brazilian Antitrust Authorities (“SBDC”).

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In relation to the market share criterion, CADE's majority stand until recently was that a transaction should be mandatorily notified when one of the participants or petitioners holds a share of 20% or more in a certain relevant market, regardless of whether such market share is a consequence of the notified act. In other words, this criterion encompassed deals in which the preexisting market share was equal to or above 20%, even if the other party had no presence in the market under review.

However, a recent trend in the interpretation of this specific market share criterion has become public and official: at its 430<sup>th</sup> Ordinary Judgment Session held on October 1, 2008, in a decision rendered in connection with Concentration Act No. 08012.007026/2008-17,<sup>2</sup> CADE adopted, **by unanimous vote, the stand that there must be a causal relation between the notified transaction and actual verification of the 20% market share set forth in article 54, paragraph 3 of Law 8884/94.** In other words, when assessing whether a certain act should be mandatorily notified, the market share should be a consequence of or have a causal relation with the notified transaction and not simply a market share previously held by one of the participants.

Therefore, according to said decision, transactions in which the turnover threshold is not met (*i.e.* none of the groups participating in the transaction has posted in its latest balance sheet an annual gross turnover above R\$ 400 million in Brazil) and which involve a market player holding, prior to the transaction, a share equal to or above 20% in a certain relevant market, but in which the other participant had no presence in the market concerned, will not be required to be notified to the Brazilian Antitrust Authorities. It is also important to note that, pursuant to the vote cast by Commissioner Fernando de Magalhães Furlan, to be sure that the transaction does not need to be notified it will also be necessary to ascertain whether it does not result or may result in vertical integration between the parties.

This trend, introduced in said recently rendered decision, does not translate automatically into a rule, since such stand should be consolidated in a CADE Case Law Statement. However, the pointer given and disclosed in a notice published on the CADE website is that acts need not be reported if the following conditions are concurrently observed:

- 1) None of the participants or the groups to which they belong has posted in its latest annual balance sheet an annual gross turnover in Brazil equal to or above R\$ 400 million (this criterion has, therefore, remained unchanged, pursuant to CADE Case Law Statement No. 1).

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<sup>2</sup> Concentration Act between Petitioners Cintinori Acquisition GmbH and Jost Holding GmbH.



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- 2) The transaction does not entail horizontal overlapping or otherwise results or may result in vertical integration.

Because this is the first CADE decision addressing the matter, albeit taken unanimously, its stand must be ratified in new decisions and further explained (such as, for instance, in relation to the matter of vertical integration) in order to offer proper legal security to market players. A CADE Case Law Statement is expected to be issued for such purpose.<sup>3</sup>

Although we must still wait for a final stand on the part of the CADE board – which currently has different commissioners<sup>4</sup> -- this is certainly a new interpretation of Law 8884/94, which should be taken into account when evaluating whether transactions between companies should be notified.

If this stand is actually ratified, in certain cases market players will be required to conduct, in even more detail, a prior study of the markets involved in the transaction, particularly the product and geographic markets, in order to correctly determine any possible horizontal and vertical relations between the participants and properly assess the need of notifying the transaction to CADE. Therefore, careful legal advice should be given to companies with respect to this matter.

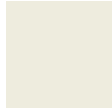
It is important to note that this new interpretation given by CADE to Law 8884/94 may reduce the number of notifications of concentration acts and, consequently, optimize the use of public funds, which may be allocated to review and control of acts and practices that may actually involve concerns or greater complexity from a competition viewpoint. Therefore, this is an initiative favorable to the Administration and market players alike.

Although the constant search for an efficient system is always a laudable endeavor, it is important that any revision of CADE's stand, such as the one dealt with herein, always observe the content of the law and be clearly implemented so as to avoid the conceptual doubts and legal uncertainties that have so often pervaded the legal and business

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<sup>3</sup> Pursuant to the CADE Internal Rules, a stand adopted by CADE will only become binding upon the issue of a case law statement. Case law statements are issued only when a new interpretation is ratified by the full board in at least 10 cases.

<sup>4</sup> Upon expiration of their 2-year term of office, which had already been renewed for another two years, between July and August 2008 Commissioners Luiz Carlos Delorme Prado, Luis Fernando Rigato Vasconcellos, Ricardo Villas Boas Cueva and CADE Chairperson Elizabeth Maria Mercier Querido Farina left CADE. Emmanuel Joppert Ragazzo, Olavo Zago Chinaglia and Vinícius Marques de Carvalho have been appointed commissioners and are now part of the new CADE board.



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communities when it comes to notification of concentration acts to the Brazilian Antitrust Authorities.

São Paulo, October 17, 2008