

Form notification of a concentration

Purpose of this form

As of September 1, 2017 undertakings in Curaçao which want to create a concentration, are under the obligation to notify such concentration. This has been laid down in Chapter 5 of the National Ordinance on Competition. Concentrations exceeding a certain turnover or market share threshold should be notified to the Fair Trade Authority Curaçao (FTAC) in a timely fashion. The FTAC may impose sanctions in case of late notifications of concentrations.

This document should be used for submission of notifications of concentrations which are subject to the obligation of notification. The document is divided into three parts.

- Part 1: a general explanation
- Part 2: the questions which you are supposed to answer
- Part 3: explanatory notes to specific questions of part 2

We recommend you to read the general explanation carefully before answering the questions in part 2. Additionally, a brochure on the monitoring of concentrations is available on the FTAC website (www.ftac.cw). Other documents available on the website include a general brochure on the National Ordinance and brochures on other competition rules such as the prohibition on cartels and the prohibition on abuse of a dominant position. The brochures are also available in hard copy at the office of the FTAC.

Do you have questions about or problems with the submission of your notification?

Please feel free to contact one of the FTAC employees via the contact details below. You may also visit the office of the FTAC.

Fair Trade Authority Curaçao

Pietermaai 6
Postbus 135, Punda
Willemstad
T: +5999 461 00 67
F: +5999 461 00 68
E: info@ftac.cw



Part 1: general explanation

Why should certain concentrations be notified to the FTAC?

Effective competition is in the interest of all residents of Curaçao. It leads to lower prices, better quality, more innovation and more freedom of choice in products and services. As a result, consumer welfare increases and it strengthens a country's economy. In addition, more competition creates additional employment because production and economic activity will increase.

Concentrations may lead to undertakings with a dominant position and as such to less competition. The obligation to notify gives the FTAC the opportunity to monitor the creation and strengthening of dominant positions in the Curaçao economy. The obligation to notify also serves to determine after a couple of years whether more stringent monitoring of competition is required.

Failure to notify a concentration which is subject to the obligation of notification is punishable under the National Ordinance on Competition. A fine can reach as high as 1 million Netherlands Antillean guilders (ANG) or, if this is greater, as high as 1% of the turnover of the undertakings concerned.

What is a concentration?

A change of control on a lasting basis of an undertaking qualifies as a “concentration” within the meaning of Article 5.1 of the National Ordinance on Competition.¹ Control is the possibility to exercise a decisive influence on the strategic and commercial policy of an undertaking.

There are three types of concentrations:

- Merger: two or more previously independent undertakings which amalgamate into one new undertaking. The activities of the undertakings concerned are transferred to a new economic entity;
- Acquisition: an undertaking acquires control over another undertaking or an important part, for example by purchasing its shares. This may be either sole control or joint control;
- Joint venture: two or more existing undertakings establish a new joint undertaking. The obligation of notification is limited to joint undertakings which perform all the functions of an autonomous economic entity on a sustained basis.

When is notification of a concentration required?

Notification to the FTAC is not required for all concentrations. The obligation of notification only applies to relatively large concentrations in Curaçao. You should notify the concentration if one of the situations below applies:

1. The aggregate turnover of the undertakings concerned amounted to at least ANG 125 million in the previous calendar year. In addition, at least two of the undertakings concerned have an annual turnover of at least ANG 15 million in Curaçao;
2. The undertakings concerned together create or strengthen a market share of at least 30% in one or more relevant markets in Curaçao.

¹ The term ‘concentration’ corresponds to the term ‘concentration’ used in the Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings.



There should be an agreement in principle between the undertakings concerned for the creation of the concentration; for instance, on the basis of a letter of intent or an agreement about the outlines of the concentration. A public bid should be notified the moment that the intended bid has been publicly announced.

Finally, it is important that you submit the notification to the FTAC prior to the creation of the concentration. A concentration results from a change in control on a lasting basis. For instance, in case of a full takeover, when the shares are actually transferred to the new owner.

Who submits the notification of a concentration?

The undertakings which have the intention to create a concentration are themselves responsible for timely notification to the FTAC. What undertakings should initiate this, depends on the type of concentration. In general, in the event of a merger, the merging partners are the initiators. In case of an acquisition it is the acquiring party. In case of the foundation of a joint venture, the founding members are the initiators.

A notification should be submitted by at least one of the undertakings concerned. However, it is preferred that the notification is submitted by the undertakings concerned collectively. In that case one or more persons can be authorized to act as representatives of the undertakings concerned.

How do you submit a notification to the FTAC?

A notification of a concentration should be submitted to the Fair Trade Authority Curaçao (i) in triplicate, (ii) in hard copy, and (iii) in Dutch at the address below. The notification may be submitted by post, by fax², in person at the reception desk or by dropping it off in the mailbox. In addition you should send a digital copy of the application by e-mail to info@ftac.cw.

Fair Trade Authority Curaçao

Pietermaai 6
Postbus 135, Punda
Willemstad
T: +5999 461 00 67
F: +5999 461 00 68
E: info@ftac.cw

One of the three copies of the notification should bear the original signature of a person who has the power of representation or who is authorized, stating their name, job title, place and date. If you attach annexes in another language than the official languages Dutch, Papiamentu or English, the FTAC may request a translation of these annexes.

What happens after submitting the notification of a concentration?

The FTAC will send the undertakings concerned or the proxy/proxies acknowledgment of receipt of the notification. The FTAC will check the notification for completeness and for the applicability of the obligation to notify. If not all requested information has been provided, this will be communicated in writing and a supplement will be requested. You are obligated to provide the requested information. If the concentration is not subject to the obligation of notification, you will receive written confirmation to this effect.

² There is a maximum of 20 pages for submission by fax.



Is the concentration subject to the obligation of notification and did you provide complete answers to all questions in part 2? Then the FTAC will inform you in writing that you have complied with the obligation to notify.

The FTAC will also publish the notification of the concentration on the FTAC website and in the [Curaçaosche Courant](#). The summary provided by you (see question 2.4 of part 2) will serve as the basis for this publication. In our website you can find a schematic representation of the notification process of a concentration.

What happens if I fail to notify a concentration which is subject to the obligation of notification to the FTAC or provide incomplete/incorrect information?

Article 7.2, first paragraph, of the National Ordinance on Competition stipulates that the FTAC is authorized to impose a fine if it finds that a concentration which is subject to the obligation of notification has not been notified to the FTAC prior to the creation thereof, or if the information provided on the notification form is incomplete or incorrect.

Will the confidentiality of business information which I provide to the FTAC be safeguarded?

Article 9.2, first paragraph, of the National Ordinance on Competition stipulates that “any person” may request “information laid down in documents regarding the performance of the FTAC’s duties”. This means that non-confidential information may be disclosed by the FTAC. A notification of a concentration also falls within the scope of this article. So you should take into account that the FTAC is obligated to share part of the information provided with any party who so requests.

This however means that not all information will be provided to the requesting party. Confidential business information and documents relating to the manufacturing process, for instance, are not subject to the FTAC's obligation of disclosure. Therefore you are asked to state what information should be regarded as confidential when you submit the notification of a concentration (see question 4 in part 2).



Part 2: information which should be provided when notifying a concentration

1. Information about the undertakings concerned

1.1 State the following contact details of all undertakings concerned:

- (trade) name;
- trade register number or the foreign register and registration number;
- legal form;
- postal address;
- name and job title of the contact person;
- telephone number and e-mail address of the contact person.

1.2 Is one of the undertaking concerned part of a group? If so, please provide the following information:

- (trade) name of the group;
- trade register number or the foreign register and registration number;
- the group's legal form;
- the group's postal address;
- the names and trade names of all undertakings which are part of the group;
- the structure of control within the group;

1.3 State the total worldwide turnover of all undertakings concerned (in ANG) over the previous calendar year, as well as the turnover in Curaçao over that year.

1.4 Is the notification submitted by one or more proxies? If so, please state the contact details and job title of the proxy/proxies.

Please attach written evidence showing the proxy's power of representation. Additionally state on behalf of which undertaking the proxy acts.

1.5 Attach the most recently adopted annual financial statements of the participating undertakings, and if they are part of a group, the (consolidated) annual financial statements of the group as well.

2. Information about the nature of the concentration

2.1 The concentration to which the notification relates, is a:

- merger;
- acquisition; or
- creation of a joint venture.

2.2 Provide a description of the concentration. Please include at least the following aspects in your answer:

- the strategic and economic rationale of the concentration;
- the parties involved in the concentration;
- the agreements and transactions related to the concentration;
- the structure of ownership and control both before and after completion of the concentration;



- o the anticipated effect of the concentration on competition in the affected market(s).

2.3 Provide a summary (a maximum of 300 words, in Dutch) of your answer to question 2.2.

The summary serves for the publication of the concentration on the FTAC website and in the Curaçaosche Courant. This summary should not contain confidential information or business secrets.

2.4 Attach a dated copy of the most recent documents on which the creation of the concentration will be based.

The documents should provide clarity on the (intended) commitment underlying the concentration. In particular, they should show the structure of ownership and control after the creation of the concentration.

2.5 Will the concentration also be notified to one or more competition authorities abroad? If so, please provide the contact details of the competition authority/authorities in question and, if possible, the case number.

3. Information about the market conditions and the anticipated effect of the concentration

Substantiate your answers to questions 3.2 through 3.4 as much as possible with references to analyses, reports, studies, research papers, presentations and other similar documents which the undertakings concerned can provide. This will strengthen the reliability and verifiability of your answers. If a document cannot be found in open sources, please attach it as an annex to your notification. Try to base your answers on recent information.

3.1 State which markets will be affected by the concentration.

3.2 Provide a reasoned explanation as to how the markets (as stated in your answer to question 3.1) should be defined.

Make sure to take account of the product dimension and geographical dimension of the market definition. Specify, if applicable, substitute goods and/or services.

3.3 Provide as accurate as possible an estimate of the size (in value and/or in volume) of all markets which will be affected by the concentration.

3.4 Provide as accurate as possible an estimate of the market share (based on value and/or volume) of all undertakings concerned operating in the markets which will be affected by the concentration.

3.5 State the trade names of the three main competitors for all markets which will be affected by the concentration.

3.6 What are the main trade associations in the markets which will be affected by the concentration? Are the undertakings concerned members of one of these trade associations?

4. Confidentiality

Providing a reasoned explanation, state what information in your notification should be regarded as confidential within the meaning of Article 9.2 of the National Ordinance on Competition.

You may highlight the confidential information of your notification in bold or by placing it between square brackets. This can be whole sentences but also specific words or numbers. You should attach an annex to the notification, explaining - per confidentiality claim - why this information is classified as confidential. Make sure to make reference to one or more confidentiality grounds, as referred to in the second and third paragraph of Article 9.2.



5. Declaration of accuracy and completeness

Your notification should conclude with the declaration below, which needs to be signed by or on behalf of all undertakings concerned:

“The notifying party or parties hereby declare(s) that the information provided in this notification is, to the best of their knowledge and belief, true, and accurate and complete, that true and complete copies of documents required on the form, have been submitted, and that all estimates are identified as such and are their best estimates of the underlying facts and that all expressed opinions are sincere. They are aware of the provisions of Article 7.2, second paragraph, of the National Ordinance on Competition.”

Checklist for annexes

Please check whether the following documents have been attached prior to submitting your notification:

- if the undertaking or undertakings is/are assisted by a proxy: written evidence showing the proxy's power of attorney (question 1.4);
- the most recently published annual financial statements of the participating undertakings, and if they are part of a group, the (consolidated) annual financial statements of the group as well (question 1.5);
- a dated copy of the most recent supporting documents on which the creation of the concentration will be based (question 2.4).
- analyses, reports, studies, research papers, presentations and other similar documents to describe the market and to provide transparency to the market share of the participating undertakings (questions 3.2 through 3.4);
- a table containing a reasoned explanation as to why the information is classified as confidential (question 4).
- a declaration signed by or on behalf of all participating undertakings stating that the information provided in the notification is complete and accurate (question 5).



Part 3: explanatory notes to specific questions in part 2

Explanatory notes to question 1.1

Which of the undertakings qualify as “concerned” depends on the nature of the concentration. The following undertakings are considered to be “undertakings concerned”:

- in case of a merger: the merging undertakings;
- in case of acquisition of control over an undertaking or part thereof (takeover): the undertaking which acquires control *and* the undertaking, or part thereof, whose control is acquired.
- in case of a public bid: the undertaking which intends to acquire control and the undertaking which is the object of this bid;
- in case of the creation of a new joint venture: the founding members of the joint venture;
- in case of a change in control in an existing joint venture: the undertakings which will have control of the joint venture after the creation of the concentration and the joint venture itself.

An undertaking which loses control as a result of the concentration (the selling party, for instance), does not qualify as an undertaking concerned. The turnover of this undertaking should not be taken into account in the calculation of the aggregate turnover.

Explanatory notes to question 1.2

The rules laid down in the National Ordinance on Competition focus on undertakings. An undertaking is an organizational unit or entity which performs an economic activity. The legal form of an economic entity is irrelevant for the purpose of competition law. This is why a corporate group or group of various legal entities may be regarded as one economic entity or undertaking for the purpose of competition law, and why the activities of the entire group are taken into account.

A group is an economic entity in which legal entities and companies are associated as far as their organization is concerned. Group undertakings are legal entities and companies which are associated in a group.

Explanatory notes to question 1.3

In this form, “turnover” is understood to mean the net turnover derived from normal business operations of the undertakings concerned. This is turnover derived from the regular sale of products or the services performed by an undertaking. Income reported in an undertaking's annual financial statements under “financial income” or “extraordinary income” generally is not taken into account. “Net” implies that tax on the added value and other taxes directly related to turnover should be deducted, as well as discounts granted to customers.

For undertakings in the financial sector, turnover is calculated differently.³ For insurance companies this is the sum of gross premiums written within the meaning of the National Ordinance on the Supervision of Insurance Companies [*Landsverordening Toezicht Verzekeringsbedrijf*]. For banks and other financial institutions this is the sum of the following items in the latest income statement:

- interest income and similar income;
- income from securities;
- commissions received;

³ See Article 5.2, third and fourth paragraph, of the National Ordinance on Competition.



- o result from financial transactions; and
- o other operating income;

When amounts have to be converted from another currency, this should be done using the average rate of that other currency in the relevant year, as published by the Central Bank of Curaçao and St. Maarten ([hyperlink](#)).

Explanatory notes to question 1.4

If the undertakings concerned are assisted by one or more proxies, the proxy/proxies in principle will be the contact person(s) in communications with the FTAC. A proxy could be an attorney or corporate lawyer, for instance. The proxy may also be a person employed by one of the undertakings concerned.

Please attach written evidence showing the proxy's power of attorney. When the proxy acts on behalf of all undertakings concerned, then each individual undertaking should submit an authorization. If another person becomes the proxy in the course of the procedure, the FTAC should be notified immediately and written evidence showing the power of representation of this other proxy should be submitted.

Explanatory notes to question 2.2

You should describe in detail what the concentration entails so that it is clear to the FTAC how the structure of control will change. The background and the purpose of the concentration are also relevant. The concentration may, for instance, take place because the undertakings concerned want to realize efficiency benefits.

Explanatory notes to question 2.3

Article 5.4, third paragraph, of the National Ordinance on Competition stipulates that the FTAC will publish the notification of a concentration in the *Curaçaosche Courant*. Furthermore, Article 9.1 of the National Ordinance provides that announcements in the *Curaçaosche Courant* are also published on the FTAC website.

Explanatory notes to question 3.1

In answering this question, a general description of the market will suffice. Concentrations between undertakings may affect competition in two ways.

- o There is horizontal overlap between activities. Two or more of the undertakings concerned operate in the same market.
- o There is vertical overlap between activities. Two or more of the undertakings concerned operate in different segments of the same industry. Undertaking A, for instance, is manufacturer of a certain product and undertaking B is wholesaler of the same product.

If an undertaking is part of a group, the activities of the entire group should be taken into account in answering the question whether it concerns an affected market. However, the activities of an undertaking which loses control as a result of the concentration should not be taken into account.



Explanatory notes to question 3.2

In order to properly assess the concentration's impact on competition in an affected market, the relevant market needs to be defined. The term "relevant market" is derived from European competition law.⁴ In applying this term, the FTAC will take account of the legal, economic and social circumstances in Curaçao.

The relevant market forms the basis for determining the market share of the undertakings concerned and for assessing the impact of the concentration on competition. When defining a relevant market, both the market's product dimension and geographical dimension should be taken into account.⁵

The relevant product market comprises goods and/or services which the consumer considers to be substitutes by reason of product characteristics, price and intended use. Physical and technical characteristics of the goods or the nature of the services, price ratios and customers' reactions to price changes are determining factors in defining the relevant product market.

When describing the relevant product market, one frequently will have to deal with the question of which market definition is the right one. If the undertakings have any doubt about the proper market definition, it is wise to use several market definitions. The follow-up questions regarding market share and competition, among others, should be answered for each separate market definition.

Example: An undertaking which sells only apples and an undertaking which sells only pears decide to merge. They are not sure whether the relevant product market is that of apples, pears, apples and pears or even fruit in general. Therefore they submit market information about the following possible product markets: (i) apples; (ii) pears; (iii) apples and pears; and (iv) fruit.

The relevant geographical market is the area in which the undertakings concerned operate and where the conditions of competition are sufficiently similar. In addition, there are clear differences in the conditions of competition in the neighboring areas. The relevant geographical market may be a part of Curaçao, the whole of Curaçao or a larger area (for instance, the Caribbean region, Latin America or the whole world). Decisive factors for market definition include: the distribution of market share among suppliers in different areas, the customers' reactions to price changes, the customers' purchasing behavior and trade flows between areas.

Example: Two undertakings which sell fruit in the west of Curaçao (Westpunt) decide to merge. If many residents from Westpunt do not buy their fruit outside Westpunt, the relevant geographical market is probably limited to Westpunt. However, if many of the residents from Westpunt buy their fruit from different places in Curaçao, the relevant geographical market is probably larger than Westpunt. Therefore the undertakings should submit market information about the following possible relevant markets: (i) the sale of fruit in Westpunt; (ii) the sale of fruit in the west of Curaçao; and (iii) the sale of fruit in Curaçao.

⁴ See the European Commission Notice on the definition of relevant market for the purposes of community competition law' (PbEG 97/C 372/03).

⁵ Sometimes the relevant market also has a temporal dimension. Competition during high season, for example, can be very different from competition during low season.



Explanatory notes to questions 3.3 and 3.4

It is important to substantiate the answers to these questions as much as possible. This can be done by means of references to analyses, reports, studies, research papers and presentations. If you do not have any market information at your disposal, please provide a substantiated estimate.

The total size of the relevant market may be expressed in value or in volume. The market value comprises the turnover of all undertakings which operate in the relevant market. The total market volume comprises the total production of all undertakings in the relevant market. The market share of the undertakings concerned and of the competitors may be expressed in value (% of the total turnover) or in volume (% of the total number of products or services sold). If possible, please state the size of the market and the market share based on value *and* volume.

A format which can be used to answer these questions is available on the FTAC website under the heading “regulations → forms”.

Explanatory notes to question 4

Article 9.2, first paragraph, of the National Ordinance on Competition stipulates that “any person” may request “information laid down in documents regarding the performance of the FTAC’s duties”. A notification of a concentration also falls within the scope of this Article. Hence, you should take into account that the FTAC is obligated to share part of the information provided with any party who so requests it.

Confidential information will not be disclosed. You may use the following grounds, as referred to in the second and third paragraph, to justify why certain information is confidential. According to you:

- it involves information which could damage the unity of the government, as referred to in Article 11 of the Curaçao Constitution;
- it involves information which could compromise Curaçao's security;
- it involves non-public business information and documents relating to the manufacturing process;
- the interest in disclosure does not outweigh the economic or financial interests of Curaçao;
- the interest in disclosure does not outweigh the criminal investigation and prosecution of criminal offenses;
- the interest in disclosure does not outweigh the inspection, control or monitoring by or on behalf of administrative bodies;
- the interest in disclosure does not outweigh the respect for personal privacy;
- the interest in disclosure does not outweigh the interest of the addressee in being the first to have the information;
- the interest in disclosure does not outweigh preventing a disproportionate benefit or unjustified disadvantage for the natural persons or legal entities or third parties involved in the matter.

You may use the format made available on the FTAC website under “regulations/forms” for the submission of confidentiality claims. The FTAC will assess your confidentiality claims. If insufficient justification is provided for an individual confidentiality claim, the FTAC will contact you or your proxy/proxies. The FTAC will also seek contact if it intends to reject a confidentiality claim.

The FTAC will assume that it may disclose any information which you do not consider confidential.



Explanatory notes to question 5

The information in your application should be complete and accurate. If you are unable to provide certain information, we kindly request you to state the reasons why.

Article 7.2 of the National Ordinance on Competition stipulates that the FTAC may impose fines when undertakings fail to notify a concentration which is subject to the obligation of notification or when the information provided in the notification is incorrect. The fines will not exceed ANG 1 million or, if this is greater, 1% of the aggregate turnover of the undertaking(s) concerned.
