

MERGER NOTIFICATION AND PROCEDURES TEMPLATE

BRAZIL

IMPORTANT NOTE: This template is intended to provide introductory material. Reading the template is not a substitute for consulting the referenced statutes and regulations. If you are analyzing a particular transaction, this template should be a starting point only.

1. Merger notification and review materials (please provide title(s), popular name(s) and citation(s))

A. Notification provisions	The Brazilian Antitrust Law (Law 8.884/94), that regulates the constitutional provisions regarding the economic power repression, states, on a preventive basis, that "any acts that may limit or otherwise restrain open competition, or that result in the control of relevant markets for certain products or services, shall be submitted to CADE for review". Therefore, the economic agents will submit the respective documentations, in three copies to SDE that shall promptly forward one copy to CADE, and another to SEAE
B. Notification forms or information requirements	The Administrative Council for Economic Defence has edited the Normative Act Resolution nº 15/1998, which provides the formalities and procedures that shall be observed by the economic agents when submitting the request form to the Brazilian System for Competition Defence. The main forms are in the exhibit I from Normative Act Resolution 18/98 (pre merger consultation - Annex 2 - Portuguese) and the exhibit I from Normative Act Resolution 15/98 (merger notification - Annex 1 - in English).
C. Substantive merger control provisions	Refer to table in the Annex 3 (horizontal merger guidelines)
D. Implementing regulations	The regulation is implemented through the Normative Act Resolution nº 15/98
E. Interpretive guidelines	Annex 3 (horizontal merger guidelines)

and notices	
F. Annual report	Annex 4 (Annual Report)

2. Authority or authorities responsible for merger enforcement.

<p>A. Name of authority. If there is more than one authority, please describe allocation of responsibilities.</p>	<p>The Brazilian Competition Policy System is composed by the Secretariat for Economic Monitoring (SEAE) of the Ministry of Finance; the Secretariat of Economic Law (SDE) of the Ministry of Justice; and the Administrative Council for Economic Defense (CADE), an independent body administratively linked to the Ministry of Justice. SEAE and SDE have analytical and investigative functions while CADE is an administrative tribunal. CADE's decisions can only be reviewed by the courts.</p>
<p>B. Address, telephone and fax (including country code), e-mail, website address and languages available.</p>	<p>SECRETARIAT FOR ECONOMIC MONITORING - MINISTRY OF FINANCE Adress: Esplanada dos Ministérios, block P, 3rd floor, Office 307 Brasília 70048-900 Distrito Federal, Brazil Telephone number: 55 61 3412 2360 Fax Number: 55 61 3225 09 71 E-mail: seae.df@fazenda.gov.br Website: http://www.fazenda.gov.br/seae Languages available: Portuguese, English</p> <p>SECRETARIAT OF ECONOMIC LAW – MINISTRY OF JUSTICE Adress: Esplanada dos Ministérios, block T, 5th floor Brasília 70064-900 Distrito Federal, Brazil Telephone Number: 55 61 3321 7800 Fax Number: 55 61 3321 7800 E-mail: sde@mj.gov.br Website: http://www.mj.gov.br/sde Languages available: Portuguese, English</p> <p>ADMINISTRATIVE COUNCIL FOR ECONOMIC DEFENSE SCN – Q2 – Projeção C Brasília 70712-902 Distrito Federal, Brazil Telephone Number: 55 61 34268400 Fax Number: 55 61 3328 5523 E-mail: cade@cade.gov.br Website: http://www.cade.gov.br/ Languages available: Portuguese, English</p>

<p>C. Is agency staff available for pre-notification consultation? If yes, please provide contact points for questions on merger filing requirements and/or consultations.</p>	<p>Yes. The Administrative Council for Economic Defence (CADE) can be formally consulted. The procedure for this consultation is described by Normative Act Resolution nº 18/1998 from CADE. A form (Annex 1 of the Normative Act Resolution) must be filled in and formally presented.</p>
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3. Notification requirements

<p>A. Is notification mandatory pre-merger?</p>	<p>No</p>
<p>B. Is notification mandatory post-merger?</p>	<p>Yes. The Brazilian competition legislation establishes that all economic mergers covered by the Law 8.884/94 on its article 54 must be notified previously or no longer than fifteen business days after its occurrence.</p>
<p>C. Can parties make a voluntary pre- or post-merger filing even if filing is not mandatory?</p>	<p>Yes. Despite not being mandatory the parties can make a pre-merger filing. Only the post-merger filing is mandatory. It must be done within 15 days after the merge occurrence.</p>

4. Covered transactions

<p>A. Definitions of potentially covered transactions</p>	<p>The covered transactions include merger with or into other companies, organization of companies to control third companies or any other form of corporate grouping that meet the thresholds</p>
<p>B. If change of control is a determining factor, how is control defined?</p>	<p>Control is established whenever the agent possesses more than 50% of the voting capital of a company. In addition to this definition, control can be characterized whenever one company acquires the direct control of the relevant market decisions of another company such as, production level, sales, technological investments and R&D strategies.</p>
<p>C. Are partial (less than 100%) stock acquisitions/minority</p>	<p>Yes. Any stock acquisition is covered, unless it represents a simple corporative reorganization.</p>

shareholdings covered? At what levels?	
D. Do the notification requirements cover production joint ventures or any other type of joint venture?	Yes. Any stock acquisition is covered, unless it represents a simple corporative reorganization.
E. Are any sectors excluded from notification requirements? If so, which sectors?	No
F. Are transactions that do not meet merger notification thresholds subject to substantive merger control?	No

5. Thresholds for notification

A. What are the general thresholds? Are the thresholds subject to adjustment: (e.g. annually for inflation)? If adjusted, state on what basis and how frequently.	Any transaction related to economic concentration, whether through merger with or into other companies, organization of companies to control third companies or any other form of corporate grouping, when the resulting company or group of companies accounts for twenty percent (20%) of a relevant market, or in which any of the participants has posted in its latest balance sheets an annual gross revenue equivalent to R\$ 400,000,000 (four hundred million of Reais). These thresholds are not subject to adjustments. Any adjustment in the thresholds would only be possible by modification in the law.
B. To what period(s) of time do the thresholds relate	Pre and post merger market share and the gross revenue in the previous fiscal year (which coincides with the calendar year).

(e.g., most recent calendar year, fiscal year; for assets-based tests, calendar year-end, fiscal year-end, other)?	
C. Describe methodology for identifying and calculating any values necessary to determine if notification is required, including:	There is no methodology established
i. The methodology for identifying and calculating the value of the transaction, if applicable.	There is no methodology established
ii. The methodology for identifying and calculating relevant sales or turnover, if applicable.	There is no methodology established
iii. The methodology for identifying and calculating the value of relevant assets, if applicable.	There is no methodology established
iv. Methodology for calculating exchange rates.	There is no methodology established
D. Do thresholds apply to worldwide sales/assets, to sales/assets within the jurisdiction, or both?	This is not defined by the Brazilian antitrust law. Until recently, CADE considered the worldwide gross revenue for the application of the thresholds. However, by a decision rendered in January 2005, CADE reviewed its interpretation and determined that annual turnover would henceforth be measured with reference to Brazilian rather than worldwide sales. CADE expects to issue in the near future a formal resolution confirming this interpretation.
E. How is the nexus to the jurisdiction determined? If based on an “effects doctrine,” please describe how this is applied.	Without prejudice to any agreements and treaties to which Brazil is a party, the Brazilian Antitrust Law applies to transactions wholly or partially performed within the Brazilian territory, or the effects of which are or may be suffered therein. Foreign companies that operate or have a branch, agency, subsidiary, office, establishment, agent or representative in Brazil shall be deemed situated in the Brazilian territory.

<p>F. If national sales are relevant, how are they allocated geographically (e.g., location of customer, location of seller)?</p>	<p>As explained in answer 5. D above, CADE has recently reviewed its interpretation and determined that annual turnover would be measured with reference to national rather than worldwide sales. National sales are usually allocated according to customer location.</p>
<p>G. If there are market share tests, are there guidelines for calculating market shares?</p>	<p>There are no guidelines for calculating market shares</p>
<p>H. If there are market share tests, do they apply even if there is no horizontal overlap in the parties' activities, either in the jurisdiction or worldwide?</p>	<p>Yes, despite the lack of horizontal overlap it's applicable whenever there is vertical integration</p>
<p>I. Describe the methodology for determining relevant undertakings/firms for threshold purposes (e.g., group-wide? only the acquired entity? If based on control, how is control determined?).</p>	<p>For thresholds purposes the Brazilian authorities consider both the acquired or acquiring group-wide, with activity in Brazil.</p>
<p>J. Are there special threshold calculations for joint ventures?</p>	<p>No</p>
<p>K. Are there special threshold calculations for particular sectors (e.g., banking, airlines) or particular types of transactions (e.g. partnerships, financial investments)?</p>	<p>No</p>

6. Transactions in which the acquiring and acquired parties are foreign

Are there special rules or exemptions

A. With respect to application of jurisdictional thresholds?	No. Notification is compulsory when at least one of the two following conditions is satisfied: (i) if one of the merging parties acquires, after the merger, at least 20% of the market share in a relevant market, or (ii) if any of the players involved in the merger had a gross annual [national] revenue in its last financial statement equal or higher than R\$ 400 million (Law 8.884, article 54, paragraph 3).
B. With respect to information required (e.g. information submitted or document legalization)?	The information required is the same for foreign or national parties. However, whenever any of the binding documents are in any language other than portuguese, such documents must be submitted along with the respective translation. Besides, any document executed in a foreign jurisdiction, must be notarized in the country where it was signed and such notarization must be certified by the Brazilian Consulate of that country.
C. With respect to waiting periods?	No.

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7. Simplified procedures

Describe any special procedures for notifying transactions that do not raise competition concerns (e.g., short form, simplified procedures, advanced ruling certificates, waivers, etc.).	On February 2003, SEAE and SDE issued a Joint Ordinance N° 1/2003 introducing a simplified procedure for the review of certain categories of mergers which clearly do not present competitive risks ("fast-track" review). This Joint Ordinance represents a major step to hasten merger reviews in Brazil. According to the regulation, the simplified review is adopted at the discretion of SEAE and SDE, which will always have the possibility, at any point of the analysis, to return to the regular proceedings. Similarly, CADE will be able to request at the decision stage, that SEAE and SDE apply the full analysis, whenever CADE understands that the case deserves a more detailed review.
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8. Timing of notification

A. What is the earliest that a transaction can be notified (e.g., is a definitive agreement required; if so, when is an agreement considered definitive)?	Paragraph 4 of article 54 of the Brazilian Antitrust Law establishes that transactions may be notified to the competition authorities anytime prior to its occurrence, with no need of a definitive agreement to have been entered by the parties. In such case, the authorities will start reviewing the case with the submitted documents and informations and the agreement will be considered definitive when the parties deem it to be so. Even though the parties have the opportunity to pursue prior notifications, they are not required by the Brazilian Law in any case, as the Brazilian system adopts the ex post examination as the rule.
B. Must notification be made within a specified period following a triggering event? If so, describe the triggering event (e.g., definitive agreement) and the deadline following the event.	Paragraph 4 of article 54 of the Brazilian Antitrust Law establishes that transactions must be notified to the competition authorities up to fifteen (15) days after the occurrence of the transaction. Although the law does not define the precise meaning of "occurrence of the transaction", CADE has interpreted that the triggering event for the notification is the execution of the first binding document among the parties (regardless it being definitive or not), unless the parties stop behaving as competitors among themselves or in relation to any third party (CADE's Resolution No. 15, art. 2)

9. Documents to be submitted

A. Describe the types of documents that parties must submit with the notification (e.g., agreement, annual reports, market studies, transaction documents).	The parties must submit with the notification certified copies of all the binding transaction documents and of the last annual report prepared for the stockholders (CADE's Resolution No. 15, Annex I, Item III). In addition, the parties must also present a list of members of the executive board of the group that also integrate boards of other firms in the same markets as the parties; as well as any agreement that includes rules in any way related to the administration of the merging parties, such as Shareholders' Agreements. The authorities might also require supplementary documents such as analysis, reports and market studies prepared by the
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	parties, as well as the financial statements of the three previous years (CADE's Resolution No. 15, Annex II, Item III).
B. Are there any document legalization requirements (e.g., notarization or apostille)?	Any document executed in a foreign jurisdiction must be notarized in the country where it was signed and such notarization must be certified by the Brazilian Consulate of that country.

10. Translation

Describe any requirements to submit translations of documents with the initial notification, or later in response to requests for information, including the categories or types of documents for which translation is required, requirements for certification, language(s) accepted, and whether selected excerpts are accepted in lieu of complete documents.	<p>Whenever a binding document is executed in any language other than portuguese, such documents must be submitted, at the time of the initial notification, along with a certified translation. By means of a justified petition, the parties may eventually request authorization to present selected exerppts of the documents, being up to the authorities to accept or deny such request.</p> <p>Even though the translation shall be presented at the time of notification, the parties may request to the authorities additional time to submit the certified translation.</p>
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11. Review and waiting periods/Suspensive effects

A. Describe any applicable review and/or waiting periods following notification, including whether closing is suspended during any initial review or waiting period and/or further	<p>Brazil has an ex post merger notification system and the parties have up to fifteen days after the occurrence of the transaction to notify the competition authorities.</p> <p>Once the notification is submitted (in three copies, one for each authority - SEAE/SDE/CADE), the Secretariat for Economic Monitoring, at the Ministry of Finance (SEAE), has thirty (30) days to prepare its economic analysis and issue its recommendations. Subsequently, the Secretariat of Economic Law (SDE) pursues its analysis, having also a deadline of thirty (30) days to do so.</p>
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<p>review periods (i.e., second-phase proceedings).</p>	<p>Finally, both reports with recommendations are sent to CADE, which will have sixty (60) days from the date it receives the files from the SDE to issue its final decision (Law n. 8.884/94, article 54, paragraph 6).</p> <p>In January 2004, SEAE and SDE instituted a “Joint Procedure for Merger Review” that has expedited merger analysis. Under this procedure, both Secretariats begin reviewing a notification immediately upon its receipt and send a joint recommendation to CADE, thus avoiding the delay inherent in referring a case to SEAE and awaiting its analysis before SDE commences work. Whenever any of the antitrust authorities request supplementary information to the parties, the 30 or 60 day period is suspended. (please refer to Law n. 8.884/94, article 54, paragraph 8). If the parties request confidentiality of any documents or information, the SDE will start analyzing it as from the submission date, regardless the merit analysis is still being done by SEAE.</p>
<p>B. Are there different rules for public tenders (e.g. open market stock purchases or hostile bids)?</p>	<p>Paragraph 10 of article 54 of the Brazilian Antitrust Law establishes that in addition to the other requirements, any change in the stock control of publicly-held companies and registration of mergers shall be reported to SDE by the Securities Commission — CVM and by the Brazilian Commercial Registry Department of the Ministry of Industry, Trade and Tourism — DNRC/MICT, respectively, within five business days for review, if applicable.</p>
<p>C. Are the applicable waiting periods limited to aspects of the transaction that occur within the jurisdiction (e.g., acquisition or merger of local undertakings/business units)? If not, to what extent do they apply to the parties’ ability to proceed with the transaction outside the jurisdiction? Describe any procedures available to permit consummation outside the jurisdiction prior to the expiration of the local waiting period and/or clearance. (e.g. request for a derogation from the bar on closing, commitment to hold separate the local business operations.)</p>	<p>As Brazil has a post merger notification system, there is no waiting period defined by law.</p> <p>However, in March 2002 the Brazilian Competition Policy System (SBDC) implemented a new procedure that allowed CADE to issue a “Preliminary Injunction” on complex and potentially anticompetitive merger cases. This injunction may be issued either ex officio or at the request of SEAE, SDE or an interested third party, to prevent the firms from implementing the transaction before a final administrative decision. Along the same line, there is also the possibility that the merging parties and CADE will enter into an agreement, within the scope of the review process, through which a commitment is reached concerning the measures which may and may not be taken by the merging parties before the review process is complete.</p> <p>The scope of this "Provisional Agreement of Operational Reversibility" is to prevent that any irreversible and/or anticompetitive measures are taken during the exam period, thus guaranteeing the effectiveness of the final decision.</p>
<p>D. Describe any provisions or procedures available to the enforcement authority, the parties and/or third parties to extend the waiting period.</p>	<p>Not applicable, as Brazil has a post merger notification system. Please see answer C above.</p>

<p>Is there a statutory maximum for extensions of the review period by the authority.</p>	
<p>E. Describe any procedures for obtaining early termination of the applicable waiting period, and the criteria and timetable for deciding whether to grant early termination.</p>	<p>Not applicable, as Brazil has a post merger notification system. Please see answer C above.</p>
<p>F. Describe any provisions or procedures allowing the parties to close at their own risk before waiting periods expire or clearance is granted (e.g., allowing the transaction to close if no "irreversible measures" are taken).</p>	<p>Brazil has a post merger notification system and according to paragraph 4 of article 54 of the Brazilian Antitrust Law, the parties have up to 15 days after the occurrence of the transaction to notify it to the Brazilian authorities. Nonetheless, paragraph 7 of the same article establishes that the full effectiveness of the transaction is conditioned to the approval by CADE, which may, at the end of the analysis, request partial divestiture or block the deal if it finds the transaction to be anticompetitive. Therefore, even though there is no waiting period that prevents the parties to implement the merger, they are acting at their own risk before CADE grants the authorization.</p>

12. Responsibility for notification / representation

<p>A. Who is responsible for notifying – the acquiring person(s), acquired person(s), or both?</p>	<p>Preferrably, the parties shall submit the notifications together (Article 3 of CADE's Resolution 15). In the case one of the parties does not do so, one party may submit it alone, but in any case the notification must contain all the information required for the analysis.</p>
<p>B. Do different rules apply to public tenders (e.g. open market stock purchases or hostile bids)?</p>	<p>No.</p>
<p>C. Are the parties required to appoint a joint representative?</p>	<p>No, the parties are allowed to appoint either the same or different attorneys to represent them.</p>
<p>D. Are there any rules as to</p>	<p>According to the Brazilian Code of Civil Procedure, the notifying parties must be represented by a lawyer</p>

<p>who can represent the notifying parties (e.g., must a lawyer representing the parties be a member of a local bar)?</p>	<p>enrolled with the Brazilian Bar Association (Ordem dos Advogados do Brasil - OAB).</p>
<p>E. How does the validity of the representation need to be attested (e.g., power of attorney)? Are there special rules for foreign representatives or firms? Must a power of attorney be notarized, legalized or apostilled?</p>	<p>This representation must be attested by a power of attorney duly notarized. Whenever a power of attorney is granted abroad, such document must be notarized and legalized in the Brazilian Consulate of the country where it was notarized. If the power of attorney was granted in a foreign language, a certified translation must be also presented.</p> <p>As mentioned in item D above, foreign representatives or firms are not allowed to represent the notifying parties before the Brazilian authorities.</p>

13. Filing fees

<p>A. Are any filing fees assessed for notification? If so, in what amount and how is the amount determined?</p>	<p>Yes. In Brazil the fee is R\$ 45,000.00 (approximately US\$ 15,000.00)*, which is determined by Law 9.781 of January 19, 1999, altered by Law 10.149 of December 2000.</p>
<p>B. Who is responsible for payment?</p>	<p>Any petitioner can pay the fee, i.e. either of the parties involved or the lawyers acting on their behalf.</p>
<p>C. When is payment required?</p>	<p>Payment shall be made until the filing and the receipt must be attached to the notification</p>
<p>D. What are the procedures for making payments (e.g., accepted forms of payment, proof of payment required, wire transfer instructions)?</p>	<p>The procedures for making payments are regulated by Law 9.781 of January 19, 1999. The payment can be made by check, cash or wire transfer and must be presented for proof of payment in order to complete the legal process of notification.</p>

14. Confidentiality

<p>A. To what extent, if any, does your agency make public the fact that a pre-merger notification filing was made or the contents of the notification?</p>	<p>Pre merger notification filings must always be made public according to the Resolution 12 of March 31, 1998, (Annex 6) however requests for confidentiality in the divulgation of the contents may be granted at the discretion of competition authorities</p>
<p>B. Do notifying parties have access to the authority's file? If so, under what circumstances can the right of access be exercised?</p>	<p>Yes, but when the authority requests information from third parties companies (competitors, customers and suppliers), the right of access to the file by the notifying parties can be restricted if the information is economically sensitive.</p>
<p>C. Can third parties or other government agencies obtain access to notification materials? If so, under what circumstances?</p>	<p>In the case of a private party, the authority has to consider what information can be made public without prejudice to the parties involved with the transaction. Other government agencies usually have the right to access notification materials; however, when the antitrust agency sends documents to other government agencies, it recommends not publicizing any information considered confidential.</p>
<p>D. Are procedures available to request confidential treatment of the fact of notification and/or notification materials? If so, please describe.</p>	<p>Yes. All procedures are described by Resolution 12 of March 31, 1998, Section II. The respondent, claimant or inquirer, or the respective lawyers, shall place a request for confidentiality to the Reporting Member, based on substantiated reasons. To the extent required by law or in the public interest, the Reporting Member shall declare certain documents and information confidential, to be entered on separate records.</p>
<p>E. Is the agency or government a party to any agreements that permit the exchange of information with foreign competition authorities? If so, with which foreign authorities? Are the agreements publicly available?</p>	<p>Yes. Brazil and USA have an agreement, promulgated by Decree 4.702 of May 21, 2003, regarding cooperation between their competition authorities in the enforcement of their competition laws. The agreement includes exchange of confidential information and is at disposal on the following link: http://www.fazenda.gov.br/seae/english/Agreement%20Brasil-USA%20Regarding%20Competition.htm</p> <p>The English version is the annex 5</p>

15. Sanctions/penalties

A. What are the sanctions/penalties for failure to file a notification and/or failure to observe any mandatory waiting periods?	Noncompliance with the deadlines for notification will be punishable with fines ranging from \$63,846.00 (approximately US\$ 20,000) up to R\$6,384,600.00 (approximately US\$ 2,000,000).* *Exchange rate estimates based on values calculated May 28, 2003
B. Which party/ies are potentially liable?	All parties involved are jointly and severably liable. Eventually, if one of the parties did not provide it's respective information, there is some case law making that part exclusively liable.

16. Judicial review

Describe the provisions and timetable for judicial review or other rights of appeal/review of agency decisions on merger notification and review.	The parties have the right to petition for judicial review of agency decisions on mergers for up to five years after the judgment has been officially published. There must be uncontestable evidence of new facts or documents not originally presented during the original judgment in order to initiate a judicial review. Also the proof of procedural errors during the merger review process, or proof of the decision having imposed an unnecessary cost to the parties due to lack of having raised competitive issues, can also be grounds for initiating a judicial review. According Law 8.884/94, article 50, the CADE decisions do not qualify for Executive Branch review
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17. Additional filings

Are any additional filings/clearances required for some types of transactions, e.g., foreign investment or regulated sectors?	No. The antitrust law does not discriminate among procedures required of national versus foreign investment nor between those required for the regulated versus unregulated sectors.
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18. Closing deadlines

When a transaction is cleared or approved, is there a time period within which the parties must close for it to remain authorized?

No, but CADE stipulates that parties must file the final agreement to verify that it matches the original pre-merger notification filed.