

# Doing Business in Brazil

Guidelines for foreign investment

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## Brazil – Key Facts

### Legal Framework

Brazil follows a Civil Law (codified) legal system.

There are **3** main regulatory agencies for foreign investments:

**Conselho Monetário Nacional (CMN)** is the Brazilian National Monetary Council, which is the highest decision-making agency of the National Financial System;

**Banco Central do Brasil (BACEN)** is the Central Bank of Brazil, which controls foreign exchange policy and is charged with registering and monitoring foreign investments; and

**Comissão de Valores Mobiliários (CVM)** is the Brazilian Securities and Exchange Commission, which regulates the Brazilian capital market, including securities, listings and disclosure requirements.

In addition to those agencies, it is also worth mentioning:

**Receita Federal do Brasil (RFB)** is the Brazilian Federal Revenue Office, which is the Brazilian tax authority

**203 mil +**

People living in Brazil, making it the 7<sup>th</sup> most populated country worldwide

**5<sup>th</sup> largest country**

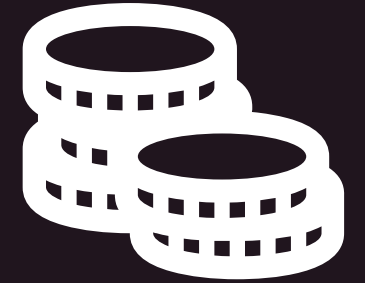
8.5 million + square kilometres of area

**9<sup>th</sup> biggest economy**

According to 2023 GDP in USD, worldwide

# Foreign Investment

- Foreign investors may invest in one of **3** ways:
  - **Direct** ownership of shares/ quotas, making up part of the corporate capital of Brazilian companies
  - Granting loans to a Brazilian resident, be them individuals or companies, as a foreign or non-resident individual or company
  - **Indirectly**, through the Brazilian Financial Market, which allows investors to access all types of investments available on the Brazilian capital market
- **Direct investments:**
  - Acting through a Brazilian legal entity established by the foreign investor
  - Directly or through a branch, with prior authorization from the Brazilian government
- **Indirect investments:**
  - Capital Markets



# Capital and Financial Markets

- Investments by non-Brazilians in Financial and capital markets are regulated by CMN, CVM and BACEN
- Non-residents who invest in the financial and capital markets may also hold direct investments with BACEN, but those investments are subject to different regulations.
- Entities or individuals domiciled abroad who own assets located in Brazil must also register with the tax authority (RFB).
- This requires the foreign company or individual to appoint a Brazilian resident to represent them with the Brazilian Authorities.
- The foreign entity must appoint a Brazilian financial institution as their legal representative in Brazil, which will be responsible for:
  - Providing information to Brazilian market authorities, including periodic reports to the CVM
  - Registering all transactions carried out
  - Registering and updating foreign investments with BACEN
  - Registering and updating information on the investor with CVM
  - Receiving notices on behalf of the investor regarding legal or administrative proceedings.



# Currency Regulations and BACEN

- In Brazil, **foreign investments and investors must be registered with BACEN**. While this was mandatory in all foreign investments, Law No. 14286/2021 (“New Legal Framework for Exchange Market”), as well as BACEN Resolutions 277-281 established new rules.
- The obligation to inform BACEN, regarding **foreign direct investment**, is now applicable to transactions of over USD 100,000.00.
- The obligation to inform BACEN, regarding **foreign credit**, is applicable only in transactions over:
  - (a) USD 1 million for direct loan operations, export pre-payment operations and foreign financial leasing (with payment terms over 360 days); and
  - (b) USD 500,000.00 for financing operations for import of goods or services, with payment terms over 180 days
  - The equivalence in other currencies should consider the contract’s signature date, or when securities were issued abroad, with BACEN’s exchange rate of the previous business day.
- This registration is done through the electronic system, SCE (*Sistema de Prestação de Informações de Capital Estrangeiro*) or through an RDE (*Registro Declaratório Eletrônico*) of the BACEN Information System (SISBACEN), according to investment type:
  - Foreign Direct Investment: **SCE-IED**
  - Foreign/External Credit: **SCE-Crédito**
  - Capital and Financial Markets: **RDE-Portfólio**
- The CDNR (Non-Resident Declaratory Registration) is required of non-resident individuals or legal who wish to provide information in the SCE-Crédito and in BACEN’s RDE-Portfolio system, and in order to obtain a CPF number (if an individual) or CNPJ number (if a legal entity).
- **The SCE/RDE, when required, is essential for the transfer of dividends abroad and for the repatriation of capital.** The entry of foreign capital without proper registration, or through false information are subject to fines.
- The recipient of the investment must also file quarterly (R\$300 million), annual (R\$ 100 million) and 5 year declarations (and), depending on its’ total assets.

# Direct Investment

- **Legal Framework:**
  - Civil Code (Lei 10.406/02)
  - “Corporate Law”/”Lei das S.A.s” (Lei 6.404/76)
  - Federal Constitution
- **2 main types of corporate entities:**
  - **Sociedade Limitada (Ltda)**
  - **Sociedade por Ações (S.A.)**
  - These are not the only types of corporate entities that may be established in Brazil, but they are the most common, since they both establish being limited. Also worth mentioning:
    - Brazilian Subsidiary (allows the investor to establish a direct local presence, which provides direct control over activities, management and personnel, as well as avoiding debt succession or liability concerns that may arise in a joint venture or acquisition)
    - Sociedade Simples (used for non-business purposes, including intellectual, scientific, artistic or other non-organized or non-professional activities)



# Sociedades Limitadas (Ltda)

- Most widely adopted corporate entity in Brazil.
  - Limited liability (limited to corporate capital determined on Articles of Association.)
  - No amount of the corporate capital paid upon incorporation.
  - Features similar to English private limited companies or other European limited liability companies, but including elements of both partnerships and corporations.
  - Sociedades Limitadas are prohibited from issuing bonds, ADRs or making offerings on capital markets
- Benefits:
    - Simple and inexpensive incorporation
    - May be incorporated by a sole quotaholder.
    - Less stringent disclosure requirements
    - Easier decision making and less bureaucratic requirements
    - More “custom-made” provisions can be made on Articles of Association



## Sociedades Limitadas (Ltda)

Regulated by the Brazilian Civil Code.

The capital is divided in **quotas**, not shares. Usually, one quota is equal to one vote at quota holders meetings.

Must be registered with the Commercial Registry of the state where the company's head office is located (*Junta Comercial*).

Articles of Association (*Contrato Social*) must establish the company's corporate capital, but there is no minimum amount required.

Quota holders are not liable for the debts and obligations of the company, but they are jointly and severally liable to payment of the subscribed capital (established in the Articles of Association).

Only Brazilian residents (quota holders or not) can be appointed as officers (*administradores*) of a Ltda. The company can have 1 or more officers.

Several requirements, such as publicity of records or maximum employees, depend on the size (measured in annual gross revenues or total assets) of the company.

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### Quota holder meetings

Required for the approval of matters on Ltda. With more than 10 quota holders. Also required for matters such as approval of financial statements and officer's accounts. Must obey specific criteria regarding call notices and voting quorums.

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### Audit Committee (Conselho Fiscal)

May exist, but not required. Responsible for auditing the corporations' management. Composed of at least 3 members, who may or may not be quota holders.

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### Dividends

Limited liability companies are not required to pay minimum dividends to their quota holders. The dividends may be pro-rated or not in accordance to the equity interests held by the quota holders, depending on the provisions of the Articles of Association.



## Corporations

# Sociedades por Ações (S.A.)

Regulated by Law n. 6404/76.

Can either be **publicly-held** or **closed**.

The capital is divided in **shares**.

Shareholders are not liable for debts or obligations of the company, but they are liable for paying-in the shares they subscribed.

Dividend payments must be proportional to equity interests held by shareholders.

Must hold 1 (one) annual shareholder's meeting (*Assembleia Geral Ordinária*), where shareholders pass resolutions regarding financial statements, officer's accounts, utilisation of net profits, distribution of dividends and election of Director's and Audit Committee members.

Must have an Executive Board, comprised of at least 1 officer (*administrador*), who must be an individual, who may or may not be a shareholder and may or may not be a resident. Non-residents must appoint an attorney-in-fact resident in Brazil prior to their investiture as officers. Only 1/3 of the Directors can be appointed as officers at one time.

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## Preferred Shares

Preferred shares might confer the pre-emptive right to receive dividends or reimbursements in case of dissolution. They may also confer final or minimum dividends, or dividends up to 10% higher than the dividends pay to common shareholders.

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## Audit Committee

Required, either on a permanent or non-permanent operation basis. Is responsible for auditing the corporations' management. Composed of 3-5 members, who may or may not be shareholders. Shareholders holding 10% of voting or 5% of non-voting shares may request that the Audit Committee convenes.

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## Shareholders Representation

Shareholders may be represented at meetings by duly appointed proxies, who must be either shareholders, attorneys or directors of the corporation. Directors cannot be appointed as proxies through power-of-attorneys lasting longer than 1 year.

# Sociedade por Ações (S.A)

- General Meeting of Incorporation
  - All shares that make up the company's capital are subscribed
  - By-laws are approved
  - Executive Board is appointed
  - Board of Directors is appointed
- Must have at least 2 shareholders, unless the company is a wholly-owned subsidiary (subsidiária integral)
- Most matters must be approved through a special shareholder's meeting (*Assembléia Geral Extraordinária*), with strict regulations regarding the calling, opening and approval of matters in these meetings.
- **May privately issue bonds (debentures) and warrants**, as well as other securities provided for in Brazilian law.
- Financial statements must be filed with Commercial Registry (*Junta Comercial*), and published in a major newspaper and the Official Gazette (DOU).
- At least 10% of subscribed capital must be paid on incorporation, but there is no minimum subscribed capital.
- The capital is divided into shares, with or without par value.
- Shares can be common or preferred, but preferred shares must not exceed 50% of total capital.
- Board of Directors:
  - May be comprised of Brazilian or non-Brazilian individuals or companies.
  - Non-residents must grant power of attorney to a Brazilian resident, who shall represent them in Brazil and receive notices.
  - Some mechanisms ensure that minority shareholders and holders of preferred shares might appoint some of the directors.

## Sociedade por Ações (S.A)

- Most provisions regarding Closed Corporations applicable, but there are specific requirements of publicly held corporations.
- Must be registered with CVM and obtain a publicly held corporation registration statement and a issuance of shares registration statement.
- Must pay annual inspection fee to CVM.
- May be incorporated by IPO (initial public offering).
- **May conduct public or private offerings of any security negotiated in capital markets.**
- Sale of majority interest in the publicly held corporation may only be made if a public offering is carried out to acquire all outstanding voting shares, at least 80% of the price of controlling block shares.
- Must report financial information to CVM, market and shareholders quarterly, through “ITR”.
- Are required to engage in independent audits.
- Penalties might be applicable to the corporation, their officers, members of the audit committee and shareholders, including warnings, fines, suspension or cancellation of rights, provided for in Law n. 6385/76.
- Closed corporations can become Publicly-held corporations.
- Most proceedings regarding Publicly-held corporations (such as M&A, dissolutions, etc.) are subject to strict CVM regulations and requirements.

# Setting up a business in Brazil

- Requirements:

- **Address**

- **Activities**

- **Legal Representation**

- **Management**

- **Annual Approval of Accounts**

- **Ultimate Beneficial Owner (UBO)**

- Address:

- Companies that are not involved in the commercialization of goods might adopt a virtual office/address.

- The by-laws/Articles of Association must report an address where the activities of the company will be carried out.

- **Activities:**

- The corporate purpose must inform the main activity to be carried out by the company, detailing the activities carried out in other to fulfil the main activity.

# Setting up a business in Brazil:

- Legal Representation:
  - All non-residents who hold quotas/shares in Brazilian entities must grant corporate power-of-attorney and tax/RFB power of attorney to a Brazilian resident, for the purposes of legal representation.
  - The attorney-in-fact shall be the legal representative of the foreign entity in its capacity as quota/ shareholder, and may be summoned in their name by organs other than the RFB.
- Management:
  - All Brazilian entities must have at least one individual acting as a manager.
  - Managers might be held liable for crimes committed during their administration.
  - Managers who are non-residents must grant power-of-attorney to a Brazilian resident.
  - Ideally, since this is a new legal provision, it is best that at least one Brazilian resident be a manager.
- Annual Approval of Accounts:
  - Quota/Share holders are required to hold annual meetings within the four months following the end of the corporate year, where they must review the company's financial statements and management accounts, as well as deliberate over any other matters of their interest and elect officers, if needed.
- Ultimate Beneficial Owner:
  - UBO means an individual that directly or indirectly controls, or significantly influences the entity (i.e. holds more than 25% of the entity's shares, either directly or indirectly).
  - All companies that hold a CNPJ (Legal Entity National Registration Number) must inform the RFB of their UBO within 30 days of registration.

# Mergers & Acquisitions

- Overall, since establishing a new business from scratch in a new market brings some challenges, foreign investors usually choose to engage in M&A proceedings.
- The steps in a standard M&A transaction in Brazil are not much different to M&A transactions outside of Brazil, and documents such as confidentiality agreements, asset purchase agreements and letters of intent are widely accepted.
- Most large-scale M&A transactions are subject to prior clearance by the Brazilian Antitrust Authorities (CADE), and failure to obtain clearance prior to the transaction might result in gun-jumping penalties.

# M&A Due Diligence Review

- It is recommended that the acquirer perform a Due Diligence Review, which shall include legal matters, as well as assisting in defining a purchase price and planning the entity's future structure. Questions to be analyzed include, but are not limited to:
  - Corporate and financial documents
  - Contracts
  - Regulatory matters
  - Pending litigations
  - Tax aspects
  - Labor and employment matters
  - Environmental matters
  - Intellectual property matters
  - Real Estate matters
  - Insurance matters
  - Anticorruption and compliance matters

# Acquisitions of different corporate entities

- Acquisition of a Limited Liability Company (Sociedade Limitada):
  - Articles of Association of the company must be amended within 30 days of signing the transfer of quotas agreement.
  - Amendment must be registered (with Junta Comercial) and publicly disclosed, but parties may keep other transaction documents confidential.
  - In addition to transfer of quotas, the agreement might contain new appointments of officers and administrators, as well as address or name changes, if needed.
- Acquisition of a Closely Held Company (Sociedade por Ações de Capital Fechado):
  - Shares representing the capital of a closely held company can be either book-entry or nominative shares,
  - Nominative shares are registered in physical books and records, filed at the entity's head office. The transfer of these shares do not require registration or disclosure to any authority, other than registration in the company's books.
  - Book-entry shares are deposited and registered by a retained financial institution, and the transfer of these shares must be implemented through the financial institution and the execution of the terms of transfer by the parties involved.
- Acquisition of Shares of a Publicly Held Company (Sociedade por Ações de Capital Aberto):
  - Foreign investor might opt for direct or indirect investment in a public company.
  - Prior notice to stock exchange of acquisition of a large number of shares, indirectly, might be required.
  - Notice must be sent to CVM, to the capital markets, and to the Brazilian Securities, Commodities and Futures Exchange (BMF&BOVESPA).
  - If the acquisition represents transfer of control or acquisition of a certain percentage of equity interests, a tender offer of stock held by minority owners might be required.

# Other M&A requirements:

- **Antitrust Approval** by CADE prior to the transaction is required depending on:
  - **Effects**
    - The transaction takes place in Brazil or takes place abroad, but the target company (or new company, in a joint venture) has or will have a direct or indirect presence in Brazil.
  - **Revenue**
    - At least one of the parties/groups annual revenue exceeds 750 million BRL **and** at least one other party's gross annual revenue exceeds 75 million BRL.
  - **Concentration**
    - Merger of 2 or more independent companies
    - Acquisition of control of one or more companies
    - Association agreements, consortia and joint ventures
- **Corporate Control Agreements:**
  - **Shareholder or quotaholder's agreements** usually address topics such as:
    - **Management** (Right to appoint directors and officers, Veto rights on Board of Directors' meetings)
    - **Resolutions** (Veto rights on general shareholder's meetings)
    - **Restriction on Transfer of Shares/Quotas** (Tag-along and Drag-along rights, First offer/refusal)
    - **Withdrawal Mechanisms** (Put options, shotguns, public listing)
    - **Non-competition**
    - **Additional Provisions** (Expiration date to Shareholder's agreement, Release of shares, Assignment of rights and obligations to 3<sup>rd</sup> parties)



## CADE – Administrative Council for Economic Defense

- In Brazil, the main antitrust and competition law enforcer is the Administrative Council for Economic Defense (*Conselho Administrativo de Defesa Econômica* – CADE).
- **CADE is composed of 3 divisions:**
  - **General Superintendence:** Conducts antitrust investigations and decides on less complex merger control cases.
  - **Administrative Tribunal:** Composed of six commissioners and one president, responsible for issuing final rulings in antitrust investigation and complex merger control cases.
  - **Department of Economic Studies:** Provides non-binding economic opinions to support both the General Superintendence and the Administrative Tribunal.

## Competition Law

- Competition Law in Brazil is primarily governed by the **Brazilian Antitrust Law (Lei n. 12529/11)**.
- Supplemental regulation on competition is issued by CADE.
- The 2 major goals of Brazilian competition laws are:
  - Ensuring **fierce competition**, by preventing the joint action of competitors.
  - Preventing **abuses of economic power** from dominant players in relation to costumers, distributors and suppliers.

# Merger Control and Anti-competitive Conducts Investigation

- CADE enforces Brazilian Competition Law in 2 ways:
  - **Merger Control**
    - M&A contracts and transactions require antitrust approval from CADE before implementation or execution.
  - **Anti-competitive Conduct Investigations**
    - Anti-competitive practices are administratively investigated by CADE, who might fine them up to 20% of the entity's turnover, as well as propose criminal persecution of certain practices.
- **Merger Control:**
  - **Filing Obligations** are based on 3 elements: **Effects, Revenues** and **Concentration**.
  - **Standstill Obligations** mean that, in transactions subject to mandatory filing with CADE, parties must remain independent until receiving approval.
  - **Review Proceedings** vary according to complexity and might be Fast-track (30 days) or Ordinary (240 days).
- Failure to comply with CADE's requirements before implementing a transaction might result in **fin**es of up to R\$ 60 million (approximately 12 million USD), **as well as annulment of the transaction**.
- **Anti-competitive conducts** are usually split in 2 groups:
  - **Collusive or coordinated practices**
  - **Unilateral practices**
- **Anti-competitive conducts investigations** may result in fines up to 20% of the group's gross revenues in the fiscal year prior to investigation, depending on gravity of violation, good-faith, the proposed economic benefits and whether they were achieved, negative impacts on the market, potential harm to competition and recidivism.

# Taxation in Brazil

- Brazil has a very complicated taxation system, but recent legislation changes, especially the Tax Reform (PEC 45/2023), are seeking to improve this condition.
- Brazil attributes tax authority to the Federal, State and Municipal levels.
- At the Federal level, the main tax authority is *Receita Federal do Brasil* (RFB).
- The Brazilian Tax System is governed by the Federal Constitution, the National Tax Code, ordinary laws, complimentary laws, Senate resolutions, state laws and municipal laws.
- In addition to the taxes levied on the business activities of Brazilian companies, foreign investors are also subject to taxation of income and gains of non-Brazilian residents. Some treaties have been signed with specific countries to avoid double taxation, following the model provided by the Organization for Economic Cooperation and Development (OECD).

## Main Taxes

- Corporate Income Tax (IRPJ)
- Social Contribution on Net Profits (CSLL)
- Social Contributions on Gross Revenues (PIS/COFINS)
- Taxes on Consumption and Services (IPI/ISS)
- State VAT on Goods (ICMS)
- Tax on Financial Operations (IOF)
- Customs duty (II)
- Withholding Income Tax (IRRF)
- Taxes on property holding or transfer (IPTU/ITR/ITCMD/ITBI)



**Questions?**



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