Do real estate transactions require antitrust clearance?

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Brazilian Competition Law provides, since Law 12,529/2011 came into force, that certain transactions require the Brazilian Administrative Council for Economic Defense (CADE – *Conselho Administrativo de Defesa Econômica*) clearance before they are completed. However, the provisions that define which transactions are subject to prior approval contain vague concepts, and thus depend on CADE's interpretative guidance to be applied to day-to-day business transactions.

One example concerns qualifying transactions involving the purchase of real estate assets as acquisitions of "parts of a business" – i.e., a "concentration" under article 90(II) of Law 12,529/2011. CADE has considered the topic in a number of cases, but its decisional practices does not list conclusive criteria that allow the clear identification of all circumstances in which real estate transactions require pre-closing antitrust approval.

Recently, CADE had the opportunity to issue more guidance on the reportability of real estate transactions and, in two cases conducted by BMA, decided that the deals did not require pre-merger clearance, showing an important advance in the authority's position. According to the CADE Superintendence-General's decisions, acquisitions of real estate assets do not require clearance if they meet the following criteria, cumulatively: (i) the acquired assets are not operational (i.e., not used for a business activity), (ii) the buyer's economic group is not active in the same segment for which the property was used, if any, (iii) the asset is not related to the activities of the buyer's economic group, and (iv) the property requires investments, licenses, modifications, etc. to be used for the activity the buyer intends to perform on it.

How these criteria will be applied to other cases remains, however, uncertain. According to another recent Superintendence-General decision, the acquisition of an empty plot of land for the development of a real estate project, for example, would constitute the purchase of an "essential asset" for real estate developers, increasing their productive capacity and, consequently, amounting to a "concentration". The Superintendence-General also adopted a similar position in a transaction where a closed gas station was located on the acquired property.

It is not clear, however, whether pre-closing clearance would be required for transactions involving business activities other than real estate development or fuel retail.

Thus, the matter is far from settled. Despite important recent developments, there is still room for improvement in the rules governing the submission of real estate transactions, in order to bring more legal certainty and predictability to the sector. Until then, the question of whether antitrust clearance is needed even for the sale of non-operational real estate assets will remain, at least in some cases, controversial and uncertain.

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