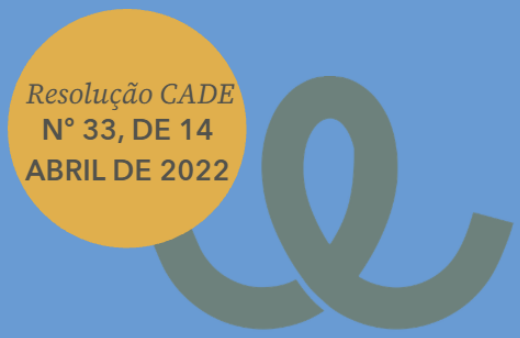
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SUBMISSION TO THE PUBLIC CONSULTATION
Review of CADE Resolution No. 33 of April 14, 2022

Notification criteria, exercise of the powers set forth in Article 88 §7º of Law No. 12,529/2011, and legal certainty in partnerships in artificial intelligence markets

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1. Purpose and summary of the submission

The Legal Wings Institute commends CADE for launching this public consultation on the rules governing the notification of mergers and acquisitions. The review of CADE Resolution No. 33/2022 (the "Resolution") provides an opportunity to improve the predictability and accuracy of merger control.

In light of the Institute's scope of work, which focuses on the regulation of innovative markets, this submission addresses the scope of Article 88 § 7º of Law No. 12,529/2011 (the Brazilian Competition Law, or "LDC"), particularly in view of CADE's recent experience in initiating proceedings to investigate potentially notifiable transactions (APACs) in order to assess whether partnerships between incumbent technology companies and artificial intelligence (AI) startups are subject to mandatory notification.

In this context, the initiative to include Article 9-A in the proposed Resolution is appropriate. Under that provision, CADE may periodically issue general guidance on the application of Article 88 § 7º of the LDC. This would promote transparency and predictability in relation to an important, yet exceptional, merger-control power. Its usefulness, however, will depend on the substance of the guidance and on clear compliance with the procedures governing the application of the provision.

This submission seeks to help ensure that the rules governing the application of Article 88 § 7º of the LDC reconcile the constitutional commitment to free competition (Article 170 of the Federal Constitution) with the country's scientific and technological development (Article 218 of the Federal Constitution). We emphasize the need to align competition policy with Brazil's strategic objectives for technological development through AI, as set out in the Brazilian Artificial Intelligence Plan (PBIA).

A crucial aspect of this effort is ensuring legal certainty in the application of the power established under Article 88 § 7º of the LDC to AI markets. We therefore submit that the exercise of this power should begin with a reasoned finding that a concentration exists within the meaning of Article 90; be supported by concrete elements justifying the call-in of the transaction; and take place under a procedure whose subject matter, stages, and duration are reasonably foreseeable. Predictability is particularly important in emerging technology markets. Startups often depend on capital, computing capacity, access to distribution channels, technology licences, and cooperation with established companies to develop products, test business models, and achieve scale. A competition policy that preserves the possibility of intervention in genuinely problematic situations, without making the classification of every form of collaboration under ex ante merger control uncertain, helps ensure that enforcement focuses on transactions and conduct that meet the statutory requirements and present concrete grounds for scrutiny.

2. Legal uncertainty in APACs involving AI partnerships

Recent APACs[1] have exposed uncertainty regarding both the applicable procedure and the limits of the power established under Article 88 §7º. In these proceedings, the General Superintendence (SG) found that notification was not mandatory because none of the startups involved met the minimum Brazilian turnover threshold, but nevertheless referred the cases to the Tribunal "for its information". Such a referral is not one of the outcomes contemplated by Resolution No. 24/2019. Under that Resolution, once the absence of a mandatory pre-merger notification requirement has been established, the SG must either (i) close the APAC or (ii) decide that the transaction must be notified pursuant to the power under Article 88 § 7º of the LDC, in which case the company under investigation may appeal to the Tribunal.[2] The informal referral transfers to the Tribunal an issue that the Superintendence is required to resolve conclusively.

Resolution No. 24/2019 does not provide for an APAC to be referred to the Tribunal merely for its information. Its framework requires the SG to complete the investigation and adopt an outcome consistent with its findings. If the SG considers that a concentration exists, that it is not subject to mandatory notification, and that calling it in is appropriate, it must expressly state that conclusion and the grounds for applying Article 88 §7º. If it considers that no concentration exists, it must close the APAC, without prejudice to referring evidence to the competent unit for any investigation into anticompetitive conduct.

The second source of uncertainty is the insufficient reasoning given for referring APACs to the Tribunal. In all the proceedings, the rationale for the SG's decision was limited to references to "digital ecosystems", the strategic importance of startups, and the principle of *in dubio pro societate*. These references are overly general unless accompanied by the identification of the relevant markets, assets, capabilities transferred, and theory of harm that would justify scrutiny. "Digital ecosystem" is a framework describing business models based on certain characteristics[3] and involving the orchestration of actors ("complementors") from different industries.[4] If that expression alone is sufficient to trigger paragraph 7, the criterion ceases to be exceptional and begins to encompass an indeterminate range of business relationships.

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[1] Proceedings No. 08700.005962/2024-55 (Amazon/Anthropic); 08700.005961/2024-19 (Microsoft/Mistral); 08700.005966/2024-33 (Microsoft/Inflection); 08700.005638/2024-37 (Google/Character.AI) and 08700.006150/2024-27 (NVIDIA/Run:ai).

[2] Resolution CADE No. 24/2019, art. 15.

[3] Accoding to Petiti e Teece, these characteristics are "five C's": "a) cross business, market and industry competition; b) co-evolution; c) complementor; d) co-opetition; and e) conscious direction". PETIT, Nicolas; TEECE, David J. Taking Ecosystems Competition Seriously in the Digital Economy: A (Preliminary) Dynamic Competition/Capabilities Perspective, 2020. Available at: https://ssrn.com/abstract=3745453.

[4] ZINGALES Nicolo; AZEVEDO, Paula Farani de (eds.), *A aplicação do direito antitruste em ecossistemas digitais: desafios e propostas*, FGV Direito Rio, 2022. Available at: https://repositorio.fgv.br/items/9637c39f-3e32-42cd-99c0-e619a2b91301. PETIT; TEECE, *Taking Ecosystems Competition Seriously in the Digital Economy* (cit).

The principle of *in dubio pro societate* cannot replace the duty to give reasons either. Uncertainty may justify preliminary inquiries, but it does not authorize the indefinite prolongation of an APAC or the transfer to the Tribunal of the task of identifying the statutory grounds that the SG should have examined. The need to protect emerging markets does not dispense with the duty to demonstrate why the specific transaction may affect competition and why calling it in would be useful and proportionate.

The third source of uncertainty is the lack of clarity as to whether Article 88 § 7º may be applied to relationships that do not constitute a concentration under Article 90 LDC. In the Amazon/Anthropic APAC, the Tribunal relied on the Azul/Gol[5] precedent to argue that the power could be exercised even where there was a dispute as to whether a concentration existed.[6] This interpretation expands the scope of paragraph 7 beyond its statutory purpose, which is to allow the calling in of concentrations that do not meet the turnover thresholds.

In an apparently different direction, in the Microsoft/Mistral APAC, the Tribunal closed the proceedings after finding both that the turnover threshold was not met and that no concentration existed under Article 90 and Resolution No. 33/2022, without ordering notification under paragraph 7.[7] Although the Reporting Commissioner's opinion did not develop a legal position on whether a transaction may be called in when no concentration exists, the outcome points to the more legally consistent interpretation: the power under paragraph 7 presupposes the existence of a transaction that falls within Article 90.

The solution consistent with the principles of legality and legal certainty is not to apply Article 88 § 7º where the transaction does not constitute a concentration. This does not mean immunizing contracts or partnerships from competition law; it means using the appropriate legal instrument. If the facts indicate exclusion, discrimination, coordination, the exchange of competitively sensitive information, or market foreclosure, the investigation should take place under the rules governing anticompetitive conduct. Merger control should not be converted into a general procedure for supervising commercial relationships.

The fourth source of legal uncertainty is the absence of more precise territoriality criteria for the application of the LDC. Some proceedings (particularly NVIDIA/Run:AI and Microsoft/Mistral) involved investments in companies with no direct presence in Brazil, and the reasoning under Article 2 of the LDC did not always clarify what effect the transaction, even if only potential, would have in the national territory. Although Article 2 LDC adopts territoriality and potential-effects criteria,[8] transactions with no discernible impact in Brazil should not

[5] APAC nº 08700.003565/2024-49.
[6] Opinion by Reporting Commissioner José Levi Mello do Amaral Júnior no APAC Amazon/Anthropic, No. SEI 1824693, §275.
[7] Opinion by Reporting Commissioner José Levi Mello do Amaral Júnior,APAC Microsoft/Mistral, No. SEI 1753206.
[8] FORGIONI, Paula. Os fundamentos do antitruste. 13ª ed. Revista dos Tribunais, 2024.

reasonably be expected to undergo CADE scrutiny. To promote legal certainty and the strategic allocation of the authority's resources, it is advisable to identify a concrete and reasonably foreseeable nexus with the Brazilian market – for instance, minimum thresholds for customers or active users in Brazil, the supply of inputs to businesses operating in the country, restrictions on Brazilian competitors' access, or a likely impact on supply conditions in the national territory.

The application of Article 2 to potential effects should not be confused with universal jurisdiction over international transactions. The absence of a local presence does not rule out the application of the law, but it makes it all the more important to demonstrate how the transaction may produce effects in Brazil. Without such an assessment, CADE may devote resources to transactions with only a remote territorial connection, while the parties lack criteria by which to anticipate whether the law applies. In addition to the existence of a concentration, the assessment of convenience and opportunity under paragraph 7 should take into account the strength of the Brazilian nexus, the concrete usefulness of the measure, and the opportunity costs of the investigation.[9]

[9] These three factors were also highlighted in the recommendations made by Commissioner Camila Pires-Alves in her opinion in the Google/Character.AI APAC.

3. AI markets, digital ecosystems, and evidence-based competition assessment

Although the Tribunal issued opinions containing a detailed analysis of the Amazon/Anthropic and Google/Character.AI cases and the related competition concerns, the manner in which the cases were referred to the Tribunal – based on a general reference to challenges associated with "digital ecosystems" – makes it appropriate to offer some considerations on AI-related markets for future assessments of the convenience and opportunity of initiating APACs and of the SG's application of Article 88 §7º.

First, the characteristics associated with certain digital markets[10] should not automatically be transposed to AI products and services.[11] In the research report "Competition in AI Markets", we analyzed publications by international competition authorities on the risks they perceive for competition in AI development and offered counterarguments based on empirical evidence and literature.[12] One of the main findings was that several characteristics of digital markets are not replicated in AI markets. Near zero marginal costs, which have been associated with economies of scale and concentration in digital platforms, are not present in generative AI assistants: the inference stage consumes computing capacity with each query, meaning that marginal costs increase with usage and may be substantial, including because of specialized chips, energy, and data-center infrastructure.[13] The need to amortize training costs remains relevant, but it does not eliminate the recurring costs of serving users. This difference may weaken economies of scale and alter incentives to offer products free of charge solely to expand the user base.

The specialized literature also recommends caution in using the concept of an ecosystem. Complementary relationships among models, cloud services, applications, and distribution channels may increase rivalry among different technological combinations. Access to global infrastructure may allow a startup to commercialize a model without building its own data centers; a non-exclusive licence may expand distribution without depriving the developer of

[10] The term "digital markets" is used in the broad sense commonly adopted in the literature discussing competition across various markets involving digital products and services. In fact, there is no single relevant market encompassing all major digital services, which may exhibit distinct characteristics that are relevant to antitrust analysis. Accordingly, the term encompasses markets for different digital services, such as search engines, social media, online marketplaces, etc.

[11] We also use the term "AI markets" as shorthand for the sectors comprising AI products and services, such as foundation models, generative AI, and predictive AI, encompassing various markets across the entire AI value chain. However, the focus is on generative AI and foundation models, given their widespread adoption among consumers and in keeping with the main documents published by competition authorities.

[12] MARANHÃO, Juliano et al. Competition in AI markets: full report. São Paulo, Legal Wings Institute. 2025. Available at: https://legalwings.com.br/en/competition-in-a-i-markets/. Accessed October 3, 2026.

[13] Ibid; MASLEJ Nestor et al, The AI Index 2025 Annual Report, Stanford University 2025, p. 66.
AUSTRALIAN COMPETITION AND CONSUMER COMMISSION (ACCC), Digital Platform Services Inquiry. Final Report, 2025. pp. 306–307;
DESISLAVOV, Radosvet et al, Trends in AI inference energy consumption: Beyond the performance-vs-parameter laws of deep learning, Sustainable Computing: Informatics and Systems, Volume 38, 2023;
OECD. Artificial intelligence, data and competition. 2024. p. 23.

autonomy; and, for example, integrating a model into productivity tools may increase adoption and generate competition between ecosystems.[14] The effect depends on exclusivity, interoperability, third-party access, dependency, the possibility of multi-homing, and the parties' incentives. Data on the profitability of the different layers of AI markets indicate that computing providers have no incentive to foreclose downstream markets, since these services are more profitable and certain than potential future returns in the model-development layer.[15]

Therefore, the existence of relationships between companies within the same ecosystem or operating at different vertical levels does not, in itself, indicate foreclosure or leveraging. The literature on dynamic competition and AI partnerships indicates that, in rapidly innovating markets, alliances and complementarities can recombine capabilities, accelerate commercialization, and create competitive pressure on incumbents.[16] Conversely, AI services and products may exert new competitive pressure on previously established digital markets – for example, the competitive pressure exerted by generative AI chatbots on online search services, which, according to Nicolas Petit's analysis, has already affected Google's profitability and market position;[17] or the anticipated disruption of marketplaces as agentic AI becomes more widespread.[18]

The distinction between digital markets and AI markets also calls for caution when predicting the competitive value of startups. Popularity, user numbers, or private-company valuations are not sufficient measures of viability or future capabilities. Computing costs, monetization difficulties, product quality, litigation, financing, and technological developments can rapidly change a company's prospects.

The Character.AI case illustrates this difficulty. In May 2026, CADE's Tribunal adjudicated the Google/Character.AI APAC and considered that the startup could be a "technology gazelle", with the potential to follow an independent innovation trajectory capable of challenging incumbents' market power.[19] In October of the same year, that hypothesis proved mistaken, as Character.AI filed for bankruptcy in the United States. The bankruptcy was not caused by difficulties in operating the technology following the transfer of specialists and intellectual property to Google, as the decision had feared. Rather, it resulted from difficulties in attracting

[14] MARANHÃO, Juliano et al. *Competition in AI markets: full report*. Cit.
[15] Ibid.
[16] PETIT, Nicolas; TEECE, David J. Innovating Big Tech firms and competition policy: favoring dynamic over static competition. Industrial and Corporate Change, Oxford, v. 30, n. 5, p. 1168-1198, out. 2021. DOI: https://doi.org/10.1093/icc/dtab049; SCHREPEL, Thibault; PENTLAND, A. 'Sandy'. *Competition Between AI Foundation Models*. 2023. Availabe at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4493900. Accessed November 3rd, 2026.
[17] PETIT, Nicolas. [LikedIn post] Availabe at: https://www.linkedin.com/posts/nicolaspetit1_moligopoly-dynamiccompetition-innovation-activity-7522581878273421313-VYsG. Accessed October 30, 2026.
[18] HAGIOU, Andrei; WRIGHT, Julian. Artificial intelligence and competition policy. 2024. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4985840.
[19] Opinion by Reporting Commissioner Camila Cabral Pires Alves in the Google/Character.AI APAC, No. SEI 1755152.

paying users, the high computing costs of sustaining the free chats offered to attract users – which illustrates the differences between AI and digital markets, including the changed rationale for offering free services to attract a user base and the significant marginal costs per user – and losses in lawsuits concerning harmful effects of the product.[20]

Therefore, enforcement of Article 88 § 7º of the LDC should not be guided by classifying the parties involved as digital-market incumbents and startups. Prior activity in different digital markets does not automatically create market power that can be leveraged into AI markets; the competitive patterns observed in digital markets are unlikely to be replicated in AI markets; and, at the current stage of AI-market development, numerous startups are experimenting with transactions involving new entrants, with a high degree of risk arising from uncertainty as to which business models will be profitable and which players will prove viable.

4. Consequences of legal uncertainty for investment and innovation in Brazil

4.1. Chilling effects upon competition in AI markets

The first consequence of the absence of clear criteria is that AI companies cannot assess, with reasonable certainty, the applicable legal framework before entering into a transaction. In conventional transactions, shareholding and turnover criteria generally allow the parties to identify whether a transaction will be subject to CADE approval. In technology partnerships, however, the combination of investment, licensing, team hiring, computing supply, and distribution may raise doubts as to whether a concentration exists in the first place. If, in addition, the possibility of an ex officio call-in is not guided by objective parameters, the assessment becomes even more difficult.

The problem is not limited to the possibility that CADE may disagree with the parties' interpretation. The risk is that any arrangement involving a large company and a startup may come to be perceived as potentially subject to merger control, even where there are no concrete indications that it qualifies as a concentration. This may encourage precautionary notifications, reduce the willingness to experiment with cooperation models, and increase the cost of transactions that ultimately do not meet the statutory requirements for merger control.

Uncertainty regarding the legal classification of a transaction has effects even before any decision on the merits and is not limited to the parties under investigation. It also affects other startups, investment funds, infrastructure providers, and companies that depend on external resources to develop solutions.

[20] V.g. FORBES. 12 Million Monthly Users Couldn't Prevent Character.AI's Bankruptcy. October 23, 2026. Availabel at: https://www.forbes.com/sites/sasirekhasubramanian/2026/10/23/12-million-monthly-users-couldnt-prevent-characterais-bankruptcy/. Accessed November 3rd, 2026.

This risk is critical for partnerships involving access to computing resources and model distribution. Uncertainty as to whether these relationships may be classified as concentrations may lead infrastructure providers and distributors to restrict the commercial terms, capacity commitments, or forms of cooperation they offer where these involve greater integration between the parties. For startups, this means less predictability as to whether they will be able to contract for the resources needed to operate and expand their models, as well as a potential reduction in the options available to reach users and compete at scale.[21] The effect is more problematic where the partnership involves no exclusivity, transfer of control, or restriction on third-party access: in such circumstances, the possibility of prolonged scrutiny may discourage precisely those arrangements that increase the ability of firms to enter and challenge AI markets.

The risk is also relevant to transactions involving the hiring of professionals from other companies. The mobility of engineers and researchers is part of the dynamics of a market in which expertise is scarce and valuable.[22] Although the hiring of a significant number of employees from another company, when coordinated with the transfer of technology, assets, projects, or operational capacity (the type of transaction known as a "reverse acqui-hire"), may be classified as the acquisition of part of a business under Article 90(II) of the LDC, it is necessary to carefully define when such transactions acquire "competitive plausibility",[23] so as to avoid over-inclusion under merger control. The risk of over-inclusion (or false positives) is acute in these markets, both because it may discourage the pace of employee mobility that is important for innovation and because it may overburden the competition authority with monitoring such transactions.

Discouraging active recruitment of specialized workers from other companies in the sector would undermine competition policy itself, since the intense mobility of such workers is, in itself, pro-competitive.[24] Discouraging competition for human resources runs counter to CADE's recent efforts to protect competition in labor markets.[25]

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[21] OECD. Competition In the Provision of Cloud Computing Services. OECD Roundtables on Competition Policy Papers, No. 323. Available at: https://www.oecd.org/content/dam/oecd/en/publications/reports/2025/05/competition-in-the-provision-of-cloud-computing-services_f42582ad/595859c5-en.pdf

[22] MARANHÃO, Juliano et al. *Competition in AI markets: full report*. Cit. Chapter 3.

[23] In the sense described in the Opinion by Reporting Commissioner Camila Cabral Pires Alves in the Google/Character.AI APAC, SEI No 1755152.

[24] In this regard, it is "no-poach" agreements that may be considered anticompetitive. See, e.g., CORDÃO, Catarina; PICCOLI, Julia. Acordos de não-aliciamento de trabalhadores e suas implicações antitruste. Jota, 2021. Available at: https://www.jota.info/opiniao-e-analise/artigos/acordos-de-nao-aliciamento-de-trabalhadores-e-suas-implicacoes-antitruste. Accessed November 3, 2026.
MARANHÃO, Juliano et al. Competition in AI Markets: Full Report. Cited above, Chapter 3.

[25] V.g. Proceedings No 08700.000992/2024-75 and No 08700.001198/2024-49.

Legal uncertainty also increases compliance costs. APACs may require extensive documentary investigation, including successive contracts, governance information, financial flows, licences, business plans, and commercial strategies. The Amazon/Anthropic case illustrates this cost: only after an investigation lasting more than a year into investments and computing, licensing, and distribution agreements was a decision reached finding no obligation to notify the transaction. Even if the companies in that case had the resources to bear these costs, other similarly situated entities – companies below the turnover threshold required under Article 88 of the LDC in conjunction with Ordinance No. 994/2012, operating at different layers of AI markets and seeking to enter into partnerships and/or minority investments – may find it more difficult to devote the human and financial resources needed to deal with notification of the transaction.

4.2. Need to align competition policy with public policies for technological development

The key issue is that legal uncertainty surrounding the initiation of APACs and the application of Article 88(7), as well as the broad direction given to the application of these proceedings in AI markets, produces harmful effects not only for market participants but also for the government's own planning for Brazil's technological development.

The SG referred the APACs to the Tribunal by reference to the particularities of digital ecosystems and the principle of *in dubio pro societate*,[26] without identifying which concrete elements of the transactions gave rise to the competition concerns. In practice, *in dubio pro societate* turns an unresolved doubt at the screening stage into a reason to prolong the proceedings by referring them to the Tribunal. This empties the duty to give reasons of substance and prevents economic agents from anticipating how similar transactions will be treated. In this context, this submission does not propose eliminating references to public interests, since, under Article 1, sole paragraph, of the LDC, society is the holder of the legal interests protected by competition legislation. Rather, it proposes that this interest be given content through public and verifiable parameters, such as the Brazilian Artificial Intelligence Plan 2024–2028 (PBIA),[27] which is relevant to these cases.

The PBIA treats AI as a strategic driver of economic development and is built around priorities that include strengthening national capabilities, supporting startups, and attracting

[26] Furthermore, it is important to note that this principle originated in criminal procedure, where its validity is itself controversial. The Brazilian Federal Supreme Court has held that the alleged principle "finds no support whatsoever in the Constitution or in statute". BRAZIL. Federal Supreme Court (Second Panel). Extraordinary Appeal with Interlocutory Appeal No. 1,067,392/CE. Rapporteur: Justice Gilmar Mendes, March 26, 2019.

[27] BRASIL. Ministério da Ciência, Tecnologia e Inovação. IA para o Bem de Todos: Plano Brasileiro de Inteligência Artificial 2024-2028. Brasília, DF: MCTI, 2024.

investment.[28] This policy gives effect to Articles 218 and 219 of the Federal Constitution, which impose on the State the duty to promote innovation and encourage its development and strengthening within companies. It also relates to Article 88 §6º (c) of the LDC, which recognizes technological development as a relevant efficiency in the merger-control assessment. Accordingly, if CADE invokes the interests of society to guide its actions, it should consider how the State has defined those interests for this sector. Read in light of the PBIA, the collective interest does not justify presuming that society benefits from prolonged scrutiny of partnerships that generate competitive efficiencies. On the contrary, it requires consideration of the role of such arrangements in building the national capabilities that public policy seeks to develop.

The PBIA allocates approximately 46% of the budget for its structural actions (BRL 11.3 billion) to the development of algorithms and applications, while data and computing capacity each receive approximately 20% (BRL 4.8 billion).[29] In addition to being proportionally smaller, investments in these inputs are concentrated in public and institutional infrastructure, such as the upgrade of the Santos Dumont supercomputer (BRL 1.8 billion) and the government cloud for confidential documents (BRL 1 billion). As Johansson Neto, Farias da Costa, and Gaspar observe, a focus on algorithms cannot, in isolation, substantially transform Brazil's structural digital dependencies, since its success depends on capabilities associated with other enablers, including computing capacity.[30] The plan therefore relies on Brazilian companies to develop models and applications, but does not ensure that they will have access to data, large-scale computing, and capital in the amounts required for AI development. Brazilian startups will continue to obtain these inputs to a large extent through partnerships with private cloud providers, investors, and foundation-model developers. Such startups, moreover, often do not seek to replace incumbents, but rather to create complementary functionalities, meaning that partnerships increase their scale, distribution, and innovation capacity.[31]

It follows that, when properly defined, the reference to the interests of society operates in the opposite direction from the way it was used in the APACs or in other situations in which scrutiny is prolonged through an improper referral to the Tribunal. In other words, subjecting AI partnerships to lengthy proceedings with unpredictable outcomes, without identifying concrete competition concerns, increases the regulatory costs of precisely those arrangements through which Brazilian startups access inputs that public policy does not provide them, making the

[28] JOHANSSON NETO, Germano P.; FARIAS DA COSTA, Viviane C.; GASPAR, Walter Britto. Brazil's Artificial Intelligence Plan (PBIA) of 2024: enabler of AI sovereignty? *The African Journal of Information and Communication*, Johannesburg, n. 34, p. 1-15, 2024, p. 4. DOI: https://doi.org/10.23962/ajic.i34.20424.

[29] Ibid., p. 8.

[30] Ibid, p. 9.

[31] PETIT, Nicolas; TEECE, David J. Innovating Big Tech firms and competition policy: favoring dynamic over static competition. Industrial and Corporate Change, Oxford, v. 30, n. 5, p. 1168-1198, out. 2021. DOI: https://doi.org/10.1093/icc/dtab049.

State's conduct in the sector inconsistent with its stated objective of fostering such innovation as an expression of the public interest.[32]

This does not mean that AI partnerships should be immune from competition scrutiny or that every such arrangement is pro-competitive. We submit only that that the decision to initiate APACs and exercise the power under Article 88 § 7º should: (i) identify the statutory basis for finding a concentration and the concrete elements justifying intervention, with verifiable effects in Brazil; (ii) expressly consider the strategic importance of the partnership for access to data, computing capacity, capital, and distribution, in light of the PBIA; and (iii) weigh the costs of delay for the parties and for the national ecosystem. Accordingly, reliance on *in dubio pro societate* without these parameters, failure to comply with the procedures set out in CADE Resolution No. 24/2019, and other factors that generate legal uncertainty should be reconsidered.

The selection of transactions for exceptional merger control should take into account the concrete usefulness of intervention and the opportunity costs of government action. As Hovenkamp observes, antitrust authorities have limited resources and should prioritize situations in which the evidence of harm and the likelihood of benefit from intervention justify the costs of enforcement.[33] In technology markets, it is advisable to combine sectoral monitoring and studies by the Department of Economic Studies with conduct or merger investigations when the relevant requirements are met. APACs and Article 88 § 7º should not be used as general instruments for generating institutional knowledge about a sector.

5. Recommendations for the review and for the guidance under Article 9-A

The review should preserve CADE's ability to call in concentrations that are not subject to mandatory notification, while making explicit the legal limits and the factors governing the exercise of that power. We recommend that the guidance contemplated by Article 9-A address the following parameters.

First, the issuance of general guidance on the application of Article 88 § 7º of the LDC should be mandatory rather than discretionary, and should be preceded by a public consultation. As explained above, greater legal certainty is needed in the application of this provision, as is consideration of the measure's effects on the sectors concerned and on the implementation of other Brazilian public policies. It is therefore important to ensure that the guidance is necessarily published. In addition, subjecting the guidance to public scrutiny

[32] MARANHÃO, Juliano; SOUSA, Beatriz. O Cade está alinhado com o futuro da IA no Brasil? Jota, 2026. Available at: https://www.jota.info/opiniao-e-analise/artigos/o-cade-esta-alinhado-com-o-futuro-da-ia-no-brasil. Accessed October 30, 2026.

[33] HOVENKAMP, Herbert. How Should Antitrust Policy Select Enforcement Targets? Are We Overly focused on Internet Tech?. The Monopoly Problem, Substack, 10 jun. 2026. Available at: https://herbhovenkamp.substack.com/p/how-should-antitrust-policy-select. Accessed October 30, 2026.

through a consultation helps meet these needs, particularly by allowing different interested groups – such as academia, organized civil society, affected businesses, and government bodies – to inform CADE about the potential effects of the proposed guidance.

Second, the SG should comply with Resolution No. 24/2019, or any subsequent rule governing the procedures under paragraphs 3 and 7 of Article 88 of the LDC; inform the parties, at the outset of the APAC, which procedural track will be followed; and issue an express and reasoned conclusion at the end of the investigation.

The decision should state whether a concentration exists, whether notification was mandatory and, where applicable, why the transaction is being called in under Article 88 § 7º of the LDC. References to AI, digital ecosystems, startups, incumbents, or the strategic importance of the sector should not, on their own, constitute sufficient grounds. Moreover, referral to the Tribunal "for its information" should not operate as a form of closure or as a substitute for a decision.

Third, any AI-specific guidance should not presume that partnerships between incumbents and startups, minority investments, talent hiring, or computing and distribution agreements are, by their nature, prone to be called in under paragraph 7. The guidance should distinguish between types of transactions and identify relevant factors: exclusivity and the duration of licences; the possibility of sublicensing; the startup's operational continuity; the transfer of teams and projects; governance rights; access to information; capacity commitments; infrastructure dependency; and third-party access conditions.

Fourth, the territorial application of the law should be reasoned by identifying the effects produced or potentially produced in Brazil. The guidance should consider, among other factors, the existence of customers or users in the country, sales or supplies to Brazilian businesses, participation in national markets, local competitors' dependence on inputs, and the concrete likelihood of changes to competitive conditions in the territory.

Finally, the assessment of convenience and opportunity should expressly weigh the concrete usefulness of the measure, the proportionality of ex post scrutiny, legal certainty, the maturity of the evidentiary record, the existence of alternative avenues for action, the time elapsed since the transaction, and the nexus with the Brazilian market. These factors, already highlighted in the opinion of Commissioner Camila Cabral Pires Alves in the Google/Character.AI APAC, provide an appropriate basis for general guidance and prevent the mere relevance of an issue or the convenience of acquiring institutional knowledge from being confused with the need for notification.

6. Suggested wording for Article 9-A

In order to ensure greater legal certainty regarding the criteria for applying Article 88 § 7º of the LDC, we suggest that the proposed new Resolution establish guidelines for the general guidance to be periodically issued by CADE. We therefore suggest the following wording for Article 9-A:

> *"Article 9-A. CADE shall periodically issue general guidance on the application of Article 88 § 7º of Law No. 12,529 of 2011, based on the following parameters:*
> *I. Compliance with the procedures established in CADE Resolution No. 24/2019, or any other rule governing the procedure under Article 88 § 7º of Law No. 12,529/2011, and the assurance of legal certainty;*
> *II. Objective criteria governing the convenience and opportunity of exercising this power, taking into account existing public policies to promote the country's economic and technological development;*
> *III. The concrete usefulness of the measure and the proportionality of ex post scrutiny;*
> *IV. Objective criteria for determining whether transactions have a sufficient nexus with the national territory.*
> *Sole paragraph. The issuance of the general guidance referred to in the main provision shall be preceded by a public consultation in order to enable participation by civil society, academia, the private sector, and other interested parties."*

7. Conclusion

The analysis developed in this submission shows that AI markets have economic characteristics and competitive dynamics that do not allow assumptions developed for digital markets to be transposed automatically. Their cost structure, ongoing need for computing capacity, diversity of business models, and rapid technological evolution require a contextualized assessment based on the characteristics of the transaction and concrete evidence. In this environment, partnerships between established companies and startups, investments, technology licensing, and infrastructure-access agreements may enable the recombination of capabilities, accelerate the commercialization of solutions, and improve the conditions for new players to enter and expand.

This submission has also sought to demonstrate that legal certainty in the application of Article 88 § 7º of the LDC is not an objective detached from competition policy. In markets that are still taking shape, predictability regarding the classification of transactions and the authority's intervention criteria directly influences investment decisions, the formation of partnerships, and companies' access to the resources needed for innovation. The absence of clear parameters may discourage arrangements that strengthen the competitive capabilities of Brazilian startups, without necessarily producing any benefit for the protection of competition.

For this reason, competition policy should be coordinated with public policies aimed at developing AI in Brazil, particularly the objectives established by the PBIA. The development of national capabilities depends not only on encouraging the creation of models and applications, but also on access to data, computing infrastructure, capital, technology, and distribution channels. Given that Brazilian companies may benefit from partnerships with private actors to access these inputs, government action should avoid the unpredictable application of merger-control instruments creating obstacles to the very technological development policy it seeks to promote.

This does not mean excluding AI partnerships from competition scrutiny or presuming that such arrangements are necessarily pro-competitive. It means recognizing that intervention must be grounded in statutory requirements and concrete risks, while also weighing the effects that scrutiny may have on innovation, the entry of new players, and the development of technological capabilities in the country. The effectiveness of competition policy therefore depends not only on its ability to identify and prevent potentially harmful transactions, but also on its consistency with the broader objectives of economic and technological development established by the Brazilian State.

The Legal Wings Institute thanks CADE for the opportunity to contribute to this regulatory review process and to participate in the debate on improving competition-law instruments in light of the challenges posed by AI markets.