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# Corporate M&A 2022

Brazil: Law & Practice
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# BRAZIL

## Law and Practice

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# 1. TRENDS

## 1.1 M&A Market

After recovering from the harsher impacts of the pandemic by the end of 2020, the M&A market in Brazil benefitted from a boost in 2021, with a growth over 60% in the number of transactions closed and over a 100% in the value of the deals, when compared to 2020. The significance of the upsurge can be attested by the steep increase in number of transactions involving more than BRL500 million.

### The Wider Economy

Although the Brazilian market is optimistic in relation to the first half of 2022 and M&A players expect, and are already experiencing, a surge in the number of transactions, M&A activity may be slowed down in the second part of the year due to the uncertainty surrounding the Presidential and Congressional elections and the much expected but still undefined reform of the Brazilian tax rules.

The crisis in Ukraine may also be expected to impact the country's economy since Brazil is heavily dependent on imports of fertilisers (mainly potash and urea) from Russian companies. Agribusiness is the largest economic sector in Brazil and represents a significant portion of the country's GDP. Invocation of the "force majeure" clause by Russia to suspend contracts for the sale of agricultural inputs as a consequence of economic sanctions on the country is not out of question. The Brazilian government has so far adopted a wait-and-see approach while preparations for the announcement of National Fertilizer Plan is expected to occur presently.

Nevertheless, the magnitude of the Brazilian economy and market has sustained Brazil's position as the main recipient of foreign investment in LATAM and legislation recently enacted to incentivise entrepreneurship and creation of employment positions is expected to enhance such position.

## 1.2 Key Trends

As a direct result of the pandemic, numerous companies and business groups faced financial distress and were forced to seek alternative solutions to renegotiate their indebtedness with creditors and filings of in-court or out-of-court reorganisations became recurrent in 2021.

The sale of assets (including equity in subsidiaries) stood out as the main source of funding for companies under financial distress and the relatively low price of the assets combined with the abrupt devaluation of the local currency (real) transformed the purchase of distressed assets into attractive investments and "distressed M&A" transactions skyrocketed. Although distressed M&A was, and continues to be, a trend in all industry sectors, infrastructure companies and groups were particularly affected by the economic crisis and foreign investors have shown great appetite for renewable energy related assets.

During 2021, activity in several infrastructure sectors intensified in Brazil, especially sanitation, railways, and energy. After the Brazilian New Sanitation Framework came into force in 2020, the market became accessible to private investment and USD150 billion is expected to be invested in the sanitation sector in the next ten years. In the same vein, the Brazilian Railway Framework was recently approved, and will enable private companies to operate railways in Brazil, upon prior authorisation of the regulatory body but without the need for a public bid. Brazilian Federal Government expects BRL240 billion in investments in the sector. The Brazilian energy market is also very promising with 48.3% of its energy matrix based on renewable sources (the global index is around 2%) and the potential to become a leader in the production of green hydrogen.

Following the 2020 trend, environmental, social and governance (ESG) related M&A transactions continue to be a highlight, boosted by the Glasgow Climate Change Conference (COP-26) which took place in October/November 2021. Clean energy, electric vehicles, infrastructure, and mobility solutions continue to be the main focus of investors. Further, maximising ESG-related synergies and mitigating ESG risks, notably risks related to climate change, greenhouse gas emissions, waste, diversity, and labour practices among other matters, became material concerns to M&A, venture capital and private equity transactions. ESG factors can be expected to increasingly influence how investors select potential targets and business partners.

IPOs continued to be a relevant source of funding in a cash strapped market, with a growth of almost 50% when compared to 2020.

In line with other LatAm countries, venture capital transactions have also been widely increasing and technology continues to be the preferred industry.

Cloud computing, SaaS and IT security businesses continued to be hot targets, as well as telecommunications and media related companies; the consolidation trend of the health industry also remained strong, reflected in numerous acquisitions of clinics, laboratories or small hospitals by the main players of the market.

Investment in start-ups attained a new record during 2021 and the most invested entities were fintechs, a trend that is expected to remain unchanged in 2022. Banco do Brasil launched a venture capital company, aiming at investing BRL200 million in start-ups in 2022.

### Fintech

While Brazil is one of the most regulated markets when it comes to banking activities, fintechs continued to be the ultimate trend in 2021.

The number of Brazilian fintechs grew 67% in 2021 and the volume of funds invested in such entities increased from BRL8.9 billion to BRL21 billion, in 12 months. The ecosystem of fintechs is diversified, and such entities operate in several market segments: credit, payments, financial management, loans, investments, private financing, insurance, debt negotiation and crypto-assets and ledgers ("Distributed Ledgers" or DLTs). A new regulation came into force in 2018 permitting the creation of two new types of credit fintechs: direct credit companies (SCDs) and peer-to-peer loan companies (SEPs). Both SCDs and SEPs are allowed to attract investment through a fast-track procedure, since the authorisation process by the Central Bank is faster than for other traditional financial institutions.

In 2020, the Brazilian Central Bank created a new and instant payment method called "Pix" though which the clearing and funds availability occur in real time. The transfers occur directly from the payer's account to the payee's account, involving fewer intermediaries in the payment chain and lower transaction costs. In 2021, Pix became the most used payment arrangement in the country.

In addition to Pix, in 2021 the Brazilian Central Bank gradually started the implementation of Open Banking in Brazil, allowing the sharing of financial data between consumers and different financial institutions, with the prior authorisation of the data owner. Full implementation of the Open Banking is expected to take place in 2022.

According to the Central Bank, Open Banking aims at reducing information asymmetry between financial services providers, thus favouring the emergence of new business models and new forms of relationship between participating institutions, customers, and partners.

### The Financial Crisis

As the financial crisis lessened, the business consolidation witnessed in 2020 (IT, telecom/media and health care) continued in 2021 and is likely to continue and expand to other sectors during 2022.

As the challenge for companies in Brazil during 2021 was to grow without cash and in the midst of high inflation and interest rates, venture capital and private equity transactions funded, and as expected to continue to fund, and develop start-ups.

The lessening of the restrictions caused by COVID during 2021 was not sufficient to restore businesses in several industries to their previous level of activity, but financial sustainability and improvement is expected for 2022.

### Data Protection

Even though the Brazilian General Data Protection Law (LGPD) came into force in 2020 and put verification of compliance with the new legal requirements on the road map of due diligence, its effects have timidly started to be felt through 2021. The data protection due diligence expanded to encompass not only the analysis of compliance with legal requirements, but also the companies' practices and possible weaknesses. Conditions precedent already came to include amendments of contracts with clients and suppliers to reflect specific data protection provisions and Codes of Conduct were drafted. Adoption of proper governance and compliance with and monitoring of privacy programs will certainly ensue, and possibly even affect the valuation of the companies.

### The Petroleum Industry

According to the strategic plan (2021–25) of the state-owned Brazilian multinational corporation in the petroleum industry – Petrobras, divestment of assets was a priority during 2021 and will remain so in 2022. The divestment will comprise the sale of several oil and gas assets in key segments, including onshore and shallow water fields and refineries. Petrobras' divestment process will represent a relevant investment opportunity in the short and mid-term. In 2021, Petrobras earned USD4.8 billion with the sale of 17 assets in a total of 14 divestment procedures but similar transactions are likely to be put on hold until the Presidential and Congressional elections in 2022.

## 1.3 Key Industries

As a direct consequence of the pandemic, health care related M&A were the most significant transactions during 2021 (by amounts involved), resulting in a clear consolidation of such market (laboratories and hospitals). Conversely, as technology gained importance in our current "new normal", technology related deals were far more numerous.

The adverse economic impacts of the pandemic were most strongly felt in the tourism industry (hotel and airlines) as well as catering, entertainment, and culture sectors.

Although the real estate market experienced a retraction in 2020, M&A activity in the sector resumed in 2021 and the consolidation of the market is likely to continue during 2022.

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## 2. OVERVIEW OF REGULATORY FIELD

### 2.1 Acquiring a Company

#### Unlisted Companies

In Brazil, M&A deals involving private (unlisted) companies represent by far the majority of the transactions and M&A can be generally divided into equity deals and asset deals.

The typical M&A step plan is similar to those followed in other markets: after negotiations reach a certain point, a Term Sheet or MOU is executed, establishing the basic business terms. Due diligence then follows (focus and breadth vary from deal to deal and according to the target's business). Drafting and negotiation of agreements may happen concurrently or after due diligence has been concluded. Common market practice dictates that, in private deals, the purchaser drafts the agreements.

Acquisition of distressed assets follows a different set of rules since assets need to be acquired at a public bid. The above does not prevent negotiations with interested parties from taking place before the bid (even exclusivity rights may be granted although, in reality, such rights only serve to establish the asset's minimum price and grant the potential purchaser the right to match higher offers during the bid).

#### Listed Companies

M&A deals involving listed companies are also subject to specific rules and regulations set primarily by the Brazilian Securities Exchange Commission (*Comissão de Valores Imobiliários* or CVM). Purchases of listed companies are conditioned on other shareholders' tag-along rights (buyer shall also make a tender offer to purchase the remaining voting shares, for a minimum price equivalent to 80% of the price paid for the controlling shares or 100% of such price if the company is listed on Bovespa's *Novo Mercado*). Alternatively, buyer may offer to the remaining shareholders the option to keep their shares, upon payment of a premium in the amount equivalent to the difference between the shares' market value and the price offered for the controlling shares.

Acquisitions are often preceded by corporate reorganisations (of target or sellers), segregation of assets and incorporation of a purchase vehicle by buyer (specific purpose company). Corporate reorganisations often also occur post-closing, by purchaser combining the purchased entity with another company from purchaser's corporate group. In such cases, the surviving entity is usually the entity with most tax benefits, or the entity with more regulatory enrolments.

#### Challenges for Investors

One of the main challenges for investors acquiring businesses in Brazil is the succession of liabilities. Whether the business acquisition is structured as an asset deal or equity deal, the buyer may be considered liable for the acquired business' past liabilities.

Further, in relation to labour and tax matters, other companies of purchaser's economic group (entities under the same management or control) will be considered to form an economic group and all legal entities of an economic group are jointly liable for all labour and tax obligations of any other entity of the same economic group.

The above considered, seller's indemnification obligations must be very clearly defined (ideally, to include any and all past liabilities of target, until the end of the statute of limitations).

Succession of liabilities does not apply to the purchase of distressed assets. In this case, the assets (including shares) will be segregated and transferred to an UPI (Brazilian acronym for Isolated Productive Unit). The purchaser of an UPI is legally exempt from previous liabilities involving the asset, the seller or other companies of seller's economic group.

Brazilian legal system is based on codified regulation (instead of common law) and interpretation of agreements' provisions (in case of disputes) is supposed to be based on the parties´ intentions and good faith principles instead of the strict language of a provision.

## 2.2 Primary Regulators

The primary regulator of M&A activities in Brazil is the Brazilian Securities Exchange Commission (*Comissão de Valores Imobiliários* or CVM), a federal agency which regulates and supervises the stock market activities and players.

The Brazilian antitrust authority (*Conselho Administrativo de Defesa Econômica* or CADE) is responsible for preventing abuses and enabling free competition and therefore also plays a very active role in the M&A market.

When a target entity is involved in regulated activities (financial institutions, oil and gas, telecommunications, etc), other regulatory agencies will also play a relevant role (specific approvals may be necessary).

## 2.3 Restrictions on Foreign Investments

There a few but important activities that must necessarily be exercised by Brazilian nationals or controlled by Brazilian nationals or entities. Some restrictions also extend to the management of such entities.

Prohibitions (foreign capital investment is prohibited) include:

- activities involving nuclear energy;
- health services (with exceptions established by law);
- post office and telegraph services; and
- aerospace industry (launching of satellites, vehicles and aircraft; manufacture and commercialisation of the same are permitted).

Restrictions (foreign capital investment limited by legal requirements) include:

- for reasons of national security, certain limitations apply to the acquisition of property in border areas;
- the incorporation of financial institutions and increase of foreign investment in existing entities must be approved by the Brazilian Central Bank;
- ownership of newspapers and broadcasting companies is restricted to 30% of total and voting capital and certain positions (management, programming, etc) must be occupied by Brazilian nationals (native-born Brazilians or naturalised for over ten years); and
- mining activities and generation and transmission of hydroelectric energy must be developed by entities incorporated and validly existing in Brazil (incorporation of a Brazilian company is therefore mandatory).

Further to the above, in Brazil, the Union has the monopoly of oil and gas activities. The current oil and gas framework provides a hybrid regulatory system, which authorises the development of oil and gas exploration and production economic activities under:

- concession regime;
- production sharing agreements (PSA) for pre-salt and other strategic areas; or
- transfer of rights agreements, executed between the Union and Petróleo Brasileiro S.A. – Petrobras (mixed-capital company controlled by the Brazilian Federal Government).

## 2.4 Antitrust Regulations

The Administrative Council for Economic Defense (CADE) is the agency in charge of the enforcement of competition laws in Brazil (primarily governed by Law No 12,529/2011 – the Brazilian Competition Law).

Brazil adopts a suspensory merger control regime, under which the parties can only consummate and implement a reportable transaction after obtaining final antitrust approval (antitrust clearance is therefore a mandatory condition precedent for the closing of such transactions). Between signing of the deal and CADE's final clearance, the parties must comply with a standstill obligation and remain fully independent; transfers of assets and/or employees, the exchange of sensitive information and the exercise of any kind of influence on each other's business may be considered "gun jumping" and subject the parties to severe penalties.

### Three-Prong Test Conditions

A transaction will be considered reportable, and therefore filing for CADE clearance will be mandatory, if all conditions of a three-prong test are satisfied:

- the effects test – if the transaction or agreement will produce effects in Brazil (effects will be produced in Brazil if:
  - (a) the transaction takes place in Brazil; or
  - (b) even though the transaction takes place abroad (foreign to foreign), the target (or the new company) has or will have direct and/or indirect presence in Brazil (where a "direct presence" may be characterised through the existence of a local subsidiary, distributor, sales representative, and an "indirect presence" could be exemplified by export sales to the country);
- the revenues test – if at least one of the groups involved in the transaction generated gross revenues in Brazil (including export sales) in excess of BRL750 million, and at least one of the other groups involved generated gross revenues (including export sales) in Brazil in excess of BRL75 million, both in the fiscal year immediately preceding the transaction; and
- the concentration test – if the transaction will trigger a market concentration under the Brazilian Competition Law; "concentration" being:
  - (a) acquisition of control;
  - (b) acquisition of certain minority stakes or assets;
  - (c) joint ventures; or
  - (d) certain collaborative/co-operative agreements and consortia, except if created for the purposes of a given tender process launched by the public administration.

Failure to file for CADE clearance and gun jumping will subject the parties to penalties ranging from BRL60,000 to BRL60 million. CADE may also declare any acts deemed gun jumping as null and void. Furthermore, the delivery of misleading or false information, documents or statements is punishable by a pecuniary fine ranging from BRL5,000 to BRL5 million and denial of antitrust approval due to lack of sufficient information.

## 2.5 Labour Law Regulations

According to the Brazilian labour law, mainly the Brazilian Labour Code (CLT), labour rights and obligations shall remain unaltered whether a company is merged, acquired, or if its original corporate structure is modified.

Accordingly, ownership change resulting from M&A transactions or corporate reorganisations shall not affect the employment contracts (terms, conditions, rights and obligations) of the target's employees unless such modifications are more beneficial. Hence, salaries and benefits cannot be reduced or suppressed (salary reductions are prohibited by the Federal Constitution). Employment agreements executed in breach of the above may be considered null ab initio.

Employees may file labour claims until the second anniversary of the termination of their employment contracts (dismissal date), to claim labour rights related to the five-year period immediately preceding the filing date of the claim.

It is very important for investors to take into consideration that under Brazilian labour law:

- entities under the same management or control are considered to form an economic group;
- all legal entities of an economic group are jointly liable for all labour obligations and charges of any employee who works for any other entity of the same economic group; and
- in a labour claim, a former employee may involve and obtain condemnation of all entities of an economic group.

Further, Labour Courts often determine the piercing of the corporate veil and seizure of partners', shareholders' and managers' assets to cover unpaid indemnification. Indemnification provisions related to labour matters must therefore be airtight.

### 2.6 National Security Review

Although Brazil does not formally adopt a national security review, for reasons of national security, certain activities and industry sectors are prohibited to foreign investment or permitted with restrictions.

## 3. RECENT LEGAL DEVELOPMENTS

### 3.1 Significant Court Decisions or Legal Developments

In 2021, corporate law changed with the intention of simplifying and facilitating the incorporation and operation of legal entities and reducing the formalities and bureaucracy involved in such process. The new legislation also improved the protection of the rights of minority shareholders.

A new resolution was also issued by the Brazilian Securities Exchange Commission (*Comissão de Valores Imobiliários* or CVM), changing the rules related to the filing, reporting and disclosure obligations to give more transparency to the procedures and regulate the consequences of the practice of insider trading.

Insolvency cases abounded in 2020 and 2021, partially due to changes to the Brazilian Bankruptcy Law (enacted in December 2020 and in force as of 23 January 2021). The most relevant and impactful change is the clear affirmation that the purchase of shares or assets segregated from the insolvent company into an UPI will protect the buyer of the UPI from succession for past liabilities of the acquired business.

Dispute resolution (both in court as well as arbitration) was also much sought after to resolve many disputes related to the economic crisis, such as breach of contract, shareholders disputes, and collection claims.

On case law, an important decision issued by the Superior Court of Justice about the disregard doctrine determined that, even when consumer rights are involved – in which the disregard of legal entity does not require proof of fraud or abuse of rights – the lifting of the corporate veil for the purpose of attributing liability to the company's managers, who are not shareholders, is not admissible and that the liability of individuals or entities who are not shareholders rely mandatorily on proving abuse of the legal entity.

Another significant decision issued by the Superior Court of Justice ruled that, in determining the value of the dissenting shareholder's assets, the best calculation method is the equity value based on the company's balance sheet. According to such decision, the calculation methodology based on discounted cash flow shall only be used to determine the company's economic value for the sale of the company's quotas/shares.

### 3.2 Significant Changes to Takeover Law

In recent years, no significant change to takeover law or regulations was implemented in Brazil and the prior tender offer requirements are still applicable: a mandatory tender offer, if the company has controlling shareholders, or a voluntary tender offer, if the company's capital is widespread and control is diluted.

No change to such rules is envisioned for 2022.

## 4. STAKEBUILDING

### 4.1 Principal Stakebuilding Strategies

As most listed companies in Brazil have controlling shareholders, stakebuilding prior to launching an offer is commonly privately negotiated, between the potential purchaser and the controlling shareholders (the legally established tag-along right attributable to the minority shareholders must be observed).

Otherwise, stakebuilding may also occur through corporate reorganisations, such as the merger of companies or the merger of shares.

When stakebuilding, it is common for bidders to acquire shares of the target company in a percentage below the disclosure threshold before making a tender offer. This strategy ensures that the information about the purchase does not become public, and the company's valuation is not affected. However, before conducting the tender offer, the bidder shall disclose the price paid for the shares of the controlling shareholder or its related parties in the previous 12 months.

### 4.2 Material Shareholding Disclosure Threshold

In Brazil, any transaction that results in a shareholder's equity interest variation (increase of decrease) of 5%, 10% or another multiple of 5% of the shares of any type or class (or rights on shares, or certain securities or derivatives under securities), of a listed company, must be informed to the company.

If the transaction results in the change of control or in the management of the company, or leads to a mandatory tender offer, the transaction shall also be informed to the market.

The market must also be informed of the approval of any tender offer that has been submitted to registration by CVM, any control acquisition, and the negotiation, by the company or its managers, of its own equity, or of equity of its controlling or controlled entities.

The company's controlling shareholders or management may request the waiver of the disclosure obligation if the disclosure may put the company's rightful interest at risk.

### 4.3 Hurdles to Stakebuilding

The 5% disclosure threshold may only be altered if to establish stricter conditions and a lower threshold may be imposed by the company's corporate documents.

Poison pill-like provisions may also be included in companies' bylaws to determine that, when a transaction would result in the buyer holding a significant percentage of the company's equity interest (for example, 20% or 30%), such buyer must make a tender offer to the other shareholders. Such provision, although usually construed as irrevocable, may be challenged in court, under the allegation that it may affect the shareholders' rights to sell their shares.

### 4.4 Dealings in Derivatives

Dealings in derivatives are permitted in Brazil, provided that certain rules are followed. Moreover, the sale of derivatives without a tender offer is possible but, during the offer period, the offeror and its related parties are prohibited from negotiating derivatives involving the same class of shares of those being negotiated.

### 4.5 Filing/Reporting Obligations

The filing and reporting obligations for derivatives dealings, under securities and competition law, are the same applicable to the acquisition of shares: any acquisition or disposal of "relevant equity interest" in a listed company must be disclosed to the company.

Pursuant to CVM rules, a transaction involving "relevant equity interest" means a transaction resulting in the variation (increase or decrease) of the equity ownership of a person, or group of persons, of shares of a listed company (or rights on shares, or certain securities or derivatives under securities), of 5%, 10% or 15%, or any subsequent 5% variations. When any such transaction results in the change of control or in the management of the company, or leads to a mandatory tender offer, it shall also be informed to the market.

Furthermore, the approval of any tender offer subject to registration with the CVM, the acquisition of control and the negotiation, by the company, of its own interest, or of interest of its controlling or controlled entities, must be informed to the market.

### 4.6 Transparency

Any share dealings involving a listed company that could result in the company's change of control must be informed to the market.

Moreover, a buyer of a controlling stake is required to state its intentions regarding the control of the company and details of the transaction, including the identity of the seller, price and payment conditions and the purpose of the transaction, as well as whether or not buyer intends to delist the company in the following 12 months, or to promote any corporate reorganisation or make any relevant change in the conduction of business.

In addition to the above, CVM requires that any fact involving a listed company and deemed relevant must be broadly and immediately disclosed to the market.

Pursuant to CVM regulation, a "relevant fact" is any act or fact (including any deliberation by the company's controlling shareholder, by the shareholders' meeting, or by the company's management, or any political, technical, business or financial-economic act or fact) occurred to or related to the company's business, that may reasonably affect the valuation of the company's equity interest and/or the investors' decision to acquire new shares or dispose of shares, or to exercise their rights as holders of the company's shares.

## 5. NEGOTIATION PHASE

### 5.1 Requirement to Disclose a Deal

Deals involving a listed company that may be considered a "relevant fact" shall be disclosed immediately when the decision is made, together with the information of the number of shares involved, the price per share, payment conditions and any other conditions applicable to the transaction. The obligation to immediately disclose is not applicable to preliminary analysis for listing requests, which is confidential.

If the transaction is subject to suspensive or resolutive conditions, other disclosures shall be made when each of the conditions are met, informing whether the deal conditions were modified or not, if the deal was effectively closed or was called off, as applicable.

A deal involving the change of control of a listed company must be disclosed when definitive documents are signed, even if the transaction is subject to suspensive or resolutive conditions, and again when the conditions have been met and the deal closed.

Deals involving the delisting of the company and the approval of tender offers subject to registration by CVM shall be disclosed immediately when the decision has been made. However, if the information becomes public prior to delisting or CVM approval, disclosure must immediately be made.

Deals involving the acquisition of shares/derivatives of a company or its affiliated entities, by the company itself and/or by its managers, must also be disclosed to CVM, within ten days counted after the end of the month in which the transaction occurred.

## 5.2 Market Practice on Timing

Market practice on timing of disclosure of the transactions usually abide by legal requirements since breach would trigger penalties.

Early disclosure, prior to completion of the change of control transaction, although not barred by CVM regulation, is not customary since the possible impact of early disclosure normally prevents the parties from doing so (market conditions and the potential transaction itself could be adversely affected).

Public companies with high governance levels usually make disclosures in earlier stages.

Moreover, when a transaction is subject to antitrust approval, any disclosure prior to such approval must be strictly made, according to the applicable rules (until antitrust authorities' final clearance, the parties must comply with a standstill obligation and remain fully independent and evidence of breach of such obligation may be considered "gun jumping" and subject the parties to severe penalties).

## 5.3 Scope of Due Diligence

M&A deals typically start with negotiation of business terms and conditions and, as soon as a Term Sheet or MOU has been executed, reflecting such terms, due diligence starts (focus and breadth vary from deal to deal and according to the target's business).

Tax and labour potential and actual contingencies (including ongoing or threatened litigation), as well as environmental compliance and licenses and registrations are primary focuses.

In most cases, due diligence also comprises civil and consumer aspects, commercial and financial contracts, corporate matters, intellectual property, real estate, and, more recently, data protection (in the latter case, due diligence shall not only encompass the analysis of compliance with legal requirements, but also the companies' practices and possible weaknesses). Compliance also became a "must" in the wake of Operation Car Wash.

Inevitably, the COVID-19 pandemic affected the length and efficiency of due diligence processes due to lack of personnel to provide information, restrictions on transit and increased delay on the issuance of official documents by public authorities.

### 5.4 Standstills or Exclusivity
Standstill agreements, whereby a bidder receives a premium against a commitment not to make a hostile takeover offer, or increase its equity interest in the company, are not common in Brazil, given that such rights and obligations would violate the legal principle establishing that all investors shall be treated equally. Standstill agreements could also be construed as a violation of the fiduciary duties of the company's management, since their object is the preservation of the company's current control regardless of whether maintaining the company's control is in the best interest of the company.

#### Listed Companies
Transactions involving listed companies are subject to a mandatory standstill in the negotiation of securities of the target by its controlling shareholders and managers, upon occurrence of a "relevant fact" subject to disclosure until the actual disclosure of such fact (a "relevant fact" is any act or fact that may reasonably affect the valuation of the company's equity interest and/or the investor's decision to acquire new shares of the company).

The mandatory standstill is also compulsory during the 15-day period preceding the disclosure, by the company, of its quarterly and annual financial statements.

Further, during the 12 months subsequent to a tender offer, the target listed company, its controlling shareholders and related parties are, in general terms, prevented from conducting tender offers for the same shares of the company and during the tender offer period, the bidder and its related parties are prevented from negotiating shares of the same class and type of the shares to be acquired or derivatives under such securities.

#### Exclusivity
It is normal for purchasers to request and be granted exclusivity rights, even when the target is not a listed company. Exclusivity, as a rule, is limited in time and often renewed.

Exclusivity may also be granted in distressed M&A deals, even though such right is actually a "right to match" the offers of other potential purchasers during the bid for the sale of the distressed asset.

### 5.5 Definitive Agreements
The execution of share purchase agreements or other documents reflecting terms and conditions of tender offers, although permitted, is not common, as the tender offer shall follow the terms and conditions established in the tender offer call notice; shareholders agreements, regulating the relationship between shareholders or groups of shareholders, are occasionally executed.

When the transaction involves non-listed companies, the execution of purchase agreements and shareholders agreements, among others, is the rule.

## 6. STRUCTURING

### 6.1 Length of Process for Acquisition/Sale
The process for acquiring or selling a business in Brazil varies depending on the size and complexity of the target's business, number of players involved in the transaction, scope and length of the due diligence and the need for approval by regulatory or antitrust authorities. A fair estimate of timing would be between six and 12 months,

counted from the execution of the Term Sheet or MOU.

Although the COVID-19 pandemic negatively impacted the length of due diligence, due to lack of personnel to provide information, restrictions on transit and increased delay on the issuance of official documents, discussion of drafts agreements and the actual closing of transactions became more efficient through remote interactions and electronic signing of documents.

## 6.2 Mandatory Offer Threshold

In Brazil, a mandatory offer threshold applies only in a few specific cases.

When the purchase of shares represents a takeover, the bidder shall put a tender offer for the acquisition of the remaining voting shares for a minimum price equivalent to 80% of the price paid for the controlling shares (or 100% of such price if the company is listed on Bovespa's *Novo Mercado*). Alternatively, the bidder may offer to the remaining shareholders the option to keep their shares, upon payment of a premium in the amount equivalent to the difference between the market value of the shares and the price paid for the controlling shares.

In the event of an increase of the equity interest by the controlling shareholders or its related parties, other than by means of a trade offer (in which case, if such increase affects the liquidity of the remaining shares and/or if the acquisition comprises more than one third of the outstanding shares of the same of class or type), the bidder shall put a tender offer for the acquisition of the totality of the company's shares.

In the absence of a takeover, in any event when a bidder acquires more than one third of the outstanding shares of the same of class or type, the offer must contain a statement by bidder in the sense that, if bidder acquires more than two thirds of such shares, bidder will be obliged to buy the remaining shares of the same class or type, if the holders of such shares so require, for the same price of the tender offer, within the following three months.

Finally, an offer is also mandatory in the event of delisting of the company.

## 6.3 Consideration

Although most acquisition deals in Brazil are paid in cash, the exchange of securities is also permitted, as long as such securities are tradeable in Brazil. A combination of payment in cash and securities is also possible.

Transactions involving the payment with securities must be previously registered with the CVM and only exceptionally, CVM may permit payment with securities not tradeable in Brazil (in the event of takeover offers and other special cases).

Cash consideration is not necessarily a synonym of fixed price. Not only price adjustment mechanisms (most commonly, working capital and net debt adjustments) but also price instalments (calculated based on PAT, OPAT and EBITDA for future years) are common.

## 6.4 Common Conditions for a Takeover Offer

Brazilian regulation expressly permits the imposition of conditions on takeover offers, which conditions shall be expressly established in the tender offer documents and may not depend on direct or indirect actions of the bidder. Usual conditions are:

- corporate approvals from buyer's shareholders/board of directors;
- regulatory and antitrust approvals; and
- approvals by relevant third parties, such as strategic clients and financial institutions, who

shall commit not to terminate in advance their contracts with the target company by reason of the change of control and absence of material adverse changes.

In certain situations, the takeover offer may include conditions related to change of certain provisions of the target's corporate documents, such as the shareholder exclusion and poison pill provisions.

Except when a condition is legally required (such as the antitrust approvals), any takeover offer condition may be subsequently waived by the buyer.

## 6.5 Minimum Acceptance Conditions

Tender offers are also subject to different approval thresholds as well as acceptance conditions:

- a tender offer for delisting a company must be approved by holders of at least two thirds of the outstanding shares;
- in the case of takeover offers, buyer shall either purchase the shares of the minority holders who exercise their tag-along rights, or pay them a premium for remaining in the company, in the amount equivalent to the difference between the market value of the shares and the price paid for the controlling shares; and
- voluntary tender offers for acquisition of control may be conditioned by the recipients of the offer on the effective success of the tender offer (a tender offer is considered "successful" upon unconditional acceptance of holders of shares which, jointly with the shares held by the bidder and its related parties, can ensure bidder's control of the company).

## 6.6 Requirement to Obtain Financing

In Brazil, it is possible, and even common, to condition business combination offers on the obtaining of financing by bidder. The condition must be expressly disclosed in the offer and its compliance may not be dependent exclusively on direct or indirect actions of the bidder.

## 6.7 Types of Deal Security Measures

Although no legislative change was enacted in 2020 or in 2021 to create or increase deal security, none was revoked or modified either.

Tender offers may be protected by requiring the bidder, when the offer has been accepted, to deposit the payment funds in escrow, to ensure that the transaction will be liquidated.

In private transactions, break-up fees are not uncommon.

A much sought-after protection in distressed M&A transactions is the "stalking horse" whereby a bidder (the stalking horse bidder) makes a binding offer for the distressed assets, setting, therefore, the low end of the bidding range. It is customary to grant the stalking horse bidder the right to match higher offers made during the bid.

## 6.8 Additional Governance Rights

In Brazil, control of a company can be established not only by holding the majority or totality of the voting capital of a company, but also by means of voting agreements, veto rights, supermajority approval for certain matters and the right to control the management of a company.

Furthermore, protections established in a duly executed shareholders' agreement (filed at the company's headquarters) are subject to specific performance and therefore breach of obligations contained therein (eg, the obligation to vote in a certain way in certain circumstances), will be remedied by court (in the example above, the court would determine the vote to be considered as if it had been cast according to the rules of the agreement) instead of settled in monetary terms.

### 6.9 Voting by Proxy

Shareholders can vote by proxy, provided that certain rules are complied with:

- the proxy must be granted to another shareholder or manager of the company or to an attorney; or, if the company is listed, the proxy may also be granted to financial institutions;
- the proxy must be valid for up to one year (unless the proxy is granted pursuant to the terms of a shareholders' agreement, with powers to expressly approve or disapprove any specific matter); and
- the proxy must be specific.

### 6.10 Squeeze-Out Mechanisms

Holders of less than 5% of the company's shares may be squeezed out if, after a successful tender offer for delisting the company, such shareholders do not accept or fail to revert on the tender offer. In such event, the company's shareholders may approve the redemption of all such outstanding shares. The liquidated funds shall be made available by the company to the shareholders, in a financial institution approved by CVM. The price for such shares shall be the same price paid to the shareholders who accepted the tender offer.

### 6.11 Irrevocable Commitments

It is possible to obtain irrevocable commitments to tender or vote by principal shareholders of the target company, as long as certain conditions are met, such as agreement by the parties on the valuation of the company and other aspects of the transaction. Irrevocable commitments are usually undertaken at the final stages of a transaction and commonly subject to exclusivity clauses. In the absence of exclusivity rights, the shareholders shall be free to accept a better offer.

## 7. DISCLOSURE

### 7.1 Making a Bid Public

Under Brazilian law, whenever the target company is listed, a deal is required to be disclosed, by means of a public notice, when definitive documents are signed, even if the transaction is subject to suspensive or resolutive conditions, as well as when the conditions are met and the deal closes.

Delisting of a company and approval of a tender offer subject to registration with the CVM must only be disclosed when approved provided however that if the information becomes public prior to that, disclosure must be immediately made, informing the nature of the transaction and its then current stage.

### 7.2 Type of Disclosure Required

If at least one of the companies involved in a business combination transaction that involves issuance of shares is a listed company, the market disclosure must contain, at least, the main conditions of the transaction, such as:

- the identification of the companies involved in the transaction, and a brief description of their activities;
- main benefits, costs and risks of the transaction;
- how the swap of shares will occur;
- whether the transaction must be submitted to the approval of Brazilian or foreign authorities;
- the financial statements of the companies involved; and
- any other relevant information (appraisal reports, financial statements, minutes of board meetings and any other documents related to the transaction).

### 7.3 Producing Financial Statements

If at least one of the companies involved in any business combination is a listed company, all companies involved in the transaction must disclose their financial statements, all drawn up on same base date. The shareholders meeting that will vote to approve/reject the transaction must take place no later than 180 days counted from the base date.

The financial statements must be audited by independent auditors, and prepared in accordance with Brazilian law, the CVM regulations and Brazilian GAAP.

### 7.4 Transaction Documents
Further to mandatory disclosure of financial statements by all companies involved in a business combination deal, all transaction documents must be disclosed to the CVM, the antitrust authorities and/or regulatory authorities, as the case may be.

## 8. DUTIES OF DIRECTORS

### 8.1 Principal Directors' Duties
Under Brazilian law, directors (as well as managers and legal representatives) are bound by fiduciary duties owed primarily to the company and, subsidiarily, to the shareholders. The interest of the company shall always prevail over the private interests of the shareholders.

The fiduciary duties comprise, without limitation:

- the duty of care, pursuant to which managers must conduct their duties employing the care and diligence which an honest and prudent person customarily undertakes in the administration of their own affairs;
- acting in accordance with the law and with the company's corporate documents; and
- the duty of loyalty, pursuant to which managers must not take part in any corporate activity in which they have an interest and that conflicts with the interests of the company.

In a business combination, directors have the fiduciary duty to give their opinion about the proposed deal, in good faith and in the best interest of the company. If there is a conflict of interest, such conflict shall be immediately informed to the other directors.

### 8.2 Special or Ad Hoc Committees
Although recommended from a governance standpoint, the creation of ad hoc committees in business combinations is not common practice. In Brazil, such committees are created by the shareholders, not by the board of directors, but the board may suggest their creation, which shall then be submitted to the shareholders' approval.

Ad hoc committees have solely advisory powers and do not replace in any way the board of directors (under Brazilian law, the functions of a corporate body may not be delegated).

### 8.3 Business Judgement Rule
Brazil is a civil law country with its legal system based on codes. Courts and arbitration chambers therefore decide the merits of a dispute in accordance with the applicable Brazilian law and shall not act as amiable compositeurs or decide the merits of a dispute ex aequo et bono.

Accordingly, the judgment or opinion of boards of directors may be taken into consideration by a court or arbitration chamber when reviewing a case but cannot form the basis of the court decision or arbitration award. Neither courts nor arbitration chambers may defer their decision powers.

### 8.4 Independent Outside Advice
The company's shareholders hold the decision-making powers on business combinations and the function of the board of directors is only advisory. Nevertheless, before opining in a proposed business combination, diligent directors commonly request the advice of legal, financial and accounting advisors which will review and report

on the positive and negative impacts of the transaction and their consequences on the company.

### 8.5 Conflicts of Interest

Conflict of interest of directors, managers, shareholders and advisors are subject to judicial and administrative scrutiny. Conflict of interest can be defined, according to its nature, as a formal conflict or a material conflict.

A formal conflict of interest is a conflict that may be verified a priori, and as such is presumed, eg, a formal conflict of interest may be presumed if, in a potential transaction, a director has a personal interest in the deal, regardless of whether such personal interest is conflicting or converging with the company's interest.

A material conflict of interest is a conflict verified a posteriori, in which case the possible existence of a conflict is verified on a case-by-case basis, eg, after a director advised the shareholders in favour of a transaction, the question would be whether the director put his/her interest over the company's interest and, also, whether such fact has caused an actual damage to the company.

Currently, most of the CVM's administrative decisions are based on the formal conflict theory.

## 9. DEFENSIVE MEASURES

### 9.1 Hostile Tender Offers

Hostile tender offers are uncommon in Brazil, mainly because the capital of most companies is not widely held and therefore acquisition of control is often privately negotiated between the buyer and with the controlling shareholders of the company.

The last important hostile take-over attempt occurred in August 2020, involving two of the major players in the real estate development market in Brazil, Tecnisa and Gafisa, both family-controlled companies.

In 2021, a proposed transaction involving two fashion retail companies (Arezzo and Hering) was mistakenly referred to as a hostile offer since a "non-solicited" proposal for combination of business had been submitted by Arezzo to the board of Hering and was refused.

### 9.2 Directors' Use of Defensive Measures

In Brazil, the company's shareholders have the exclusive power to approve takeovers and, accordingly, whenever necessary, defensive measures shall be used by the shareholders, not by the directors who may, nevertheless, advise and assist the shareholders on the use of such measures.

### 9.3 Common Defensive Measures

The most common defensive measure against a takeover of a listed company is the poison pill.

Unlike other jurisdictions, the poison pill provision commonly used in Brazil does not grant the shareholders of the hostile takeover target the right to purchase additional shares of the company for a lower price; instead, when the takeover offer results in the bidder holding a significant percentage of the company's equity interest (for example, 20% or 30%), the Brazilian poison pill compels the bidder to put a tender offer to acquire the totality of the remaining shares of the target company.

Other defensive measures, such as Golden Parachute provision and Crown Jewel Options, are uncommon in Brazil.

### 9.4 Directors' Duties

The board of directors may advise the company's shareholders on the convenience or necessity of using defensive measures but cannot enact them.

Advice by the board of directors must describe all aspects that may be relevant for the shareholders to make an enlightened business decision.

When issuing an opinion or implementing any defensive measures, as determined by the company's shareholders, the directors must exercise their fiduciary duties, acting with loyalty and diligence, and disclosing any possible conflict of interest.

### 9.5 Directors' Ability to "Just Say No"

Since only the company's shareholders can accept or refuse a tender offer, directors are not entitled to "just say no" and take action to prevent a business combination.

## 10. LITIGATION

### 10.1 Frequency of Litigation

M&A related litigation is neither a regular occurrence nor a rare event. Disputes tend to be subject to arbitration rather than courts and the recurring objects of disputes are breach of representations and warranties, unpaid indemnification, and earn-out price calculations.

### 10.2 Stage of Deal

Most frequently, disputes arise a few years after closing, but 2020 was a peculiar year and broken deal disputes were filed as well as disputes over the applicability of MAC – Material Adverse Change provisions to indemnification of losses arising out of the COVID-19 pandemic.

### 10.3 "Broken-Deal" Disputes

It is too early to tell since jurisprudence has not yet been formed. Court decisions have been challenged by appeals and most cases therefore still await second level decisions.

## 11. ACTIVISM

### 11.1 Shareholder Activism

Social networks are playing a massive role in promoting discussions and engaging minority shareholders and, consequently, impacting the value and volatility of shares (during 2020, a major Brazilian retail company dismissed a large number of employees but, driven by livestream panels and discussions on Twitter about the company's values and initiatives to reduce impact on workers and consumers, its share price rose by 400%).

As the definition of "generating value" to shareholders switches to a broader spectrum, companies are gradually starting to focus on social and environmental issues and activists are closely monitoring the companies' actions and progress.

Most activists in Brazil still target monetary related issues but a new category of activists, epitomised by ESG (environmental, social and governance) activists, has come to prominence, as large institutional stockholders require greater transparency and accountability from companies and extend their agenda to diversity and inclusion.

### 11.2 Aims of Activists

Social change and sustainability motivate several groups of shareholder activists. Encouraging companies to divest from politically sensitive and polluting companies and from companies with unfair labour practices is often on such activists' agendas.

### 11.3 Interference with Completion

Activists generally do not try to actively prevent the completion of announced deals.

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**Felsberg Advogados** is a full-service law firm founded in 1970 and defined by its ability to combine experience, tradition and excellence with efficient, fast and focused service, offering innovative solutions in a constantly changing world. The corporate and M&A department is headed by eight partners. The firm assists Brazilian and foreign clients from the incorporation of companies to the structuring, due diligence and negotiation of acquisitions, disposals, and joint ventures. The M&A team is supported by a partner specialising in competition law, with years of experience in dealings with the Administrative Council for Economic Defense (CADE), investigations into anti-competitive practices, and settlement negotiations. More recently, the department created a specialty sub-group, Innovation, StartUps and Venture Capital, dedicated to advising all agents in the ecosystem, including investors (private equity and venture capital), start-ups receiving rounds of investments, as well as seed accelerators, financial institutions and the government.

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