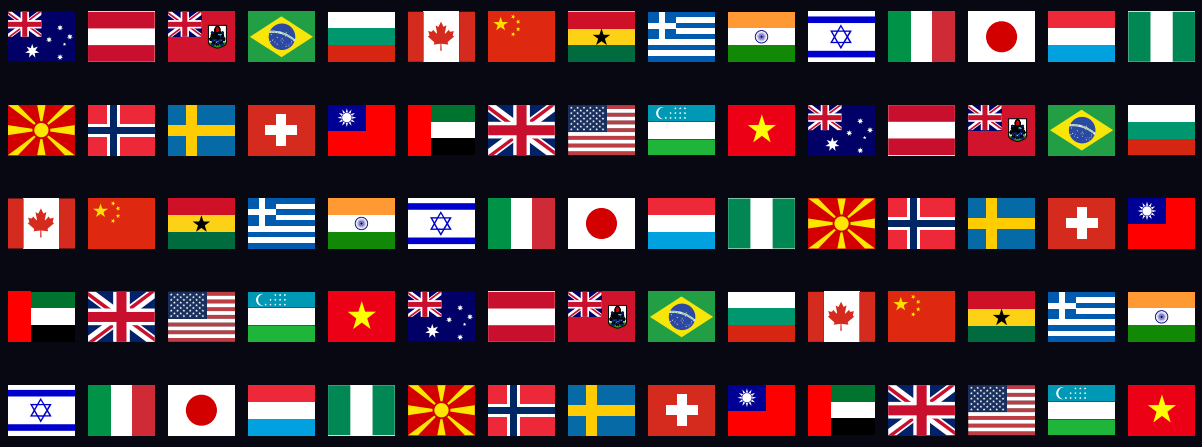
PUBLIC M&A

Brazil



LEXOLOGY
Getting The Deal Through

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Public M&A

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Quick reference guide enabling side-by-side comparison of local insights into public M&A issues worldwide, including types of business combination; principal laws and regulations; cross-border and sector-specific considerations; governing laws; filing and disclosure requirements; duties of directors and controlling shareholders; shareholder approval and appraisal rights; hostile transactions; break-up fees and frustration of additional bidders; government influence; conditional offers; financing; minority squeeze-outs; waiting and notification periods; tax; labour and employee benefits; restructuring, bankruptcy or receivership; anti-bribery, anti-corruption and sanctions issues; and recent trends.

Generated 06 June 2022

Table of contents

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Brazil

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STRUCTURES AND APPLICABLE LAW

Types of transaction

How may publicly listed businesses combine?

Under Brazilian law, publicly listed companies may combine in several different ways. However, the most common types of business combinations are the following:

- mergers: two different entities combine to form a new entity, which absorbs all assets and liabilities of the previous existing entities;
- equity purchase and sale: the shares of a target company are sold to another shareholder or third party;
- demergers: spin-off of certain assets and their subsequent merger into either a pre-existing or a newly incorporated company;
- absorptions: the assets and liabilities of an entity are entirely absorbed by another entity, and the entity whose assets and liabilities were absorbed ceases to exist;
- purchase and sale of assets; and
- joint ventures: two or more legal entities combine their efforts to jointly explore business opportunities. Parties to the joint venture may incorporate a new company or acquire equity in an already incorporated company to explore a common business (traditionally, but not necessarily, by a 50/50 per cent equity arrangement), or enter into a joint venture agreement whereby their rights and obligations are specified, without incorporating a new company or acquiring equity in an already existing one.

The business combinations provided above, depending on the circumstances, may be carried out privately, without the need of a tender offer to the public. However, Brazilian law provides that a tender offer will be mandatory in the following circumstances:

- if the corporation itself or its controlling shareholder applies for the cancellation of its registration to trade as a listed company;
- if the corporation's controlling shareholder increases its equity participation to the extent that the corporation's shares may face market liquidity issues, pursuant to the rules enacted by the Securities and Exchange Commission of Brazil (CVM); or
- in an acquisition of the control of a public listed company, in which case the new controller will have to place a tender offer to purchase the remaining shares bearing voting rights.

In all these circumstances, the tender offer must be registered with the CVM.

Moreover, a bidder may also voluntarily place a tender offer to the public (the most common situation being a public takeover bid). In general, the registration of the voluntary tender offer with the CVM is not mandatory. However, should the transaction involve an exchange for securities, the registration will be required.

The tender offer requires the engagement of a financial institution, which must also sign the offering instrument along with the bidder. The offering instrument must contain the specifics of the offer, such as the number, class and species of securities being purchased, payment and other applicable terms and conditions, date, place and time of the public auction. In addition, the offering instrument must be published in a newspaper with wide circulation.

Law stated - 12 April 2022

Statutes and regulations

What are the main laws and regulations governing business combinations and acquisitions of publicly listed companies?

The main laws and regulations governing business combinations are:

- the Brazilian Civil Code (Law No. 10,406/2002);
- the Brazilian Corporations Law (Law No. 6,404/1976);
- the Antitrust Law (Law No. 12,529/2011);
- the Capital Markets Law (Law No. 4,728/1965;
- the Brazilian Securities Law (Law No. 6,385/1976);
- the regulations enacted by the CVM;
- the Brazilian Employment Law (Law-Decree No. 5,452/1943, amended by Law 13,467/2017);
- the Bankruptcy and Judicial Recovery Law (Law No. 11,101/2005); and
- the Anti-Corruption Law (Law No. 12,846/2013).

Law stated - 12 April 2022

Cross-border transactions

How are cross-border transactions structured? Do specific laws and regulations apply to cross-border transactions?

There are no specific laws and regulations that apply for cross-border transactions. However, foreign shareholders may be subject to additional obligations that do not apply to national entities, such as registering its investments with the Brazilian Central Bank and appointing a legal representative domiciled in Brazil with powers to receive summons and notices.

Brazilian law allows parties to commercial agreements to choose the governing law and the dispute resolution venue. However, when the companies or assets involved in the business combination are located in Brazil, usually the parties select the Brazilian law as the governing law, and the Brazilian courts (or an arbitration panel located in Brazil) as the dispute resolution venue. The reason for such an arrangement is to expedite enforcement actions, should they be required. As foreign court orders are subject to the prior approval of the Brazilian Superior Court of Justice (STJ), parties usually prefer to directly access Brazilian courts, instead of passing through the STJ approval procedure.

Lastly, it is worth stressing that in certain key strategic sectors, such as the broadcasting and security industries, additional restrictions and regulation requirements regarding foreign investments may apply.

Law stated - 12 April 2022

Sector-specific rules

Are companies in specific industries subject to additional regulations and statutes?

Additional regulations may apply to specific sectors, such as the energy, oil and gas, financial, telecommunications and insurance industries. The regulatory activity is carried out by agencies linked to the federal government, such as the National Electric Energy Agency, the National Telecommunications Agency, the National Agency for Petroleum, Natural Gas and Biofuels, the National Civil Aviation Agency and the Brazilian Central Bank.

Brazilian regulatory framework may directly affect business combinations. For instance, mergers, acquisitions and absorptions among financial institutions may only be effected with the prior authorisation of the Brazilian Central Bank.

Foreign investments may also be subject to restrictions in regulated sectors. For example, foreign investors are limited to a 30 per cent cap in the share capital of broadcasting companies. Nevertheless, there is a tendency to reduce or even extinguish such restrictions: in 2018, the government enacted legislation allowing foreign companies to hold 100 per cent of the share capital of civil aviation companies (under the previous rule, the threshold was limited to 20 per cent). The legislation enacted was an interim measure adopted by the President and effective during a specific term, but the interim measure was later converted into ordinary law in June 2019.

Another sector that is experiencing regulatory flexibility is the financial sector. Under Brazilian laws, a foreign financial institution cannot open a branch, incorporate a subsidiary or increase its equity participation in a Brazilian financial institution, unless the Brazilian government is interested in it. The declaration of interest by the Brazilian government is expressed through a presidential decree. However, in October 2018, the President enacted a decree declaring that the Brazilian government is interested in all entities that are considered to be fintech companies. Following the enactment of the decree, fintech companies are presumably considered to be of interest of the Brazilian government. A foreign fintech company is no longer required to seek a declaration of interest from the Brazilian government on an individual basis.

Law stated - 12 April 2022

Transaction agreements

Are transaction agreements typically concluded when publicly listed companies are acquired? What law typically governs the agreements?

Although the choice of foreign law is accepted and valid under Brazilian law, the transactions taking place in Brazil, especially if the parties entering into the agreement are Brazilians, are usually governed by Brazilian law. In addition, to implement the transfer of shares and certain types of assets, the parties must comply with certain formalities required under Brazilian law. If the shares and assets belong to a Brazilian company, the choice of Brazilian law and venue facilitates the enforcement of the agreement as regards the Brazilian company.

Tender offers for Brazilian listed companies are mandatorily governed by Brazilian laws. In these cases, the offering instrument will have to comply with the regulations enacted by the CVM and the choice of foreign law will not be permitted.

Law stated - 12 April 2022

FILINGS AND DISCLOSURE

Filings and fees

Which government or stock exchange filings are necessary in connection with a business combination or acquisition of a public company? Are there stamp taxes or other government fees in connection with completing these transactions?

The corporate acts of mergers, demergers and absorptions of listed companies are required to be registered with the board of trade of the Brazilian state in which the company is headquartered.

In public offerings, as a general rule the issuer must register with the Securities and Exchange Commission of Brazil (CVM) a prospectus, along with several other documents and forms. Similarly, in mandatory tender offers, the offeror usually must register an offering instrument with the CVM.

If the business combination involves, on one hand, a group of companies whose total gross income or sales volume in the year prior to the year the transaction takes place is equal to or above 750 million reais and, on the other hand, a group of companies whose total gross income or sales volume in the year prior to the year the transaction takes place is equal to or above 75 million reais, the parties shall seek prior approval of the Administrative Council for Economic Defence (CADE), Brazil's antitrust authority.

Although stamp taxes do not exist under Brazilian law, registration with the board of trade, with the CVM and with CADE are subject to the payment of fees.

Law stated - 12 April 2022

Information to be disclosed

What information needs to be made public in a business combination or an acquisition of a public company? Does this depend on what type of structure is used?

Tender offers for the acquisition of a listed company are subject to specific disclosure requirements. For instance, the offering instrument must disclose the share capital structure of the target company, its financial and economic situation, the exposure of the bidder to derivatives whose underlying assets are securities issued by the target company, and information regarding any agreements and covenants to which the bidder is a party involving securities issued by the target company. If the transaction involves the exchange for stock or other securities, the disclosure requirements applicable to a public offering must also apply. As a general rule, a public offering is also subject to registration. The registration application must be accompanied by a prospectus, where certain information must also be disclosed. For instance, the prospectus must contain a summary of the offering, indicating the issuer, the financial institutions involved, the targeted audience of the offering, as well as the price and quantity of the securities to be listed. In addition, the prospectus must contain a schedule of the offering, the justification of the issuing price (in an initial public offering), the explanation of how the proceeds arising out of the listing will be applied and the risk factors of the issuer.

Although the disclosure requirements may differ depending on the type of structure that is used, corporations must disclose to the market any information that is deemed to be material information. Pursuant to CVM regulations, material information is any decision of the shareholders or board of directors of publicly listed companies, or any other relevant technical, economical or financial facts or transactions related to the company's business and activities, which may influence the price of any shares or securities issued by the company, the decision of the investors to buy or sell shares and securities of the company, or the decision of the investors regarding the exercise of any of their rights as shareholders. CVM regulations also provide examples of what would be material information: acquisition of control of a company, execution of shareholders' agreements involving the corporations' securities, mergers, demergers and absorptions are among the material information that must also be disclosed. The list of examples provided by the CVM is not exhaustive, so any information that may fall within the definition of material information will be subject to the disclosure requirements. Pursuant to CVM Resolution 78, of 29 March 2022, the disclosure of material information involving mergers, demergers and absorptions must contain at least, and to the extent available, the identification of the companies involved, the purpose, benefits, costs and risks of the transaction, and the replacement criteria of the securities, among others.

On 29 March 2022, the CVM enacted a new regulation which will enter into force on 2 May 2022, concerning disclosure requirements applicable to publicly listed corporations (CVM Resolution No 80, of 29 March 2022). Overall, the new regulation does not introduce substantial changes to the previous framework, except for the obligation of publicly traded companies to disclose court claims and arbitration proceedings related to corporate matters, which (1) involve collective rights; or (2) may affect the legal structure of the company, such as claims to void corporate resolutions of the company, and claims against the company's management and controlling shareholder. The new regulation also

stresses that arbitration proceedings subject to confidentiality restrictions do not exempt the company from disclosing the minimum information required by the CVM, so transparency related to public M&As disputes is likely to increase.

Certain business combinations may be subject to shareholders' or board of directors' approval. Given that the minutes of the meetings of the shareholders and board of directors are subject to registration with the Board of Trade, the information provided therein will also be available to the public.

Lastly, business combinations that are subject to CADE's prior approval may also be subject to additional disclosures. Although the economic information submitted to CADE is usually treated as confidential information, the general details about the combination (such as the parties involved) are usually made public.

Law stated - 12 April 2022

Disclosure of substantial shareholdings

What are the disclosure requirements for owners of large shareholdings in a public company? Are the requirements affected if the company is a party to a business combination?

Listed companies are subject to the disclosure requirements of the CVM, which requires the disclosure of the company's controlling shareholder (including the ultimate beneficial owner). In addition, listed companies are required to disclose the shareholders or group of shareholders, with a shareholding stake equal to or above 5 per cent of the same class or species of shares and that have common interests or act jointly in relation to the company's affairs.

Business combinations by themselves do not affect disclosure requirements related to substantial shareholdings. However, should the business combination result in a shareholding stake that requires disclosure, such as in the case of controlling shareholder of listed companies, the disclosure requirements shall apply.

Law stated - 12 April 2022

DIRECTORS' AND SHAREHOLDERS' DUTIES AND RIGHTS

Duties of directors and controlling shareholders

What duties do the directors or managers of a publicly traded company owe to the company's shareholders, creditors and other stakeholders in connection with a business combination or sale? Do controlling shareholders have similar duties?

Under Brazilian law, directors must observe the duty of care (diligent management of the company's affairs) and the duty of loyalty (refraining from pursuing personal interests instead of the company's interests). In addition, directors must always act within the scope of their powers and must refrain from participating in the company's affairs in case of conflict of interest. This is also the case in connection with a business combination among or involving different companies or companies within the same economic group.

Although, as a general rule, directors are not liable for the company's obligations, in the case of ultra vires acts, as well as in the event of breach of the laws and the company's by-laws, they may be personally liable. In addition, although the company's by-laws may designate different roles to different directors, under Brazilian law all directors may be held jointly and severally liable for damage caused to the company and the shareholders.

Although business combinations as a general rule must be approved by the shareholders, directors are responsible for providing accurate information regarding the transaction, to enable the shareholders to make an informed decision.

When it comes to listed companies in mergers, demergers and absorptions involving its affiliates, the Securities and Exchange Commission of Brazil (CVM) adopts a more stringent interpretation as to the duty of care and duty of loyalty.

In such circumstances, the directors are only discharged of their duties if they have complied with certain specific requirements, such as assuring on an impartial basis that any proposed business combination is carried out in the most beneficial form to the shareholders, including the minority shareholders, and the company. The CVM also requires directors of publicly listed companies to comply with all applicable capital markets rules and regulations. Also, pursuant to CVM Resolution 78, of 29 March 2022, directors of publicly listed companies involved in the negotiation of such transactions must act carefully and diligently to verify that all information provided by the other companies involved in the transaction are in compliance with the applicable regulations.

One of the statutory directors of a publicly listed company must be appointed as investor relations director, who will be the person responsible for submitting all required filings and complying with all capital markets rules and regulations (eg, publish a relevant fact of the public company such as a sale or an acquisition), and who may be held personally liable (without prejudice to the corporation's own liability) for failure to do so.

In 2018, the CVM enacted a new (non-binding) guideline (No. 38, dated 25 September 2018) applicable to indemnity agreements executed between publicly listed companies and their directors with the aim at avoiding conflicts of interest, thereby creating new duties for the directors of public companies.

Under the indemnity agreements, public companies undertake to compensate directors for damage or losses arising out of arbitration proceedings, court claims or administrative proceedings in general, involving acts, facts or omissions committed by the directors in the exercise of their duties or powers. Although, in general, the parties are free to negotiate the terms and conditions of the agreement, pursuant to the CVM's interpretation, the compensation is not due if the director breached his or her duty of care and duty of loyalty. As such, the CVM recommends expressly providing the hypothesis of exclusion of liability in the indemnity agreement. In addition, the CVM recommends that before making any disbursements, the company must determine whether the compensation to the director is due or whether it falls into a hypothesis of exclusion of liability.

The CVM's guidelines provide that the directors must implement governance rules to prevent conflicts of interest in the execution of indemnity agreements. In order to be discharged of this duty, the directors must ensure that the indemnity agreements provide which body of the company will be responsible for assessing whether an exclusion of liability applies or not, as well as the applicable rules to avoid conflicts of interest. In specific circumstances, such as circumstances that could result in a material loss for the company, the CVM understands that additional governance rules must be adopted, without specifying them. Finally, directors are required to disclose the terms and conditions of the indemnity agreements to allow the shareholders to properly assess the liabilities that the company may be exposed to.

Regarding controlling shareholders, Brazilian law expressly states that they are liable for the abuse of their powers. Examples of abuse of power include: deviating the company from its scope; entering into business combinations that are detrimental to the company; and appointing board members who are not suitable for the role.

On 1 July 2020, a new regulation enacted by the CVM entered into force (Instruction No. 627 of 22 June 2020, which was later renamed as Resolution No. 70 of 22 March 2022), which increases minority shareholders' rights against the controlling shareholders, directors and officers. Under the previous legal framework, the corporation could only file a claim for damages against directors and officers if approved by the general meeting. However, if the approval was not granted, minority shareholders representing at least 5 per cent of the company's share capital could proceed with the claim. Under the new regulation, the percentage of the minority's shareholders that may propose a claim for damages against directors and officers varies from 1 per cent to 5 per cent, depending on the company's total issued share capital. Similarly, under the previous legal framework, a claim for damages against the controlling shareholder without depositing a guarantee with the courts could only be proposed by 5 per cent at least of the company's share capital, while under the current framework, the percentage varies between 1 per cent to 5 per cent, depending on the company's total issued share capital.

Law stated - 12 April 2022

Approval and appraisal rights

What approval rights do shareholders have over business combinations or sales of a public company? Do shareholders have appraisal or similar rights in these transactions?

Business combinations may be subject to the approval of shareholders, but the quorum for the approval varies depending on the type of transaction. In publicly listed corporations, mergers, demergers and absorptions require by law the approval of the majority of the corporate capital. However, as of 27 August 2021, the CVM may authorise the reduction of this quorum for publicly listed corporations with diffused ownership, whose last three general meetings were held with the attendance of shareholders representing less than half of the voting rights. In addition, as of 27 August 2021, shareholders of publicly listed corporations are required to approve transactions with related parties, and the sale or contribution in kind of assets into other companies, if the transaction involves more than 50 per cent of the company's assets, as per its latest approved balance sheet.

The shareholders who voted against the merger, demerger or absorption may be entitled to withdraw from the company and be reimbursed for the value of their shares, subject to the following conditions:

- in mergers and absorptions, the right of withdrawal is only applicable to corporations with concentrated ownership; and
- in demergers, the right of withdrawal applies if there is a change in the company's business scope (unless the main activity of the entity that absorbs the assets of the demerged entity matches the activities of the demerged entity), if there is a reduction in mandatory dividend payments, or if the demerger results in the participation in a group of companies.

The company's by-laws may contain provisions related to the appraisal methodology for the reimbursement. However, the law sets forth that the reimbursement value shall reflect at least the company's net worth, pursuant to the company's latest approved balance sheet. If the company's by-laws authorise it, the reimbursement value may be ascertained by an appraisal report prepared by experts, in which case the reimbursement value may be above the company's corresponding net worth.

Tender offers, in general, require the preparation of an appraisal report of the target company, pursuant to the regulations enacted by the CVM. If the purpose of the tender offer is to delist the company from the stock exchange, or to increase the controlling shareholders' participation up to the point that it may hinder the market liquidity of the shares, as provided in the rules enacted by the CVM, there must be the approval of more than two-thirds of the corporation's floating stock. In addition, the purchase price of the offer must be fair, corresponding at least to the company's valuation, ascertained by means of an appraisal report. Nonetheless, if there are clear indications that the valuation report was not accurately prepared, at least 10 per cent of the corporation's floating stock may request the corporation's management team to call a shareholders' special meeting to resolve on the preparation of a new report. If the new report lists a higher value, that value shall prevail.

In a takeover bid, the new controlling shareholder is required to place a public offer to all other voting shareholders of the company. In this circumstance, the offering price must correspond to at least 80 per cent of the price paid for the acquisition of the control.

The acquisition of control of a company by a listed corporation is also subject to the approval of the listed corporation's shareholders in the following circumstances:

- if the purchase price of the target is deemed to be a relevant investment, as defined by law; and
- if the average purchase price of the target's shares is above certain thresholds, as provided by the law. In such

circumstances, the corporation's directors are only compliant with their duty of care if they have submitted the business combination to the perusal of all shareholders, including the minority shareholders and those with no voting rights.

Law stated - 12 April 2022

COMPLETING THE TRANSACTION

Hostile transactions

What are the special considerations for unsolicited transactions for public companies?

In Brazil, hostile takeover bids are not yet as common as they are in more mature markets, such as the United States and the United Kingdom. Nonetheless, in the past decade Brazil has experienced a boost in its capital markets, with a significant increase in the number of publicly held corporations with dispersed shareholdings. As a result of this, hostile takeovers have gained more attention.

According to the Brazilian Corporations Act, the purchaser in a takeover bid is required to make a public offer to all other voting shareholders of the company, for a purchase price of at least 80 per cent of the takeover bid's price. In addition, in 2010 the Securities and Exchange Commission of Brazil (CVM) introduced new rules applicable to takeover bids.

According to the new rules introduced by the CVM in 2010, bidders are required not to disclose any information related to the takeover bid until it is finally disclosed to the market. Bidders must also ensure that their managers, advisers and employees also comply with this rule. If the bidder loses control of the information, the bidder will be required to immediately place a public offering or, alternatively, disclose to the market that it intends to place an offer.

The bid must take place on a stock exchange or another authorised organised market. If a third party is interested in participating in the public auction for the takeover bid, it must disclose its intention to the market at least 10 days in advance. Also, the bidder must undertake to purchase, in a 30-day period following the bid, all shares of the same class and type that remained unsold, for the same price of the final offer, thereby giving additional protection to minority shareholders.

Law stated - 12 April 2022

Break-up fees – frustration of additional bidders

Which types of break-up and reverse break-up fees are allowed? What are the limitations on a public company's ability to protect deals from third-party bidders?

In Brazil, break-up fees are not expressly set forth in law. The parties to an M&A deal are free to negotiate and agree on a break-up fee for protection against third-party bidders in the transaction agreements.

Law stated - 12 April 2022

Government influence

Other than through relevant competition regulations, or in specific industries in which business combinations or acquisitions are regulated, may government agencies influence or restrict the completion of such transactions, including for reasons of national security?

Certain business activities are subject to additional regulations from governmental agencies, which may impact

business combinations. This is especially true for the oil and gas, media and broadcasting, civil aviation, energy and electricity, and security sectors, and public services in general. All these sectors are regulated by federal government agencies, which may enact enforceable legislation. Another heavily regulated sector is the banking and financial services industry, whose business combinations are also normally subject to the authorisation of the Brazilian Central Bank.

The acquisition of land by foreigners (both individuals and companies) is also subject to restrictions, which are based on the size of the land and the scope of the activities to be performed by the foreigner. In addition, some of these restrictions also apply to Brazilian companies controlled by foreigners.

In the privatisation of state-controlled companies, the government may influence combinations through the use of golden shares, enabling it to hold influence for strategic reasons.

Law stated - 12 April 2022

Conditional offers

What conditions to a tender offer, exchange offer, merger, plan or scheme of arrangement or other form of business combination are allowed? In a cash transaction, may the financing be conditional? Can the commencement of a tender offer or exchange offer for a public company be subject to conditions?

In public offerings and tender offers, the issuer or offeror may subject the offer to certain conditions, as long as the conditions are clearly stated in a prospectus or equivalent document.

Public offerings must grant equal treatment to all offerees. The offer must be irreversible and irrevocable, but special conditions may apply to protect a legitimate right of the offeror, as long as the usual functioning of the markets is not affected, and to the extent that the fulfilment of the conditions does not directly or indirectly rely on the offeror itself, or a person related to it. The offering price must be uniform, but the CVM may authorise price variations in specific transactions, depending on the kind of securities being offered and the qualifications of the offerees.

The CVM may also acknowledge the existence of material adverse changes following a public offering. If that should be the case, the offeror may request the cancellation of the offer.

The offeror may change the terms and conditions of the public offering, without seeking the CVM's prior permission, if the changes are for the benefit of the investors, or if the offeror waives a benefit of its own.

If a public offer is revoked it becomes ineffective, and any consideration paid by the investors must be refunded pursuant to the terms of the prospectus. In its turn, the acceptance of an offer by an investor cannot be revoked by the investor itself, unless provided otherwise in the prospectus.

A tender offer, once the offering instrument is published, may only be amended or revoked by the offeror in the following circumstances:

- to improve the conditions of the offer;
- if previously approved by the CVM (in the case of mandatory tender offers); and
- in compliance with the offering instrument (in the case of voluntary tender offers).

A tender offer will be mandatory if a controlling shareholder intends to delist a company from the stock exchange or increase its equity participation to the extent that the security's market liquidity is hindered, pursuant to CVM regulations. The tender offer must be accompanied by a valuation report but should there be clear indication that the report was not accurately prepared, 10 per cent of the floating stock may request the preparation of a new report. If the

new report increases the security's value, the offeror may revoke the tender offer and the intended delisting or increase in the equity participation will not be carried out.

Changes or cancellation of a tender offer that is subject to the CVM's prior approval may only be effected in light of material adverse changes acknowledged by the CVM.

Changes to a tender offer require the publication of a new offering instrument, which must highlight the amendments that have been introduced and the new date of the public auction. Should the tender offer be revoked, its cancellation must be published by means of the same channels that were used for its original publication.

The law does not provide for any specifics relating to cash transactions conditional upon financing. In such circumstances, the general rules concerning tender offers must apply.

Law stated - 12 April 2022

Financing

If a buyer needs to obtain financing for a transaction involving a public company, how is this dealt with in the transaction documents? What are the typical obligations of the seller to assist in the buyer's financing?

Although the parties may, in theory, agree that obtaining financing by the buyer is a condition precedent to the closing, the seller may be reluctant to accept this provision. Under Brazilian law, there is no obligation on the seller to assist in the buyer's financing. Typically, it is the buyer's responsibility to obtain the financing necessary to pay the purchase price up to the closing of the transaction, and the buyer does not transfer the burden to sellers.

Notwithstanding, a seller may agree to finance an acquisition by the buyer in other forms, such as by accepting the delay of the payment of part of the purchase price until after closing or agreeing to receive a portion of the price by means of an earn-out, by means of a consulting agreement, by the exchange of shares of the buyer for the shares of the target company, and so on.

Law stated - 12 April 2022

Minority squeeze-out

May minority stockholders of a public company be squeezed out? If so, what steps must be taken and what is the time frame for the process?

As a general rule, minority stockholders may not be freely squeezed out. Brazilian corporate law provides for a series of minority stockholders' protection rights, such as pre-emptive rights to participate in any capital increases by issuing and paying in shares in the proportion of their equity participation, as an anti-dilution tool.

Notwithstanding the above, minority shareholders may be squeezed out in a specific circumstance: following a tender offer for delisting purposes, if less than 5 per cent of the capital stock remains on the free float, the corporation's general meeting may approve the forced redemption of the floating stock for the purchase price that has been offered in the public tender with the aim to delist the corporation.

Law stated - 12 April 2022

Waiting or notification periods

Other than as set forth in the competition laws, what are the relevant waiting or notification periods for completing business combinations or acquisitions involving public companies?

Mergers, demergers and absorptions must be published in a newspaper of wide circulation (as of 1 January 2022, the publication in the Official Gazette is no longer required). In mergers and absorptions, the company's creditors may oppose the operation within 60 days of its publication. In demerger operations, the creditors of the demerged company may also oppose the operation by means of a written notice to the demerged company. If that occurs, the demerger may be consummated, but the demerged company will continue to be jointly and severally liable for its liabilities before the creditors who opposed the operation.

In public offerings, the CVM has 20 days to analyse the offering request. If necessary, the CVM may request the issuer to provide additional information, which must be provided in 40 days. Once the additional information is submitted to the CVM, it must confirm or refuse the registration of the offering within 10 days, otherwise the offering will be deemed to be approved. If the registration is refused, the issuer may appeal to CVM's board.

In mandatory tender offers, the offeror must file the offer registration request, with the CVM, within 30 days of the disclosure of the offer to the markets. The request will be analysed by the CVM within 30 days of the filing date, and if the CVM remains silent, the registration will be deemed approved. If necessary, the CVM may designate a term to the offeror (which cannot be greater than 60 days) to provide additional information (the term to be actually designated depends on the complexity of the information to be submitted).

Law stated - 12 April 2022

OTHER CONSIDERATIONS

Tax issues

What are the basic tax issues involved in business combinations or acquisitions involving public companies?

Brazil has a complex tax framework. The country has federal, state and municipal taxes, which shall be taken into account in business combinations.

In business combinations involving shares, the main tax concerns refer to capital gains and goodwill that, under Brazilian law, is deductible for tax purposes.

Also, one critical tax issue always raised in business combinations involving both demergers and mergers among two or more legal entities is related to the possibility of taking benefit of losses forward, which might be lost contingent upon the way the combination is structured.

In business combinations involving the purchase of assets, other taxes such as VAT may be taken into account. If the transaction involves the transfer of real estate assets, a specific municipal tax may apply.

Law stated - 12 April 2022

Labour and employee benefits

What is the basic regulatory framework governing labour and employee benefits in a business combination or acquisition involving a public company?

As regards an acquisition of shares of a Brazilian legal entity, the acquirer is subrogated in all rights and obligations of

the seller. This rule also applies to employment agreements, meaning that the employees will continue their employment relationships with the company acquired. Therefore, the employees will continue to perform their duties for the company acquired and their employment rights will remain unchanged.

Under Brazilian Employment Law, and in the context of business combinations, the new business owner is prevented from reducing or otherwise restricting, through the acquired legal entity, the employees' rights following the business combination. To mitigate this risk, the transactional documents usually contain provisions requiring the transferor to defend and hold the acquirer harmless from losses arising out of employment claims. Although the transactional documents may not be opposed against the employees, the contractual indemnification arrangement seeks to ensure that the acquirer may claim damages against the transferor in connection with employment liabilities.

Law stated - 12 April 2022

Restructuring, bankruptcy or receivership

What are the special considerations for business combinations or acquisitions involving a target company that is in bankruptcy or receivership or engaged in a similar restructuring?

The main purpose of the Brazilian Bankruptcy and Judicial Recovery Law is to avoid companies' bankruptcy. Prior to entering into judicial recovery, the Law allows companies to negotiate with their creditors out of court, on an amicable basis. If the out-of-court negotiations do not work, the insolvent company may seek court protection to avoid its bankruptcy.

During the judicial recovery, the company must present a recovery plan, which will be the basis for negotiations with its creditors. The company's creditors may present amendments to the recovery plan, or even reject it as a whole. Failure to approve the recovery plan with creditors may lead to the company's bankruptcy.

The recovery plan may provide for the sale of specific assets of the company, business units thereof or the company's branches, subject to the court's prior authorisation. In these circumstances, as a general rule, the assets are transferred to the acquirer free from liabilities.

In addition to the sale of assets, the Brazilian Bankruptcy and Judicial Recovery Law provides that the company's judicial recovery may involve other types of business combinations, such as mergers, acquisitions and absorptions, which must also be specified in the company's recovery plan.

In January 2021, several amendments to the Brazilian Bankruptcy and Judicial Recovery Law entered into force, aiming at reducing bureaucracy and speeding up the bankruptcy and judicial recovery process. In terms of business combinations, the amendments clarified what the risk of succession of an acquirer of assets from a distressed company is, highlighting that in such circumstances, the acquirer shall not succeed in any obligation of the seller, including, but not limited to, environmental, regulatory, criminal, anticorruption, tax and labour liabilities.

Law stated - 12 April 2022

Anti-corruption and sanctions

What are the anti-corruption, anti-bribery and economic sanctions considerations in connection with business combinations with, or acquisitions of, a public company?

Pursuant to the Brazilian Criminal Code, bribery and corruption are criminal offences punishable with imprisonment. The main offences associated with corruption and bribery are active corruption (which consists of offering or promising an unlawful benefit to a public officer to encourage him or her to perform, abstain from performing or delaying the performance of an official act) and passive corruption (which consists of a public officer soliciting,

receiving or accepting an unlawful benefit based on his or her public office or role).

In 2012, Brazil improved its anti-money laundering legislation. Since the enactment of this legislation, any predicate offence may be considered for the purposes of punishing money laundering (under the previous legislation, only a set of criminal offences could be taken into account). The law put into place more rigorous control mechanisms, requiring several market players to report suspicious activities to Brazil's Financial Activities Control Council. In addition, in December 2019, the Securities and Exchange Commission of Brazil (CVM) enacted Instruction No. 617 of 5 December 2019 (later renamed to Resolution CVM No. 50 of 31 August 2021), which regulates anti-money laundering and terrorism financing in the capital markets. The Instruction applies to entities and individuals that provide services related to the distribution, custody and intermediation of securities, portfolio managers, independent auditors and other capital markets' service providers. These entities and individuals are required to implement anti-money laundering and terrorism financing policies in accordance with the minimum standards set forth in the Instruction. In addition, they are required to implement know your client and due diligence procedures aimed at identifying potential entities and individuals involved with money laundering and terrorism financing.

In 2013, Brazil enacted its Anti-Corruption Law. Under the terms of this law, legal entities are strictly liable for corruption acts practised by its officials. The sanctions vary from fines, prohibition to contract with governmental authorities and even the extinction of the entity itself.

The law also encourages companies to adopt a compliance programme to prevent bribery and corruption. Although an effective compliance programme does not fully exempt the entity from sanctions, it may at least reduce the amount of the fines and, in an acquisition of shares transaction, also reduce any risks to which the acquirer of the target company and the target company itself may be exposed.

In July 2020, the regulation enacted by the CVM (Instruction No. 617 of 5 December 2019, later renamed Resolution CVM No. 50 of 31 August 2021) addressing anti-money-laundering and terrorist financing (AML/CFT) in the capital markets entered into force. Although the new regulation does not apply to publicly listed corporations, it applies to all individuals or legal entities that provide services in the capital markets, such as bookkeeping agents, securities consultants, rating agencies, securitisation companies and independent auditors. These entities and individuals are required to establish their own AML/CFT policy pursuant to a risk-based approach, and appoint an officer to act as the AML/CFT officer, who will have reporting duties to the authorities. Lastly, the instruction enacted a series of rules to monitor suspicious operations, identification of the ultimate beneficial owner, and cooperation with the United Nations Security Council to curb terrorist financing.

Law stated - 12 April 2022

UPDATE AND TRENDS

Key developments

What are the current trends in public mergers and acquisitions in your jurisdiction? What can we expect in the near future? Are there current proposals to change the regulatory or statutory framework governing M&A or the financial sector in a way that could affect business combinations with, or acquisitions of, a public company?

The war in Ukraine, the pandemic, higher inflation and interest rates and the October presidential election are likely to influence the public M&A landscape in Brazil in 2022. These uncertainty factors may lead market players to be more selective in terms of equity transactions.

Nevertheless, M&A activity in Brazil in the first quarter of 2022 proved to be busy, especially on the agribusiness, IT services and software sectors, a tendency which is likely to continue throughout the year. In addition, the movement to change the energy matrix hastened by the war in Ukraine will probably boost the renewables sector in Brazil, which

counts with a privileged geographic advantage.

In terms of regulatory changes, it is worth highlighting that the CVM enacted Resolution No. 59, of 22 December 2021, which provides for a thorough review of the current disclosure framework applicable to publicly listed corporations, and which will enter into force on 2 January 2023. One of the most sensitive changes introduced by the new regulation relates to ESG disclosures, subject to greater scrutiny in terms of materiality thresholds and key performance indicators, including those related to the United Nation's Sustainable Development Goals and the Task Force on Climate Related Financial Disclosures. In addition, the new regulation adopts a 'comply or explain' approach, so companies that do not comply with ESG factors must explain their reasons.

Other topics that are expected to be covered by the CVM's 2022 regulatory agenda relate to foreign investors (natural persons) in the Brazilian capital markets, the review of the definition of 'qualified investors', and regulatory studies concerning digital influencers that may offer CVM regulated services and startups.

Law stated - 12 April 2022

Jurisdictions

Australia	Squire Patton Boggs
Austria	Wolf Theiss
Bermuda	BeesMont Law Limited
Brazil	Loeser e Hadad Advogados
Bulgaria	Kambourov & Partners, Attorneys at Law
Canada	Bennett Jones LLP
China	HJM Asia Law & Co LLC
Ghana	Kimathi & Partners Corporate Attorneys
Greece	Karatzas & Partners Law Firm
India	Khaitan & Co
Israel	Barnea Jaffa Lande
Italy	Nunziante Magrone
Japan	Hibiya-Nakata
Luxembourg	Bonn & Schmitt
Nigeria	G Elias
North Macedonia	Debarliev Dameski & Kelesoska
Norway	Aabø-Evensen & Co
Sweden	Advokatfirman Hammarskiöld
Switzerland	Homburger
Taiwan	Lee and Li Attorneys at Law
United Arab Emirates	IN'P Ibrahim & Partners
United Kingdom	Herbert Smith Freehills LLP
USA	Simpson Thacher & Bartlett LLP
Uzbekistan	Azizov & Partners
Vietnam	Bizconsult Law Firm