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Reply to the Attention of	A. Neil Campbell Casey W. Halladay
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Our File No.	69459
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VIA EMAIL to marcio.junior@cade.gov.br and consultapublica22016@cade.gov.br

Márcio de Oliveira Júnior
Acting President
Conselho Administrativo de Defesa Econômica
Setor de Edifícios de Utilidade Pública Norte
SEPN Entrequadra 515, Conjunto D, Lote 4, Edifício Carlos Taurisano
Cep: 70770-504
Brasília/DF
Brasil

Dear Sr. de Oliveira Júnior:

Re: Response to CADE Public Consultation N. 02/2016 — Associative Agreements

We write on behalf of the Merger Streamlining Group (the "Group"), whose membership consists of multinational firms with a common interest in promoting the efficient and effective review of international merger transactions.[1] The Group works with competition agencies and governments to support the implementation of international best practices in merger control. In particular, the Group focuses on the *Recommended Practices for Merger Notification Procedures* ("*Recommended Practices*") of the International Competition Network ("ICN"),[2] of which the Conselho Administrativo de Defesa Econômica ("CADE") is a longstanding member.

The Group's work to date has included two major surveys on compliance with the *Recommended Practices*, as well as submissions to the European Commission, the U.S. Antitrust Modernization Commission, and competition agencies and governments in over twenty other

[1] The current members of the MSG include BHP Billiton, Chevron, Cisco Systems, Danaher, GE, Novartis, Oracle, Procter & Gamble, SAB Miller, Siemens, and United Technologies.

[2] International Competition Network, *Recommended Practices for Merger Notification Procedures*, available online at <http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf> ["*Recommended Practices*"].

jurisdictions (*e.g.*, Russia, China, Japan, Chile, Peru, South Korea, India, Germany and Spain), including prior submissions to CADE in 2014, 2012, 2009 and 2007.

The Group commends CADE's ongoing efforts to refine the Brazilian merger control regime, and its commitment to seeking broad stakeholder input through ongoing public consultation processes. CADE's efforts in this respect over the last several years have been very significant. However, as set out below, the Group is concerned that the current associative agreement proposals are inconsistent with international best practices such as the ICN *Recommended Practices*, are overly broad, and will impose undue burdens on both CADE and the business community. The Group is therefore providing this letter in the spirit of constructive engagement, based on our members' very substantial experience with multinational merger transactions.

I. The Proposed Mandatory Notification Requirement

We understand that CADE Public Consultation N. 02/2016 (the "Proposal") will make certain "*associative agreements*" subject to merger control rules requiring mandatory pre-notification to CADE, based on the following:

- A proposed agreement shall be considered "*associative*" where it *establishes a common enterprise for the purpose of exploring an economic activity*.

- A "*common enterprise*" shall be *any enterprise established in cooperation between the contracting parties, in which the agreements provide for risk and revenue sharing and which term is equal or greater than 2 (two) years*.

- Such "*associative agreements*" require pre-notification to CADE where: (i) in the case of horizontal agreements, the parties' combined market share in *at least one of the relevant markets potentially affected by the agreement* is at least 20% in the calendar year preceding the notification; or (ii) in the case of vertical agreements (with an obligation that *generates or may generate exclusivity*), at least two parties each have market shares of at least 20% in a relevant market *potentially affected by the agreement* in the calendar year preceding the notification.

II. The Proposal Is Overbroad, And Will Impose Undue Burdens On CADE And Businesses

The Group believes that these pre-notification requirements are overly broad and will require mandatory pre-notification of a wide range of agreements — for example, licensing, franchising, R&D, supply, distribution — that are often pro-competitive or benign in nature. Members of the Group are not aware of any jurisdiction in which such agreements, in the absence of any structural change or transfer of ownership or control, are subject to mandatory merger control notification. Rather, such agreements, where they pose potential risks to

competition, are generally assessed under the horizontal or vertical conduct rules in a nation's competition laws. We understand that such rules exist to address these types of competition concerns if they arise in Brazil.

Indeed, while the term "merger" is not defined by the *Recommended Practices*, the ICN Report on *Defining "Merger" Transactions for Purposes of Merger Review* recognizes that, typically, "*merger review statutes and regulations are directed at business transactions in which two or more previously independent economic undertakings are combined in some fashion that involves a lasting change in the structure or ownership of one or more of the undertakings concerned*."[3] The Proposal is not limited to transactions creating such a "*lasting change*" in structure, ownership or control of an entity.

If adopted as presently structured, the Proposal would likely result in an enormous and sudden increase in merger control notifications submitted to CADE under the "*associative agreements*" rules. This would require CADE to expend valuable and limited enforcement resources on transactions unlikely to result in any competitive harm in Brazil. The *Recommended Practices* state that thresholds which require the notification of transactions that are "*unlikely to result in appreciable competitive effects within [a country's] territory*" consume "*competition agency resources without any corresponding enforcement benefit*."[4] Similarly, the ICN Report recommends caution in the definition of "mergers" subject to mandatory pre-notification, highlighting that if the term "*'mergers'" is defined too broadly, the result may be to capture many types of ownership changes that are unlikely to have a material impact on competition, thus placing a greater burden on business and law enforcement resources*."[5] The Proposal would envision capturing may such transactions, particularly as it does not include any level of "*ownership changes*" for the notification of associative agreements.

Moreover, the Proposal's scope is inconsistent with another central tenet of the ICN *Recommended Practices*, namely that effective merger control regimes should "*avoid imposing unnecessary costs and burdens on parties*" to a transaction.[6] The ICN recommends that merger notification thresholds should "*incorporate appropriate standards of materiality*" and "*screen out transactions unlikely to result in appreciable competitive effects within [the] territory*."[7]

The Group therefore recommends the Proposal be refined to limit the pre-notification obligation to acquisitions of assets or shares, amalgamations, combinations, or joint venture transactions that result in some lasting change in the ownership, structure, or control of

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[3] International Competition Network, *Defining "Merger" Transactions for Purposes of Merger Review*, available online at <http://www.internationalcompetitionnetwork.org/uploads/library/doc327.pdf> ["ICN Report"].

[4] *Recommended Practice* I-B, Comment 1 (emphasis added).

[5] ICN Report, *supra* note 3 at part IV (emphasis added).

[6] *See, e.g., Recommended Practice*, I.B, Comment 1; *Recommended Practice* VI.E; and *Recommended Practice* XII.B, Comment 1 (emphasis added).

[7] *Recommended Practice*, I.B, Comment 1 and Comment 2 (emphasis added).

an entity. The Group appreciates that anticompetitive effects may occasionally arise from supply relationships, exclusive contracts, or other non-merger relationships; indeed, given its focus on vertical relationships that *generate or may generate exclusivity*, Article 3.II of the Proposal would appear to be aimed at dominance or related unilateral conduct issues. However, such concerns are more properly addressed by rules regarding abuse of dominance and other aspects of unilateral or co-ordinated conduct, rather than requiring parties to notify, and CADE to review, such a broad array of agreements.

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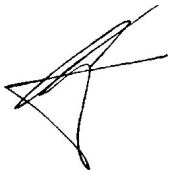
Thank you very much for considering the Group's views. We would be pleased to discuss this submission with you or your colleagues further, at your convenience.

Yours very truly,

A. Neil Campbell



Casey W. Halladay

Copy to: Eduardo Frade Rodrigues, General Superintendent, and Luiza Kharmandayan, Head of International Unit, CADE (eduardo.rodrigues@cade.gov.br; luiza.kharmandayan@cade.gov.br)
Members of the Merger Streamlining Group
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