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Are Real Estate Transactions Subject to Mandatory Antitrust Notification?

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Currently, construction sites for the development of new real estate projects are a common sight in the Brazilian major urban centers. Despite the market's resurgence, little attention is paid to the need for approval of real estate transactions by the Brazilian competition authority, the Administrative Council for Economic Defense (CADE – Conselho Administrativo de Defesa Econômica).

Several real estate transactions lie behind the signs announcing these new developments and, by law, any transaction that meets the legal thresholds must be notified to CADE before its closing. What would explain the sector's doubts on this matter?

The main question seems to rely on whether typical real estate transactions would amount to a "concentration act" for the purposes of Law 12.529/2011. Much less debate arises about the other two legal criteria – production of effects in Brazil and the revenue thresholds.

Under article 90 of Law 12.529/2011, "concentrations acts" include mergers, absorptions associative agreements, consortia, joint ventures, and acquisitions of control or part of a company. In practice, CADE acknowledges that certain real estate transactions fall within the scope of this provision. Some relevant examples are the following:

- **Creation of Special Purpose Vehicles (SPVs) between competitors for the development of real estate projects.** In September 2022, CADE acknowledged that the creation of a SPV among competitors amounted to a legal "concentration act" and should have been submitted for prior review.

- **Creation of joint ventures for future investments in real estate projects, even if not yet defined.** Recent CADE decisions have found that partnerships between competitors for future investment in real estate ventures, including greenfield projects, are notifiable concentration acts.

- **Purchase and sale of real estate, including non-operational assets such as lands.** CADE acknowledges that acquiring an asset will qualify as a legal "concentration act" if at least one of the following criteria are met: it is an operating asset, is intended for a specific purpose, is essential to the buyer's activities, or is capable of increasing the production capacity.

- **Lease of assets, including real estate.** According to CADE, transactions involving the lease of assets, such as real estate, to a competitor amount to “concentration acts”.

- **Grant of property rights in the real estate field.** In a decision issued at the end of 2022, CADE considered that granting of surface rights for the development of a real estate project would amount to a “concentration act”.

Regardless of the sector, all transactions that meet the notification thresholds must be submitted to CADE. This is a formal test and the failure to comply with it can result in administrative penalties.

Recent events in the Brazilian real estate sector highlight the relevance of monitoring the developments of CADE’s approach to certain kinds of transactions that amount to concentrations acts subject to mandatory notification.

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