

## Template pursuant to Section 3 (a) of the ICN Framework on Competition Agency Procedures

[Agency name, Jurisdiction]

The following template is submitted by the **Administrative Council for Economic Defense – CADE, Brazil**, pursuant to Section 3(a) of the ICN Framework on Competition Agency Procedures (“CAP”).

### I. Introduction

*Please add brief presentation/link to agency website.*

The Administrative Council for Economic Defense - CADE is the Brazilian competition authority. CADE is an independent federal agency that holds investigative, prosecutorial and adjudicative functions, being responsible for the enforcement of competition law at the administrative level over practices that occurred totally or partially in Brazil or that produce effects in the country.

CADE's website: [www.cade.gov.br](http://www.cade.gov.br)

### II. Laws, Regulations, and Policies relevant for the implementation of the CAP

*For each CAP Principle below, please explain how your competition law investigation and enforcement procedures meet the Principle. Please highlight important features relevant for the implementation of the CAP and explain limitations, if applicable. Feel free to include links or other references to related materials such as relevant legislation, implementing rules and regulations, and guidelines where helpful and appropriate.*

*Please update your Template reflecting significant changes as they relate to the CAP, as needed.*

#### b) Non-Discrimination

*Each Participant will ensure that its investigation and enforcement policies and Procedural Rules afford Persons of another jurisdiction treatment no less favorable than Persons of its jurisdiction in like circumstances.*

CADE enforces competition law<sup>1</sup> on a non-discriminatory basis and treats Persons of other jurisdictions no less favorably than Brazilians in like circumstances.

According to article 2 of the competition law: “[the law] applies, without prejudice to agreements and treaties of which Brazil is a signatory, to practices conducted, totally or partially, in the national territory, or that produce or may potentially produce effects in it”.

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<sup>1</sup> Law 12,529/2011 (the Brazilian Competition Law) is available in English at:  
<http://en.cade.gov.br/topics/legislation/laws/law-no-12529-2011-english-version-from-18-05-2012.pdf/view>

Under its article 31, the law clearly states its full applicability over “any individuals or legal entities of public or private law, as well as to any associations of entities or individuals, whether de facto or de jure, even if temporarily, incorporated or unincorporated, even if engaged in business under the legal monopoly system”. In other words, the legal rights and obligations foreseen apply fully and equally to any Person whose practices occurred totally or partially in Brazil or that produce effects in the country.

Furthermore, according to the Brazilian Code of Civil Procedure<sup>2</sup>, which is applied on a subsidiary basis to the Brazilian Competition Law, nationals and non-nationals, whether they reside or not in Brazil, should be treated equally with regard to the access to justice and the procedural protocol.

### **c) Transparency and Predictability**

- i. Each Participant will ensure that Competition Laws and regulations that apply to Investigations and Enforcement Proceedings in its jurisdiction are publicly available.*
- ii. Each Participant with the authority to adopt Procedural Rules will have in place such rules applicable to Investigations and Enforcement Proceedings in its jurisdiction.*
- iii. Each Participant will ensure that Procedural Rules that apply to Investigations and Enforcement Proceedings in its jurisdiction are publicly available.*
- iv. Each Participant will follow applicable Procedural Rules in conducting Investigations and in participating in Enforcement Proceedings in its jurisdiction.*
- v. Each Participant is encouraged to have publicly available guidance or other statements, clarifying or explaining its Investigations and Enforcement Proceedings, as appropriate.*

The legal framework for competition law in Brazil is primarily governed by Law 12,529, the Competition Law, while the Economic Crimes Law (Law 8,137/1990) and the Public Procurement Law (8,666/1993) set out the criminal provisions applicable to certain antitrust violations under Brazilian law. On a subsidiary basis, CADE complies with the Law of administrative procedure (Law 9,784/99), the Code of Civil Procedure (13,105/15) and the Code of Consumer Protection (8,078/90)

The rules set out in the Competition Law are supplemented by regulations, resolutions and decrees issued by CADE. It is worth mentioning: (i) Resolution No. 1, which sets forth CADE’s Internal Rules and procedural rules applicable to both mergers and conduct investigation; (ii) Resolution No. 2, which sets forth additional rules governing the Brazilian merger control system; (iii) Resolution No. 12, which governs the consultation process before CADE, allowing parties to inquire about interpretations of the law. Moreover, CADE has issued

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<sup>2</sup> Available in Portuguese at: [http://www.planalto.gov.br/ccivil\\_03/ Ato2015-2018/2015/Lei/L13105.htm](http://www.planalto.gov.br/ccivil_03/ Ato2015-2018/2015/Lei/L13105.htm)

guidelines on specific topics, such as remedies, horizontal mergers, gun jumping, leniency and compliance.

All rules are public available at CADE's website, as well as procedural rules. CADE's officials should follow the rules and the parties can request procedural correction if deemed appropriate.

In addition, CADE has introduced an Electronic System of Information (SEI), which is the official system for the management of its electronic documents. Through it, all public case files are available online for consultation by the public.

Furthermore, CADE's judgment sessions are streamed live, accessible to everyone on CADE's website.

#### **d) Investigative Process**

- i. Participants will inform any Person that is the subject of an Investigation as soon as practical and legally permissible of that Investigation, according to the status and specific needs (e.g., forensic considerations) of the Investigation. This information will include the legal basis for the Investigation and the conduct or action under Investigation.*
- ii. Participants will provide any Person that has been informed that it is the subject of an Investigation, or that has notified a merger or other transaction or conduct, with reasonable opportunities for meaningful and timely engagement on significant and relevant factual, legal, economic, and procedural issues, according to the status and specific needs of the Investigation.*
- iii. Participants will focus investigative requests on information that they deem may be relevant to the competition issues under review as part of the Investigation. Participants will provide reasonable time for Persons to respond to requests during Investigations, considering the needs to conduct informed Investigations and avoid unnecessary delay.*

In the context of merger assessment, the Brazilian Competition Law states the publication of a public notice after the notification of a merger or its amendment in accordance to article 53, §2 of the law. During the merger assessment, the merging parties and interested third parties have the opportunity for engagement regarding factual, juridical and economic facts that they consider appropriate. In addition, if approved by the General Superintendence, a third party is allowed to appeal to CADE's Tribunal (article 65, item I of the Competition Law).

In the scope of investigation of anticompetitive conducts, CADE provides any Person that is subject of an investigation with the rights to an adversarial proceeding and full defense. As stated in CADE's Internal Rules, article 146, the opening of a formal investigation will follow the notification of the Person under investigation. The notification should include: (i) identification of the respondent and, as the case may be, of the complainer; (ii) enunciation of the illegal conduct attributed to the respondent, with the identification of the facts to be assessed; (iii) identification of the legal provision in connection with the presumed infringement; and (v) determination of notification of the respondent to present a defense within the legal term and to specify the evidence it intends to produce, providing the full

identification of up to three witnesses. This will provide a broad knowledge of the accusation and, therefore, the possibility of full defense and the respondent and interested third parties are provided with the opportunity for meaningful engagement regarding factual, juridical and economic facts that they consider appropriate.

Case review meetings between CADE and the respondents, as well as between CADE and interested parties, can happen at any time, as requested by the respondents, the third parties or by the authority itself. All the meetings will be held at CADE and a succinct description of the subject of the meeting, as well as a list of presence will be made available to the public case records after the meeting is held.

The access to the case's files is ensured to the respondent (according to article 70, § 4 of the law), except in case of possible sensitive information of the competitors or legal confidentiality. In addition to the notifications in the course of the investigation, when the proceeding is submitted for judgement the Person may still present final allegations within 15 business days.

Furthermore, CADE's Tribunal final decision will be published within five (5) business days on the Federal Official Gazette containing a detailed description of the investigation, the violations assessed and the penalties imposed.

#### **e) *Timing of Investigations and Enforcement Proceedings***

*Each Participant will endeavor to conclude its Investigations and aspects of Enforcement Proceedings under its control within a reasonable time period, taking into account the nature and complexity of the case.*

The Brazilian Competition Law states a maximum period of 330 days to merger review (240 days that can be extended by 60 days at the request of the parties and by no more than 90 days, based on a reasoned decision of the Tribunal). In accordance to article 88, §2° and §9° of the law, if CADE fails to comply with this deadline, the merger will be automatically approved. Therefore, there are legal incentives for procedural promptness and administrative efficiency in the case assessment.

The Competition Law and CADE's internal rules (from articles 134 to 161) provide specific set of rules and periods applicable to investigations and enforcement proceedings. The non-compliance without reasonable justification can lead to determination of administrative, civil and criminal liability, to whomever causes it (as provided in articles 68 and 82 of the law).

In general, the competition law and CADE's Internal Regulation provide legal certainty to the parties about the course of case assessment, considering the nature and complexity of the assessment.

These endeavors are also defined in Brazil's Public Administration's Multiannual Plan (PPA), which determines public policies and the measures to achieve these that are set out in a series of goals. Among CADE's goals, the PPA establishes the following targets: (i) "Review mergers in a timely manner, maintaining the average timeframe of review of fast-track

proceedings below 30 days, prioritizing the solution of competition concerns by means of agreements.”; (ii) “Investigate violations against the economic order in a timely manner so that the number of cases under investigation for more than 5 years does not exceed 20% of the backlog.”

#### **f) Confidentiality**

- i. Each Participant will have publicly available rules, policies, or guidance regarding the identification and treatment of confidential information.*
- ii. Each Participant will protect from unlawful disclosure all confidential information obtained or used by the Participant during Investigations and Enforcement Proceedings.*
- iii. Each Participant will take into consideration both the interests of the Persons concerned and of the public in fair, effective, and transparent enforcement regarding the disclosure of confidential information during an Enforcement Proceeding.*

The Brazilian Competition Law contains several provisions regarding classification and treatment of confidential information, such as article 9, item XVIII, article 11, item III, article 13, items II and VI, article 19, § 1, item I; and article 72.

According to article 49 of the Law, CADE should ensure “confidential treatment of documents, information and procedural acts necessary for the elucidation of the facts or required in the interests of society”.

CADE’s Internal Rules also states general procedural rules regarding the confidentiality of documents establishing the parameters and procedures for classifying the information as restricted in ongoing proceedings.

The rules and guidance on confidentiality are also reinforced in CADE’s guidelines, such as the Guidelines on Leniency and Cease and Desist Agreement.

In short, CADE protects confidential information from unlawful disclosure, providing guidance regarding its policy and establishing restricted access to case files that can be accessed only by CADE’s internal staff or by the parties. Confidential data can be disclosed only when authorized by market participants, through waivers of confidentiality.

Moreover, CADE issued a Public Resolution 21/2018 adopting, as applicable, the rationale and parameters of the Directive No. 104/2014 of European Union for classification and disclosure of confidential information in its procedures. CADE adopted the standards of black list, grey list and white list, as a rule to disclose documents.

All documents mentioned above are public.

#### **g) Conflicts of Interest**

*Officials, including decision makers, of the Participants will be objective and impartial and will not have material personal or financial conflicts of interest in the Investigations and*

*Enforcement Proceedings in which they participate or oversee. Each Participant is encouraged to have rules, policies, or guidelines regarding the identification and prevention or handling of such conflicts.*

The Brazilian Competition Law explicitly states prohibitions related to conflict of interest for Administrative Tribunal members (President and Commissioners), in the article 8, including the periods after the end of their terms (quarantine period – §1). These prohibitions also apply to the General Superintendent (article 2, §3), Attorney General (article 16, §3) and Chief Economist (article 18, §2).

Moreover, the administrative procedure law (Law 9,784/99) and the Code of Civil Procedure (Law 13,105/15), applicable on a subsidiary basis to CADE's administrative proceedings (article 115 of the Law 12,529/11), state rules that prevent impediments or suspicions in the assessment, decision and judgment of the parties.

This normative is enough to prevent possible conflicts of interest with the assessed parties.

#### **h) Notice and Opportunity to Defend**

- i. *Each Participant will provide Persons subject to an Enforcement Proceeding timely notice of the alleged violations or claims against them, if not otherwise notified by another governmental entity. To allow for the preparation of an adequate defense, parties should be informed of facts and relevant legal and economic reasoning relied upon by the Participant to support such allegations or claims.*
- ii. *Each Participant will provide Persons subject to a contested Enforcement Proceeding with reasonable and timely access to the information related to the matter in the Participant's possession that is necessary to prepare an adequate defense, in accordance with the requirements of applicable administrative, civil, or criminal procedures and subject to applicable legal exceptions.*
- iii. *Each Participant will provide Persons subject to an Administrative Proceeding with reasonable opportunities to defend, including the opportunity to be heard and to present, respond to, and challenge evidence.*

As mentioned in the item 'd' above, the decision that initiates the administrative proceedings shall "determine the notification of the Person under investigation to present a defense and specify the evidence to be produced, within a period of 30 (thirty) days (article 70 of Law 12,529/11). The initial notification shall contain the entire content of the decision approving the initiation of the administrative proceedings and representation, if applicable (article 70, §1). It means that the notification shall contain, at least, the reference of the respondent, description of the conduct considered illicit and the reference to the legal provision related to the alleged violation (article 146 of CADE's Internal Rules).

The access to the process is warranted to the respondent (article 70, § 4 of Law 12.529/11), except in case of possible sensitive information of the competitors or legal confidentiality. Moreover, Law No. 12,529/11 states that the respondent can "require any diligence, which

may be performed or not, at the discretion of the General Superintendence” in the administrative inquiry (which investigates only evidence that are not sufficient to initiate the administrative proceedings – article 66, §1 and §7).

After the initiation of the case by the General Superintendence, the respondent can present new allegations of defense (article 73). After the conclusion of the administrative inquiry, the proceedings are submitted to the Administrative Tribunal and, in case of diligences requested by the Commissioner, the respondent can present final allegations (article 76, sole paragraph).

The respondent may still present the last opportunity of defense before the judgment, in public session, through oral argumentation (article 80 of CADE’s Internal Regulation).

#### **i) Representation by Counsel and Privilege**

- i. No Participant will deny, without due cause, the request of a Person to be represented by qualified legal counsel of its choosing.*
- ii. Each Participant will provide a Person a reasonable opportunity to present views regarding substantive and procedural issues via counsel in accordance with applicable law. Notwithstanding the foregoing, Persons may be required to provide direct evidence.*
- iii. Each Participant will recognize applicable privileges in accordance with legal norms in its jurisdiction governing legal privileges, including privileges for lawful confidential communications between Persons and their legal counsel relating to the solicitation or rendering of legal advice. Each Participant is encouraged to have rules, policies, or guidelines on the treatment of privileged information.*

The Brazilian Competition Law states that the respondents may be accompanied and counseled by attorney-in-fact, if they wish (article 70, §3 and §4).

This provision is in accordance with the administrative procedure law (Law 9,784/99) that provides the right of the respondent to “be assisted, optionally, by a lawyer”, according to article 3°, item IV (Law 9,784/99 is applicable on a subsidiary basis as stated in article 115 of Law No. 12.529/11).

Moreover, the Brazilian law that regulates the law activities (Law 8,906/94) provides the lawyer’s right (and client’s warranty) to “the inviolability of their written, electronic, telephonic and telematics correspondence, as long as related to the practice of advocacy” and the “communication with their clients” (article 7°, items II and III).

#### **j) Decisions in Writing**

- i. Each Participant in charge of issuing decisions or orders will issue in writing its final decisions or orders in which it finds a violation of, or imposes a prohibition, remedy, or sanction under applicable Competition Laws. Such final decisions or orders will set out the findings of fact and conclusions of law on which they are based, as well as describe any remedies or*

*sanctions. Each Participant will ensure that all final decisions are publicly available, subject to confidentiality rules and applicable legal exceptions.*

- ii. Each Participant will ensure that all commitments it accepts to resolve competition concerns are in writing. Subject to confidentiality rules and applicable legal exceptions, each Participant will (i) make public the commitments it accepts, and (1) describe the basis for the competition concerns or (2) reference public materials in which those concerns are expressed, or (ii) provide a summary explanation of the commitments and the reasons for them.*

In the context of merger assessments, CADE shall approve, reject or partially approve a transaction, with the adoption of remedies, in public session (respecting the information restricted by law or in the interest of the case). CADE's final decisions are available through the Electronic Information System and encompasses the most relevant pieces of information and reasoning. The reasoning and conclusions gathered in the investigative phase are also provided thoroughly and publicly.

In the context of anticompetitive conducts, the law states that the technical notes initiating the administrative proceedings should contain the minimum requirements for identification of the parties, description of the facts and reference to the legal provision related to the case.

According to Article 22 of the Administrative Procedure Law (Law 9,784/99, applicable on a subsidiary basis as stated in article 115 of Law No. 12,529/11), all administrative acts "of the proceedings shall be in writing, in Portuguese, with date and location of its emission and signature of the competent authority".

#### **k) Independent Review**

*No Participant will impose on a Person a prohibition, remedy, or sanction in a contested Enforcement Proceeding for violation of applicable Competition Laws unless there is an opportunity for the Person to seek review by an independent, impartial adjudicative body (e.g. court, tribunal, or appellate body).*

CADE has administrative jurisdiction that cannot be modified within the executive branch of government. However, any decision issued by CADE can be challenged in the judiciary branch. The judicial review of administrative decisions is based on the constitutional principle of separation of powers and the principle stated in article 5 (XXXV) of the Brazilian Constitution, according to which "the law shall not exclude any injury or threat to a right from the consideration of the judiciary branch". Therefore, all of CADE's decisions are subject to judicial review.

CADE's decisions can be challenged by the parties or any interested party affected by the decision before a federal judge of any of the 27 federal Brazilian states. Usually, CADE's decisions can be appealed to a federal court, whose decision can be appealed to a federal tribunal, whose decision can be further appealed to a High Court (the Superior Court of Justice, responsible for the harmonization of judiciary decisions, and/or the Federal Supreme Court, responsible for constitutional matters). The judiciary branch can review any decision



issued by CADE, irrespective whether it is a final decision, a charging document or a procedural act.

The judicial review of competition cases in Brazil entails a review of legality as well as a full review of the merits of the decision. Therefore, the judiciary branch can either confirm CADE's decision or annul it, in full or in part. When it comes to annulment, the judiciary can either order CADE to make a new decision or replace CADE's decision with one of its own.